

STATE OF MICHIGAN
COURT OF APPEALS

JAMES FOSTER,

Plaintiff-Appellant,

V

TWEDDLE LITHO COMPANY,

Defendant-Appellee.

UNPUBLISHED

February 8, 2002

No. 225169

Macomb Circuit Court

LC No. 98-003442-CL

Before: Cavanagh, P.J., and Neff and B. B. MacKenzie, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff alleged that his employment with defendant was terminated unlawfully because of age discrimination. We affirm.

We review a trial court's grant of summary disposition de novo. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). A motion for summary disposition brought under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* When deciding a motion for summary disposition, we must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id.* The motion should be granted when there is no genuine issue as to any material fact or when a party is entitled to judgment as a matter of law. MCR 2.116 (C)(10).

Plaintiff's age discrimination action is based upon the Civil Rights Act, which provides, in pertinent part:

- (1) An employer shall not do any of the following:
 - (a) . . . 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(1)(a).]

Although the ultimate inquiry is the same, i.e., whether the employee was discharged "because of age," two different approaches are used to prove unlawful age discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 708-710; 565 NW2d 401 (1997); *Hazle v*

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

Ford Motor Co, 464 Mich 456, 462; 628 NW2d 575 (2001). First, where a plaintiff is able to produce evidence sufficiently probative of impermissible bias using the ordinary principles of proof, the plaintiff can prove unlawful discrimination in the same manner as a plaintiff would prove any civil case. *Debrow v Century 21 Great Lakes (After Remand)*, 463 Mich 534, 540; 620 NW2d 836 (2001). To establish a claim of age discrimination using ordinary principles of proof, the plaintiff must present evidence that “he had skills, experience, background, or qualifications comparable to the retained employee” and “his age was a determining factor in the adverse employment decision.” *Featherly v Teledyne Ind*, 194 Mich App 352, 358-359; 486 NW2d 361 (1992).

Plaintiff failed to present any direct evidence that unlawful discrimination was at least a motivating factor in defendant’s termination decision. *Hazle, supra* at 462. Although defendant’s president made the statements which plaintiff alleges prove discriminatory intent, the statements were remote in time from the termination decision, not part of a pattern of age-based, biased commentary and not sufficiently probative of discriminatory bias. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 297-300; 624 NW2d 212 (2001); see also *Debrow, supra* at 540. Plaintiff presented no other direct proof that any discriminatory animus was causally related to the termination decision. *Hazle, supra* at 462; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 902 (1998).

Under the second approach, where a plaintiff cannot rely on ordinary principles of proof to establish his case, such as a claim based solely on indirect or circumstantial evidence, he may still prove discrimination utilizing a presumptive approach to prove unlawful discrimination. *Hazle, supra* at 462.¹ To prove a claim under the presumptive approach, plaintiff must establish a prima facie case of discrimination. *Id.* at 463. A “prima facie case in this context does not mean that the plaintiff produced enough evidence to allow the case to go to a jury, but rather that the plaintiff produced enough evidence to create a rebuttable presumption of age discrimination.” *Meagher, supra* at 710-711. To establish a prima facie case of age discrimination, plaintiff must prove that (1) he is a member of a 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, supra* at 177.

If the plaintiff is able to establish a prima facie case of age discrimination, a presumption of discrimination arises. *Hazle, supra* at 463. The burden then shifts to the defendant who must provide a “legitimate, nondiscriminatory” reason for the adverse employment action in order to rebut the presumption of unlawful discrimination. *Id.* at 464. Once the defendant provides a legitimate, nondiscriminatory reason for the adverse action, plaintiff must show that there was a triable issue of fact that the employer’s proffered reasons were not true, but were a “mere pretext for discrimination.” *Lytle, supra* at 178.

The first three elements are not in dispute. Plaintiff was over age forty when he was discharged,² and was qualified for the position because he worked for defendant in the position

¹ The presumptive or burden-shifting approach is modeled after the analysis set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

² This Court follows federal precedent, which defines a protected class for age discrimination in the employment context as persons between the ages of forty and seventy. *Lytle, supra*, 458 (continued...)

for nineteen years. The parties take issue with the fourth element, which requires proof that plaintiff's discharge occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 468. In *Meagher, supra* at 711, this Court, relying on a recent United States Supreme Court decision, *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 312-313; 116 S Ct 1307; 134 L Ed 2d 433 (1996), stated that an inference of age discrimination "can be drawn from the replacement of an older worker with a significantly younger worker."³ Plaintiff argues that an eight-year disparity is significant enough to establish a prima facie case. Michigan Courts have not specifically addressed this issue; however, we need not address how the decisions in *O'Connor* and *Meagher* affect plaintiff's claim because we find defendant was entitled to summary disposition even if plaintiff established a prima facie case. We assume without deciding that plaintiff established a prima facie case, thus giving rise to a presumption of discrimination. *Lytle, supra* at 173.

In response to plaintiff's claim, defendant clearly set forth, through the introduction of admissible evidence, legitimate, nondiscriminatory reasons for plaintiff's discharge. *Id.* None of the specific reasons proffered by defendant directly or indirectly implicated plaintiff's age, but instead involved plaintiff's overall poor performance. Thus, defendant successfully carried its burden of overcoming the presumption.

Because defendant articulated a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment, the burden shifted to plaintiff to show that the reason proffered by defendant was a mere pretext for unlawful discrimination. *Hazle, supra* at 465. We find plaintiff failed to carry his burden because he was unable to show that defendant's proffered reasons were not based on fact, were not the actual factors that motivated the decision, or were insufficient to justify the decision. *Meagher, supra* at 712.

In an attempt to prove pretext, plaintiff offered proofs to establish that some of defendant's specific proffered reasons for his termination were not based on fact. However, he failed to offer any factual evidence to establish that most of defendant's reasons were unworthy of credence. Further, plaintiff cannot defeat a motion for summary disposition by mere disproof of an employer's proffered reason for the action but must raise "a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle, supra* at 175. Plaintiff presented no probative evidence that defendant's termination decision was motivated by discriminatory animus, thereby failing to establish pretext. Reviewing the evidence in the light most favorable to plaintiff and drawing any reasonable inferences in his favor, we find that plaintiff has failed to create a triable issue for the jury concerning whether age was a motivating factor in the termination decision. *Hazle, supra* at 466; *Lytle, supra* at 157.

Defendant was entitled to summary disposition because it successfully articulated a legitimate, nondiscriminatory reason for its decision to discharge plaintiff, and plaintiff was

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Mich 153, 177 n 26. However, this Court also determined that it is not necessary that the plaintiff fit within the strict federal age limits. *Zanni v Medaphis Physician Services Corp*, 240 Mich App 472, 476-477; 612 NW2d 845 (2000).

³ In *O'Connor, supra* at 313, the Court stated that an inference of age discrimination "cannot be drawn from the replacement of one worker with another worker insignificantly younger."

unable to carry his burden of showing that defendant's reasons were merely a pretext for discrimination. We affirm the trial court's grant of summary disposition.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Janet T. Neff

/s/ Barbara B. MacKenzie