STATE OF MICHIGAN

COURT OF APPEALS

ROMAN SOWA, JR.,

Plaintiff-Appellant,

v

U.S. FARATHANE CORPORATION,

Defendant-Appellee.

UNPUBLISHED
January 17, 2006

No. 256084
Macomb Circuit Court
LC No. 2002-005621-CD

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Plaintiff Roman Sowa, Jr., appeals as of right the trial court's order granting summary disposition to defendant U.S. Farathane (USF). We affirm.

Plaintiff sued defendant for age discrimination under the Civil Rights Act, MCL 37.2101 *et seq*., after plaintiff's employment was terminated. Defendant claimed that plaintiff's employment was terminated due to plaintiff's failure to use the e-mail system. Plaintiff claimed that his termination was without justification and that defendant's proffered nondiscriminatory reason for plaintiff's termination was pretext for age discrimination. Plaintiff was 61 years old at the time he was dismissed from his position as manufacturing manager at USF's Utica plant.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). Summary disposition is appropriate when "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." MCR 2.116(C)(10). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003).

An age discrimination claim can be based on two theories: (1) disparate treatment, which requires a showing of either a pattern or practice of intentional discrimination against protected employees, or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Lytle v Malady*, 458 Mich 153, 178 n 26; 579 NW2d 906 (1998). In this case, plaintiff's claim is of disparate

treatment. To establish a claim of disparate treatment, a plaintiff must show that he was treated differently than similarly situated employees. *Id*. at 178.

"A claim of age discrimination may be shown under ordinary principles of proof by the use of direct or indirect evidence. Alternatively, many courts including [our Supreme Court], have used the prima facie test articulated by the United States Supreme Court in *McDonnell Douglas Corp v Green*, [411 US 792; 93 S Ct 1817; 36 L Ed 668 (1973),] as a framework for evaluating age discrimination claims." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-695; 568 NW2d 64 (1997)."

In *Lytle*, our Supreme Court set forth the evidentiary standard that a plaintiff alleging age discrimination must satisfy to survive summary disposition under MCR 2.116(C)(10). The Court opined:

> To establish a prima facie case of discrimination, a plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action, . . .; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. Once plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for plaintiff's termination to overcome and dispose of this presumption. . . . At this stage, defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and the factual inquiry proceeds to a new level of specificity. [*Lytle, supra* at 172-174].
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> Once the defendant produces such evidence, even if later refuted or disbelieved, the presumption drops away, and the burden of proof shifts back to plaintiff. At this third stage of proof, in this case in response to the motion for summary disposition, plaintiff had to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. [*Id*. at 174.]
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> . . . [D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. n23 In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual,

> but that it was a pretext for age . . . discrimination. Therefore, we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. n24 [*Id*. at 175-176.]

The trial court granted defendant's motion for summary disposition on the ground that plaintiff failed to establish a prima facie case of age discrimination. Specifically, the trial court found that plaintiff failed to prove that he was qualified for his job and that plaintiff failed to present evidence showing that he was discharged under circumstances that give rise to an inference of unlawful discrimination. Furthermore, the trial court opined that, even if plaintiff had established a prima facie case, plaintiff did not present evidence that defendant's proffered nondiscriminatory reason for plaintiff's termination was pretext for age discrimination.

Plaintiff first argues that the trial court erred in its determination that plaintiff was not qualified for his position. We disagree. We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

The trial court based its finding on our Supreme Court's standard for whether an employee is qualified for his position: "An employee is qualified if he was performing his job at a level that met his employer's legitimate expectations." *Town, supra* at 699. The trial court found that plaintiff did not meet his employer's legitimate expectations because he did not use the e-mail system as his boss, Andrew Greenlee, instructed.

Plaintiff argues that the trial court improperly used USF's proffered nondiscriminatory reason for discharge (his failure to use the e-mail system) in determining whether plaintiff was qualified for his position. Plaintiff relies on *Cline v Catholic Diocese of Toledo*, 206 F3d 651 (CA 6, 1999) to support this argument. In *Cline*, the Sixth Circuit determined that the district court erred in using the employer's proffered nondiscriminatory reason for discharge to determine whether the plaintiff was qualified for her position. The Sixth Circuit opined that using an employer's proffered nondiscriminatory reason for discharge to determine whether an employee was qualified for the position from which he was terminated "conflate[s] the distinct stages of the *McDonnell Douglas* inquiry." *Id*. at 660.

This Court, however, is not bound by decisions of the Sixth Circuit. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 268; 671 NW2d 125 (2003). We are, instead, bound by decisions of our Supreme Court. *Ferguson v Gonyaw*, 64 Mich App 685, 694; 236 NW2d 543 (1975). In *Town*, our Supreme Court provides a standard for determining whether an employee is qualified that clearly differs from that of the Sixth Circuit. Our Supreme Court, speaking specifically of prong two of the prima facie case, stated that, "An employee is qualified if he was performing his job at a level that met the employer's legitimate expectations." *Town, supra* at 699. Our Supreme Court found that the *Town* plaintiff was not qualified for his position because he failed to generate enough income through sales to pay his own salary. *Id*. This was the nondiscriminatory reason for his termination offered by the employer. *Id*. at 692, 699. The *Town* opinion is clear that the standard it sets forth for whether an employee is qualified applies to prong two of the prima facie case.

The trial court did not err in determining that plaintiff was unqualified for the position. Plaintiff failed to meet his employer's legitimate expectations by ignoring his boss' instructions to use e-mail. Plaintiff admitted in his deposition that he knew how to use USF's e-mail system and that Andrew Greenlee, his boss, preferred to communicate through e-mail. Plaintiff testified that, although he knew that Greenlee was upset that he was not e-mailing, plaintiff chose to respond to Greenlee's e-mails with face-to-face communication because plaintiff had a problem with e-mail and preferred face-to-face communication. Additionally, plaintiff offered a performance review from John Senkus, his first boss at USF, stating that plaintiff needed "strong improvement" in using e-mail. The review stated that, "[E-mail] is an important media for USF and Ray must strike a 'balance' to maximize his communications (to & fro)." By plaintiff's own admission, he failed to use the e-mail system, despite Greenlee's instructions. Applying the standard set forth by our Supreme Court in *Town*, it is clear that plaintiff was not qualified for his position.

Plaintiff next argues that the trial court erred in determining that plaintiff failed to present evidence rebutting defendant's proffered nondiscriminatory reason for plaintiff's termination – plaintiff's failed to use the company e-mail system. We disagree. We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).

Plaintiff argues that the following pieces of evidence prove that USF's proffered nondiscriminatory reason for plaintiff's termination was pretext for age discrimination: (1) the "Ray Sowa Termination Follow Up" memorandum, (2) plaintiff's replacement by a younger man, (3) the terminations of three USF employees in the protected class, and (4) the "out with the old, in with the new" statement made by USF's human resources employee Lori Honaker.

First, the "Ray Sowa Termination Follow Up" memo is not evidence of Greenlee's age bias. The memo, written by Greenlee, contains the following sentence, which plaintiff points to as evidence of age bias: "It was with great disappointment in the days following his termination, that I discovered Ray had made it clear to a number of people that worked for him that he not only had a problem with me, but clearly had a problem with my age." The notion expressed is that plaintiff had a problem with Greenlee's age, not the other way around. This sentence cannot be construed as evidence of age bias on the part of Greenlee.

Second, plaintiff claims that he was replaced by a younger employee. After plaintiff's termination, his position was eliminated and his job responsibilities were divided between two existing employees who performed plaintiff's former tasks in addition to their own. The two employees were younger than plaintiff, but had more seniority. According to our Supreme Court, 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." *Lytle, supra* at 178 n 27, quoting *Barnes v GenCorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990).

Third, plaintiff claims that the terminations of Donna Harcourt, Steve Lulis, and Mari-Beth Ashburn, employees over age 40, demonstrate that USF has a pattern and practice of discrimination against older employees. Defendant's evidence indicated that Donna Harcourt was terminated because she failed to return to work after her a 16-week leave of absence. Defendant's employment manual clearly states that USF will not continue to hold an employee's

position if that employee is unable to return to work after a 16-week leave of absence. Plaintiff presented no evidence that Harcourt, in her termination, was treated differently than younger employees. Defendant presented unrebutted evidence that Lulis, then 50 years old, and Ashburn, then 52 years old, were terminated for poor performance in August and September 2002, respectively, and that Steve Poprawa, then 34 years old, and Butch Westover, then 31 years old, were also terminated in September 2002 for similar reasons. Although Ashburn and Lulis were replaced with younger people, there is no evidence that their replacements were unqualified or that they were treated differently that similarly situated younger employees. Furthermore, defendant presented evidence that, of USF's 450 employees, 67 percent are in their 40s, 23 percent are in their 50s, and 10 percent are in their 60s.

Finally, the statement allegedly made by Lori Honaker, human resources manager for the Utica plant, is not evidence of age bias. A USF employee testified that Honaker, speaking of the 2002 terminations at the Utica plant, stated "out with the old and in with the new." This is a popular adage with no connotations of age bias. There is no indication that, in using that adage, Honaker was expressing satisfaction at the termination of older employees.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis