STATE OF MICHIGAN

COURT OF APPEALS

EDMUND BARON,

Plaintiff-Appellant,

and

EARNEST E. TAYLOR, DANIEL J. CHUPA, HAROLD J. DEEMER, MICHAEL S. SWIDER, DENNIS W. ARTHUR, GLENN HEPNER, and THOMAS P. PODSIADLIK,

Plaintiffs,

v

FORD MOTOR COMPANY,

Defendant-Appellee.

UNPUBLISHED
December 17, 2002

No. 226911
Wayne Circuit Court
LC No. 98-817434-NO

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Plaintiff Edmund Baron appeals as of right from the trial court's order granting defendant summary disposition, pursuant to MCR 2.116(C)(10), of plaintiff's complaint for age discrimination and harassment under the Civil Rights Act ("CRA"), MCL 37.2101 *et seq*. We affirm.

Plaintiff first argues that the trial court erred by granting defendant's motion on the basis that his subsequent decision to voluntarily retire from his employment with defendant precluded him from maintaining this action. Defendant did not argue below that plaintiff's decision to retire affected his ability to bring this lawsuit. Rather, the trial court sua sponte raised this issue at the hearing on the motion for summary disposition. We agree with plaintiff that the trial court erred in deciding defendant's motion on this basis. The conduct on which plaintiff's claims were based undisputedly occurred before plaintiff's retirement, and plaintiff's suit was timely under the applicable three year statute of limitations. See MCL 600.5805(8); *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 289; 542 NW2d 365 (1995). Although plaintiff's retirement might effect his entitlement to certain damages, *Schafke v Chrysler Corp*, 147 Mich App 751, 755; 383 NW2d 141 (1985), it did not preclude him from bringing this lawsuit for the claims alleged. MCL 37.2801; *Hyde v University of Michigan Bd of Regents*, 226 Mich App 511, 522;

575 NW2d 36 (1997). Therefore, the trial court erred in ruling that plaintiff's claims were precluded solely due to his retirement.

Nonetheless, we agree that defendant was entitled to summary disposition under MCR 2.116(C)(10) because plaintiff failed to demonstrate a genuine issue of material fact with regard to his claims for age discrimination and harassment. *Welch v District Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

Summary disposition may be granted under MCR 2.116(C)(10) when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In considering such a motion, this Court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted by the parties in the light most favorable to the nonmoving party, to determine whether a genuine issue of material fact has been shown. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). We review a trial court's decision to grant or deny summary disposition de novo. *Spiek*, *supra* at 337.

In this case, plaintiff failed to submit admissible evidence establishing a genuine issue of material fact with regard to his claim for age discrimination. Plaintiff alleges that defendant improperly used age as a criteria for promoting other individuals instead of himself to a number of management positions. Absent direct evidence of discrimination, plaintiff must establish a prima facie case of age discrimination under the "inferential test" originating in *McDonnell Douglas Corp v Green*, 411 US 792, 804-805; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). Under this test, plaintiff must prove by a preponderance of the evidence that he belongs to a protected class, that he applied for the available position for which he was qualified, and that he was rejected under circumstances giving rise to an inference of unlawful discrimination (e.g., a younger person with similar qualifications was promoted instead of plaintiff). *Id*. at 463.

First, we agree that plaintiff failed to present admissible direct evidence of age discrimination, i.e., evidence that, if believed, would prove the existence of the employer's unlawful motive without the benefit of a presumption or inferences. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001). The newspaper articles referencing allegedly discriminatory comments by Ford executives are not probative of plaintiff's individual circumstances and, in any event, are inadmissible hearsay. *Baker v General Motors Corp*, 420 Mich 463, 511; 363 NW2d 602 (1984). As such, they cannot be used to overcome defendant's motion for summary disposition. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). Also, plaintiff has not shown that a comment made by another employee suggesting that plaintiff was moved to a different division because he was slated to retire was made by a person who took part in the decision to move plaintiff or even whether this person had personal knowledge of the reason for plaintiff's reassignment. An alleged isolated comment made more than ten years before the alleged discriminatory conduct occurred is also insufficient to establish a genuine issue of material fact regarding direct evidence of discrimination. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 297-298; 624 NW2d 212 (2001). The additional matters cited by plaintiff are not examples of direct discrimination as contemplated in *Debrow*, *supra*. Because plaintiff failed to establish factual

support for his theory of direct discrimination, he was therefore required to establish a prima facie case of inferential discrimination in order to overcome defendant's motion for summary disposition.

Reviewing plaintiff's claim under the inferential test set forth above, we likewise conclude that plaintiff failed to establish a prima facie case of discrimination. Of the numerous employment positions identified by plaintiff as examples of promotional opportunities that he was denied due to his age, the record indicates that plaintiff never applied for most of them, and further, plaintiff failed to rebut defendant's evidence showing that plaintiff was not qualified for the positions for which he applied. *Pomranky v Zack Co*, 159 Mich App 338, 343-344; 405 NW2d 881 (1987). Accordingly, defendant was entitled to summary disposition.

We also agree that defendant was entitled to summary disposition of plaintiff's related claim of age-based harassment. Plaintiff's alleged claims of "harassment" consist of conclusions that discrimination existed; they are not examples of specific behavior directed toward plaintiff that would cause a reasonable person to find that he was subject to a hostile work environment due to his age. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996); *Radtke v Everett*, 442 Mich 368, 382- 383; 501 NW2d 155 (1993).

In sum, although the trial court erred in its rationale, we affirm its decision to grant defendant's motion for summary disposition. *Welch, supra* at 256.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens