STATE OF MICHIGAN

COURT OF APPEALS

CHARLES BALL,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
December 11, 2003

No. 241871
Oakland Circuit Court
LC No. 01-034066-CL

Before: Cavanagh, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant summary disposition under MCR 2.116(C)(10) with regard to plaintiff's age discrimination claim under the Michigan Civil Rights Act, MCL 37.2201 *et seq*. We affirm.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). When proffered admissible evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Id*. at 120-121. In the case at bar, we conclude that plaintiff failed to meet his burden of showing by admissible evidence a genuine issue of material fact with regard to whether age was a determining factor in defendant's decision to select him for layoff.

A plaintiff may use different methods of proof to show that age was a determining factor in an employer's adverse employment decision. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997). We consider plaintiff's arguments on appeal concerning whether he should have been compared to Band 92 employees, rather than Band 93 employees within Susan Iwasiuk's group, as involving the prima facie method of proof based on *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). But we are not persuaded that plaintiff presented admissible evidence establishing a genuine issue of material fact regarding whether he was similarly situated to the younger employee who was not laid off as part of defendant's reduction in force program. Plaintiff has not cited admissible evidence regarding Diane Schnedler's age or the date of her hire. See *Maiden, supra* (to avoid summary disposition under MCR

2.116(C)(10), a plaintiff must offer admissible evidence); *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) (to properly present an issue on appeal, the appellant must cite facts in the record that support his argument).

Furthermore, even if plaintiff could establish by admissible evidence that Schnedler was a younger employee, the uncontradicted evidence presented to the trial court established that Schnedler was a Band 92 employee, whereas plaintiff was a Band 93 employee. To establish a prima facie case of age discrimination under *McDonnell Douglas*, it was necessary that plaintiff show that he was similarly situated to Schnedler, i.e., that all relevant aspects of Schnedler's employment situation were nearly identical to those of plaintiff's situation. *Smith v Globe Life Ins Co*, 460 Mich 446, 457; 597 NW2d 28 (1999); *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). What factors are relevant to this determination depends on the circumstances of the particular case. *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (CA 6, 1998). Plaintiff was required to submit evidence that would enable a reasonable trier of fact to infer that he was similarly situated to Schnedler within the context of the reduction in force program under which he was selected for layoff.

Examined in this context, we are not persuaded that plaintiff presented admissible evidence from which it could be reasonably inferred that the distinction between Band 92 and Band 93 employees was not a relevant factor for purposes of determining whether plaintiff was similarly situated to Schnedler. Furthermore, even if a reasonable trier of fact could find that plaintiff and Schnedler were similarly situated employees, notwithstanding the difference in their bands, in order to survive summary disposition under the *McDonnell Douglas* method of proof, plaintiff was further required to present evidence that would allow a reasonable trier of fact to conclude that age was a determining factor in the decision to select him for layoff. See *Hazle*, *supra* at 465; *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986).

Because plaintiff failed to present admissible evidence to rebut Susan Iwasiuk's averments in her original and supplement affidavits that she selected employees for layoff by evaluating them within their particular bands, or that Iwasiuk's stated reasons for selecting plaintiff were a pretext to discriminate against plaintiff because of his age, the trial court properly determined that summary disposition was warranted under the *McDonnell Douglas* method of proof. See *Hazle*, *supra* at 465-466. The soundness of defendant's business judgment may not be questioned as a means of showing pretext. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 566; 462 NW2d 758 (1990).

We have also considered plaintiff's claim that he presented sufficient evidence of an age-biased statement under the direct evidence method of proof. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the adverse employment action. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003). In a direct evidence case involving mixed motives, that is, where an adverse employment decision might have been based on both legitimate and impermissive reasons, a plaintiff must prove it more likely than not that discriminatory animus was a substantial or motivating factor in the adverse employment decision. *Id.*

Examining Iwasiuk's statement that plaintiff was eligible to grow into retirement in the context in which it was made, we find no merit to plaintiff's argument that the statement may support a reasonable inference that plaintiff was selected for layoff because of his age. See

DeBrow v Century 21 Great Lakes, Inc (After Remand), 463 Mich 534, 539-540; 620 NW2d 836 (2001); *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001). The uncontradicted evidence, including the notice document offered by defendant in support of its motion for summary disposition, established that "Grow-In Special Early Retirement" was the name assigned to defendant's voluntary early retirement program. Viewed in a light most favorable to plaintiff, plaintiff's deposition testimony regarding the manner in which Iwasiuk informed him about his eligibility for this program does not give rise to a reasonable inference that plaintiff was selected for layoff because of his age. See *Bouwman v Chrysler Corp*, 114 Mich App 670, 681; 319 NW2d 621 (1982). Moreover, plaintiff's speculation regarding Iwasiuk's motives does not establish a genuine issue of material fact. See *Smith v Globe Life Ins Co*, *supra* at 457.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Peter D. O'Connell