

STATE OF MICHIGAN
COURT OF APPEALS

DAVID HUNT,

Plaintiff-Appellant,

v

MNP CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 14, 2013

No. 307679
Macomb Circuit Court
LC No. 2010-005448-NZ

Before: JANSEN, P.J., and WHITBECK and BORRELLO, JJ.

PER CURIAM.

Plaintiff David Hunt appeals as of right the trial court's order granting summary disposition in favor of defendant MNP Corporation (MNP) and denying Hunt's request for leave to amend his complaint on Hunt's claim of age discrimination. We affirm.

I. FACTS

A. BACKGROUND FACTS

Hunt began working at Sombur Machine & Tool Company (Sombur) in 1966. Hunt made tools and dies for use in the production line, and was at times a shop foreman and a plant manager. In 1995, MNP purchased half of Sombur's building. MNP manufactures high-volume fasteners. Sombur's building was split into two separate sides, and Sombur and MNP remained separate companies. Hunt worked in the tool and die room in the half of the building called Plant IV, as an employee of MNP.

In November 2008, MNP closed Plant IV and transferred the employees to different locations. MNP transferred Hunt to Michigan Wire Die, a division of MNP. Hunt primarily made tool kits for use by the production division at Michigan Wire Die. In May 2009, Michigan Wire Die moved its tool kit production to MNP's location in Utica and laid several employees off, including Hunt.

In August 2009, Hunt asked to return to work. After some discussion about his compensation with MNP president, Tom Klein, Hunt returned to work at Michigan Wire Die in Utica. Donald Hess, the tool room manager, indicated that at that time the tool and die room at MNP was behind in preparing tool kits for use on the production line. Hess indicated that Hunt's

position was temporary, until the tool and die room caught up. But Hunt testified that Klein did not tell him that the position was temporary.

Randall Allison, MNP's vice president of human resources, hired Richard Rusnak as a tool room supervisor on May 10, 2010. Rusnak testified that he had over twenty years of experiencing in tooling, seven of which were as a tooling manager. Rusnak applied for the position by submitting his résumé on the Michigan Works website in April 2009. Hunt did not apply for the position. Hess testified that he considered Hunt, even though Hunt did not apply, but that he did not think that he was suited to the position because of his attitude.

Hunt testified that Bruce Miller, the plant manager at Sombur, told him that he was not considered for the position because he was a "short timer," because of his age. Hunt could not remember when Miller made that comment. Hunt testified that he asked Hess if the reason he was not considered for the position was his age, and that Hess responded that it was not because of his age, but rather because MNP wanted someone "from outside." Hunt testified that MNP laid him off the next day.

MNP laid Hunt off from employment on June 1, 2010. Allison testified that he learned from Klein that MNP intended to lay Hunt off about three weeks before June 2010, and that he spoke with Hess about Hunt's layoff a day or two before it occurred. Hess testified that he told Klein that the tool room had caught up on preparing kits before MNP laid Hunt off. Hess admitted at deposition that there were additional reasons that he wanted to terminate Hunt's employment, including that Hunt repeatedly requested that Hess move him to the day shift, which was already sufficiently staffed, and because Hunt was sending derogatory emails to day shift employees and "playing games[.]" Hess also testified that Hunt resisted performing work that did not involve making tool kits.

Allison indicated that MNP did not hire any employees to replace Hunt. Rusnak testified that the three employees who made kits before Hunt was hired continued to make kits, and there were no new hires for that position. Rusnak testified that the day shift was able to absorb Hunt's responsibilities because he was operating it with more accountability and oversight.

B. PROCEEDINGS

Hunt filed a complaint on October 14, 2010, alleging that if he was younger MNP would not have laid him off. The trial court ordered all discovery to be initiated by August 8, 2011, including depositions. In January and April 2011, Hunt indicated that he wanted to depose several witnesses. On August 31, 2011, Hunt sent MNP notice of additional depositions, including for Hess and Miller. On September 8, 2011, MNP responded that it did not intend to produce some of the additional witnesses for deposition because the trial court's scheduling order closed discovery on August 8, 2011.

MNP filed a motion for summary disposition on August 15, 2011. The trial court heard arguments and denied the motion on September 12, 2011, reasoning that it was not clear what role Miller played in MNP's corporate structure and noting that depositions of MNP's corporate officers were scheduled for September 13.

MNP filed a renewed motion for summary disposition on September 15, 2011. MNP attached Miller's affidavit, in which he indicated that (1) he is a plant manager at Sombur, a company affiliated with MNP; (2) Sombur and MNP are separate companies; and (3) he is not a manager, supervisor, or employee of MNP, and has no input into their hiring decisions. Hunt responded to MNP's motion and moved the trial court to amend his complaint on October 4, 2011. Hunt additionally argued that MNP failed to promote him because of his age, and alleged that the September 13, 2011, depositions revealed that MNP's reasons for terminating Hunt's employment were pretexts.

The trial court granted MNP's motion for summary disposition because Hunt did not establish that there were questions of fact concerning whether MNP intentionally discriminated against him. It reasoned there were no questions of fact concerning whether Miller's statement was direct evidence of discrimination, that Hunt did not prove a prima facie case of discrimination, and that MNP articulated legitimate reasons for terminating Hunt's employment. In November 2011, the trial court clarified that it also had denied Hunt's motion to amend his complaint.

II. AGE DISCRIMINATION

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's determination on a motion for summary disposition.¹ Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." The trial court must consider all the documentary evidence when deciding the motion.² A genuine issue of material fact exists if reasonable minds could differ on the issue when viewing the record in the light most favorable to the nonmoving party.³

B. LEGAL STANDARDS

"[T]he opportunity to obtain employment . . . without discrimination because of religion, race, color, national origin, *age*, sex, height, weight, familial status, or marital status" is a civil right.⁴ An employer may not discharge an employee for any of these reasons.⁵ An employee

¹ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

² *Id.* at 120; MCR 2.116(G)(5).

³ *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

⁴ MCL 37.2102(1) (emphasis supplied).

⁵ MCL 37.2202(1)(a); *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

may establish a civil claim against an employer with direct or indirect evidence of intentional employment discrimination.⁶

To survive a motion for summary disposition, once the nonmoving party has identified issues in which there are no disputed issues of material fact, the burden is on the plaintiff to show that disputed issues exist.⁷ The nonmoving party “must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.”⁸ If the nonmoving party does not make such a showing, the trial court properly grants summary disposition.⁹

C. DIRECT EVIDENCE

As an initial matter, we note that Hunt argues that the trial court improperly considered Miller’s affidavit because neither party included Miller on their witness list or noticed him for deposition. Parties abandon issues on appeal if they “merely announce their position and leave it to this Court to discover and rationalize a basis for their claims.”¹⁰ Hunt does not provide any authority to support this assertion, and thus we consider this issue abandoned.

Further, we conclude that Hunt has not presented direct evidence of employment discrimination. Direct evidence of intentional discrimination is “evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor” in the employer’s decision.¹¹ Hunt argues that there was a question of fact concerning whether Miller was a supervisor at MNP, and that Miller’s statement that Hunt was not considered for a promotion because he was a “short timer” shows that Hunt’s age was at least a motivating factor in MNP’s decision to lay him off or not consider him for the tool room supervisor position. We disagree.

Miller’s statement did not constitute direct evidence of discrimination because it was merely a stray remark. Remarks that are “stray remarks” are not direct evidence of intentional discrimination.¹² To determine whether remarks are irrelevant “stray remarks,” the trial court may consider whether (1) they were made by a decision maker or agent within the scope of his or her employment, (2) they were related to the decision-making process, (3) they were vague or

⁶ See *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).

⁷ MCR 2.116(G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

⁸ *Id.*

⁹ *Id.* at 363.

¹⁰ *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 633; 752 NW2d 479 (2008).

¹¹ *Downey v Charlevoix Co Bd of Rd Comm’rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998); *Matras*, 424 Mich at 682.

¹² *Krohn v Sedgwick James of Mich, Inc.*, 244 Mich App 289, 292; 624 NW2d 212 (2001); see *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 136-137; 666 NW2d 186 (2003).

clearly reflective of a discriminatory bias, (4) they were isolated or part of a pattern, and (5) they were made close in time to the adverse employment action.¹³

Here, the evidence showed that Miller was the plant manager at Sombur, that Sombur and MNP are different companies, and that Miller was not involved in MNP's decision to lay Hunt off or to hire Rusnak. Hunt testified at his deposition that Miller was a plant manager at Sombur, that Hunt previously worked for Sombur, and that he and Miller worked together when Sombur and MNP shared a building. Hunt did not testify about the relationship between Sombur and MNP. The trial court ruled against MNP's first motion for deposition in part because Hunt's testimony was unclear about the relationship between MNP and Sombur.

Miller clarified in his affidavit that he worked for Sombur, and that Sombur was a different company from MNP. Hunt did not present any evidence to dispute that Sombur and MNP were different companies, or that would show that Miller had any input in MNP's decisions. Thus, the trial court properly concluded that the remark was not made by a decision maker or agent in the scope of his employment, and was not related to the decision making process. Finally, Miller made a single remark at an indeterminate time: sometime after MNP hired Rusnak, but before MNP laid Hunt off.

We therefore conclude the trial court did not err when it determined that Hunt did not present direct evidence of discrimination. The trial court excluded Miller's comment as a stray remark. And even if a jury believed that Miller told Hunt that he was not considered for the supervisor position because he was a "short timer" since he was near retirement age, no reasonable juror could conclude that this is direct evidence of intentional discrimination *at MNP*. The trial court properly determined that there was no genuine issue of material fact whether Miller's statement was direct evidence of discrimination.

D. INDIRECT EVIDENCE

Hunt also argues that he provided indirect evidence of employment discrimination. Indirect evidence of employment discrimination exists if: (1) the plaintiff has shown a prima facie case of employment discrimination, and (2) the employer cannot articulate a legitimate, nondiscriminatory reason for its employment decision, or (3) the employer has articulated such a reason, but the plaintiff has shown that the employer's reason is merely a pretext.¹⁴

We conclude that Hunt has not shown indirect evidence of employment discrimination. First, Hunt has not shown that MNP replaced him with a younger person. In Michigan, an employee proves a prima facie case of age-based employment discrimination on the basis of disparate treatment if the employee was: (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) was replaced by a younger

¹³ *Krohn*, 244 Mich App at 292; see *Sniecinski*, 469 Mich at 136 n 8.

¹⁴ *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-174; 579 NW2d 906 (1998).

person.¹⁵ Hunt argues that because the division that employed him hired several younger workers since he was discharged, there is a genuine issue of material fact whether he was replaced by a younger person. We disagree.

Though Hunt presented evidence that MNP's tooling division hired employees after he was discharged, MNP argued that there was no genuine issue of material fact concerning whether Hunt was replaced by a younger employee. An employee is not replaced if his or her work is reassigned to other employees.¹⁶ Rusnak testified that after MNP laid Hunt off, Rusnak shifted his responsibilities to the day shift tool makers that were performing the work before Hunt was hired. Also, MNP provided evidence that the employees that the tooling division hired after MNP laid Hunt off were hourly employees hired into positions with different responsibilities than Hunt's position: as kit runners and die repairers. Hunt did not provide any evidence to refute MNP's assertions. Thus, even when viewing the evidence in the light most favorable to him, Hunt has not shown that he was replaced by a younger person.

Second, the trial court properly concluded that MNP articulated several legitimate reasons for laying Hunt off. MNP alleged that it laid Hunt off because the day shift employees caught up on making tools, and because Rusnak implemented more efficient procedures. Hunt did not provide any evidence to refute this; his only evidence was that at one point, he was reassigned to making tools after he conducted an inventory, and that MNP's production line had a constant need for tools. Combined with the evidence that MNP did not hire anyone to replace Hunt, even when viewing the evidence in the light most favorable to Hunt, we are not convinced that the trial court erred.

Also, Hess admitted that he had additional reasons for laying Hunt off that he did not include in his affidavit, but these reasons were not discriminatory. Hess testified that he disliked Hunt's attitude and thought that Hunt complained too much. Hess's personal dislike of Hunt does not infer that he discriminated against Hunt.

We conclude that the trial court properly granted summary disposition because Hunt did not show that there were genuine issues of material fact, and did not present direct or indirect evidence of intentional employment discrimination.

III. MOTION TO AMEND THE COMPLAINT

A. STANDARD OF REVIEW

"This Court reviews for an abuse of discretion a trial court's denial of a motion to amend a complaint."¹⁷ The trial court abuses its discretion if its outcome falls outside the reasonable and principled range of outcomes.¹⁸

¹⁵ *Id.* at 177.

¹⁶ See *Lytle*, 458 Mich at 177 n 27.

¹⁷ *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687; 669 NW2d 575 (2003).

B. LEGAL STANDARDS

A party may move the trial court for leave to amend a complaint, and “[l]eave shall be freely given when justice so requires.”¹⁹ However, the trial court may deny a party’s request for leave to amend the complaint for reasons of: (1) undue delay, (2) bad faith, (3) dilatory motive, (4) repeated failure to cure deficiencies, (5) undue prejudice to the opposing party, or (6) the futility of the amendment.²⁰

C. APPLYING THE STANDARDS

Hunt argues on appeal that the trial court improperly denied his motion to amend his complaint. He contends that the deposition testimonies of Allison, Hess, and Rusnak (1) showed that reasons for terminating Hunt’s employment were a pretext, and (2) support an additional claim that MNP passed him over for a promotion. We disagree.

Both parties presented evidence as part of the first and second motions for summary disposition that Hunt was “passed over” for a promotion, and that the trial court had an adequate opportunity to consider that evidence. And though the depositions of Hess, Rusnak, and Allison slightly contradicted their affidavits in some ways, Hunt did not demonstrate that these minor contradictions would have any effect on the case.

And even if those depositions indisputably proved that MNP’s reasons for terminating Hunt’s employment were a pretext—and we do not believe they do—the trial court did not abuse its discretion. The burden shifts to the employer to articulate legitimate reasons for terminating an employee’s employment *after* the employee has articulated a prima facie case of employment discrimination.²¹ As discussed above, Hunt did not articulate a prima facie case of employment discrimination.

We conclude that the trial court’s decision not to grant Hunt leave to amend his complaint was not outside the reasonable and principled range of outcomes. For the reasons above, Hunt’s factual amendments to his complaint to include the September 13, 2011, depositions would have been futile because they would not have affected the outcome of his case.

We affirm.

/s/ Kathleen Jansen
/s/ William C. Whitbeck
/s/ Stephen L. Borrello

¹⁸ *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

¹⁹ MCR 2.118(A).

²⁰ *Tierney*, 257 Mich App at 687-688.

²¹ *Lytle*, 458 Mich at 173.