STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1189

Farmers Insurance Exchange, et al., plaintiffs and counterclaim defendants,
Respondents,

vs.

James Tomczik, defendant and counterclaimant,
Appellant,

DBJ, Inc., d/b/a SMA Insurance,
Defendant and Counterclaimant.

Filed March 29, 2011
Affirmed
Shumaker, Judge

Stearns County District Court
File No. 73-C3-06-005053

Kelly A. Putney, Bassford Remele, P.A., Minneapolis, Minnesota; and

Melvin D. Weinstein, Kegler, Brown, Hill & Ritter, Columbus, Ohio (for respondents)

Stephen W. Cooper, Stacey R. Everson, The Cooper Law Firm, Chrtd., Minneapolis, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant challenges the district court's grant of respondent's summary-judgment motion dismissing appellant's claim of age discrimination under the Minnesota Human Rights Act (MHRA). We affirm.

FACTS

Appellant James Tomczik was an insurance agent for respondent Farmers Insurance from 1975 until April 15, 2006, when Farmers terminated his agent-appointment agreement because he allegedly violated its terms by placing eligible business with competitor Progressive Insurance.

Before terminating Tomczik's agreement, Farmers representatives investigated a perceived drop in the number of policies Tomczik wrote for Farmers, "specifically in his Farmers auto and Mid-Century auto lines of business and . . . address[ed] the issue of [ ] Tomczik maintaining active appointments with a known competitor, Progressive Insurance." Farmers representatives audited Tomczik's files and discovered files on five individuals who appeared eligible for coverage by Farmers but whom Tomczik had placed with Progressive. Tomczik allegedly told a representative during the investigation that "if a given quote or proposal with [Farmers] was too high, he would place the business with Progressive." Farmers subsequently terminated Tomczik's agreement, and Tomczik appealed the termination to a Farmers termination-review board. The board upheld the termination.

Farmers sued Tomczik and his next employer, SMA Insurance, alleging that Tomczik had breached a post-termination obligation by recruiting his former Farmers' clients on behalf of SMA. Tomczik counterclaimed, alleging age discrimination, among other claims. Farmers moved for summary judgment on these counterclaims. The district court denied in part and granted in part Farmers' motion for summary judgment. Tomczik appeals the summary-judgment dismissal of his MHRA claim.

D E C I S I O N

Standard of Review

"[Summary j]udgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. On appeal, this court reviews summary judgment de novo by asking: (1) whether there are any genuine issues of material fact and (2) whether the moving party is entitled to summary judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

Employment Discrimination

This court will affirm a grant of summary judgment in an employment-discrimination case if the nonmoving party cannot present evidence that is "sufficiently probative with respect to an essential element of [employment discrimination] to permit reasonable persons to draw different conclusions." *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Tomczik must show there is a genuine issue of material fact regarding his discrimination claim, the elements of which are: (1) he is a member of a

protected class; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973); *see also Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978) (adopting the *McDonnell* framework for a prima facie case in employment-discrimination disputes).

The first three elements are uncontested. But the district court determined that Tomczik had not presented evidence sufficient to show a genuine issue of material fact on the fourth element, whether he was replaced by a nonmember of a protected class. We agree. After the termination of Tomczik's agreement, Farmers divided his work and redistributed his files among a group of agents, almost half of whom were over the age of 52 at the time. The district court found that "[n]early half of [Tomczik's business was] transferred to agents who were 52 years of age at the time, just four years younger than Tomczik. The youngest agent to receive some of Tomczik's business, the 43 year old, received only six (6) of the 1,300+ policies distributed after the termination." Tomczik does not dispute this finding. "[A] person is not replaced when . . . the work is redistributed among other existing employees already performing related work. A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties." *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995). Because Tomczik has not shown that a genuine issue of material fact exists on each essential element of his MHRA claim, the district court did not err in granting summary judgment dismissing his claim.

Tomczik cites *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619 (Minn. 1988), for the proposition that even if Farmers' alleged basis for terminating Tomczik's agreement was nondiscriminatory, as long as a discernible factor in Farmers' actions might have been his age, Farmers cannot prevail at summary judgment. This is the so-called "mixed-motive" analysis. But *Anderson* expressly rejected the use of the mixed-motive analysis. 417 N.W.2d at 626. Further, *Anderson* is a posttrial decision and is not dispositive of this issue at the summary-judgment stage. Tomczik also cites *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003), for the proposition that a mixed-motive analysis applies in this situation. But *Desert Palace* does not apply here because it deals with the posttrial stage and has no relevance to a summary-judgment analysis. *See Griffith v. City of Des Moines*, 387 F.3d 733, 736 n. 2 (8th Cir. 2004).

Tomczik cites *Dietrich* for the proposition that statistical information can constitute the requisite evidence of discrimination in cases in which a position is not refilled. 536 N.W.2d at 324. But *Dietrich* expressly limits an additional showing in the form of statistical information to "cases involving a bona fide reduction-in-force." *Id.*

Tomczik also cites *Williams v. Alabama Dep't of Transp.*, 509 F. Supp. 2d 1046 (M.D. Ala. 2007), to argue that the "honest belief" doctrine, which Tomczik alleges the district court employed, does not apply. The district court did not explicitly rely upon the "honest belief" doctrine but concluded that "[t]he issue at this stage is not whether Tomczik actually engaged in the behavior, but whether Farmers had a genuine belief that he did." However, the district court made this statement to show that the issue of whether Farmers had an honest belief that Tomczik violated his agreement is an argument to be

made in Tomczik's breach-of-contract claim, which survived summary judgment. The district court correctly ruled that the issue at summary judgment is whether the employer's proffered nondiscriminatory reason is actually pretext for employment discrimination. Analyzing the facts surrounding whether Tomczik actually committed the act Farmers believed he did is irrelevant to the current analysis.

Disparate Impact

To survive summary judgment, Tomczik needed to present evidence indicating a genuine issue of material fact regarding his disparate-impact claim. The elements of such a claim are: "(1) an identifiable, facially neutral personnel policy or practice; (2) a disparate effect on members of a protected class; and (3) a causal connection between the two." *Mems v. City of St. Paul, Dep't. of Fire & Safety Servs.*, 224 F.3d 735, 740 (8th Cir. 2000); *see also* Minn. Stat. § 363A.28, subd. 10 (2010) (complaining party must show employment practice "is responsible for a statistically significant adverse impact on a particular class of [protected] persons").

The district court found that Tomczik had shown no genuine issue of material fact as to whether Farmers had a facially neutral personnel policy or practice. We agree. There is no evidence of the existence of an identifiable, facially neutral employment practice that disparately affects the Farmers workforce on the basis of age. Violation of a company policy is a legitimate, nondiscriminatory basis for an adverse employment action. *See Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 547 (8th Cir. 1993) (stating that breach of company policy is legitimate reason for terminating person's employment). Farmers had the right to terminate the agreements of agents who placed

eligible business with competitors. Farmers sent a letter to all its agents in 2004 reminding them that "placement of . . . eligible business with outside carriers is a flagrant breach of the Agent Appointment Agreement, and swift and decisive measures will be taken against any agent found to be participating in such practices, up to and including termination." Tomczik admitted in his deposition that he had received and read a copy of this letter and that it was consistent with his understanding of the agreement. There is no genuine issue of material fact surrounding Tomczik's disparate-impact claim.

Expert Opinion

Tomczik contends that the district court improperly excluded evidence given by his statistics expert, Dr. Frank Martin, in support of the disparate-impact claim. Dr. Martin concluded that Farmers terminated the agreements of a disproportionately high number of agents aged 40 years or older based upon a comparison of the ages of the United States workforce in general to the ages of agents whose agreements were terminated by Farmers. However, Dr. Martin's analysis was dependent upon an assumption that the ages of Farmers' agents mirror the ages of the entire United States workforce, which is the control statistic he used in his comparison. The district court concluded that, "[a]bsent a basis to infer that the age composition of Farmers' workforce mirrors that of the U.S. workforce in general, the comparison offered by Dr. Martin lacks foundational reliability and is not helpful to the finder of fact." We agree.

Tomczik alleged that the reason Dr. Martin used the ages of the United States workforce in general in his comparison instead of the ages of Farmers' agents was that Farmers had not provided information showing the ages of its agents to Tomczik. But the

record does not support this allegation, and the district court found that Tomczik had failed to properly utilize discovery measures to compel this information.

"The admission of evidence rests within the broad discretion of the [district] court and its ruling will not be disturbed unless it is based on an erroneous view of the law or constitutes an abuse of discretion." *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). There is substantial evidence in the record to support the district court's exclusion of this evidence. Dr. Martin's opinion was irrelevant to this issue. In a similar case, this court reversed the district court's admission of "expert" testimony regarding stereotyping and gender discrimination because the testimony was not helpful to the trier-of-fact. *Ray v. Miller Meester Adver., Inc.*, 664 N.W.2d 355, 366 (Minn. App. 2003), *aff'd*, 684 N.W.2d 404 (Minn. 2004). The district court did not abuse its discretion by ruling that Dr. Martin's testimony was inadmissible.

Affirmed.