STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH CAMARDA

Plaintiff-Appellant,

v

FRIENDLY JEEP EAGLE, INC., and JIM RIEHL, JR.,

Defendants-Appellees.

UNPUBLISHED
October 18, 1996

No. 178821
LC No. 93-003960-CK

Before: Reilly, P.J., and Sawyer and W.E. Collette,* JJ.

PER CURIAM.

Plaintiff appeals as of right the order of the trial court granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing his claim for age discrimination. We affirm.

On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary disposition because he submitted evidence to establish the existence of a triable issue regarding whether defendants' reasons for terminating him were pretexts for age discrimination. We disagree.

MCR 2.116(C)(10) permits summary disposition 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." This Court considers the factual support for the claim, giving the benefit of any reasonable doubt to the nonmoving party to determine whether a record might be developed which might leave open an issue upon which reasonable minds could differ. *Jackhill Oil Co v Powell Production, Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The grant of summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo. *Jackhill*, *supra*.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff based his age discrimination claim on the Elliott-Larsen Civil Rights Act, MCL 37.2202; MSA 3.548(202), which provides, in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or . . . discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age.

The burden of proof in an age discrimination case is allocated as follows: (1) the plaintiff has the burden of proving a prima facie case of age discrimination by a preponderance of the evidence; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). Of course, at the summary disposition juncture, plaintiff need not prove his case by a preponderance of the evidence. Instead, he need only tender specific factual evidence that could lead a reasonable jury to conclude that a prima facie case of age discrimination has been established and that the employer's proffered legitimate reasons for his termination are unworthy of credence. See *Lytle v Malady*, 209 Mich App 179, 187; 530 NW2d 135 (1995).

Plaintiff sought to establish defendants' liability for age discrimination by showing that defendants intentionally discriminated against him on the basis of age, which is to say that plaintiff proceeded under a disparate treatment theory. *Id.* at 185 n 1. In order to prove a prima facie case under a disparate treatment theory where, as here, the employee was not terminated pursuant to an economically motivated reduction in workforce, plaintiff must make the rudimentary showing that (1) he was within the protected class of workers, i.e., employees between the ages of forty and seventy,[1] (2) he was qualified for the job in question, and (3) he was replaced by a substantially younger person. *Id.* at 186 n 2.

Once plaintiff submits evidence supporting his prima facie case of age discrimination, defendants must articulate some legitimate, nondiscriminatory reason for his termination. *Id.* at 187. The burden then shifts to plaintiff to show that defendants' proffered legitimate reason is merely a pretext for age discrimination. Plaintiff can do this (1) by showing the reason had no basis in fact, (2) if it has a basis in fact, by showing that it was not the actual factors motivating the decision, or (3) if it was a factor, by showing that it was insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). The soundness of an employer's business judgment may not be questioned as a means of showing pretext. *Id.* at 566. If a plaintiff fails to submit evidence to rebut the defendant's proffered legitimate, nondiscriminatory reasons for an adverse employment action, summary disposition in favor of the employer is proper. See *Barnell v Taubman Co, Inc*, 203 Mich App 110, 121; 513 NW2d 13 (1993).

The trial court correctly found that plaintiff succeeded in establishing a prima facie case of age discrimination, since the evidence showed that plaintiff was fifty-two years old when he was terminated from his employment as a finance and insurance manager at Friendly Jeep Eagle, he was qualified for this position, and he was replaced with a significantly younger person. Defendants first advanced that plaintiff was fired because his sales figures were lagging. In turn, plaintiff acknowledged that his sales figures were indeed suffering when he was fired, but submitted evidence to show that this was caused by general industry conditions, consumer distrust of automobile finance department sales tactics, and a low referral rate from managers at the dealership. Additionally, plaintiff submitted evidence that he was performing at a sales rate above rates of other finance and insurance managers at two comparable dealerships in his area. In light of this evidence, plaintiff argued that his declining sales figures was a mere pretext for illegal age discrimination.

Viewing the evidence in the light most favorable to the nonmovant, this Court concludes that the trial court was correct in finding that plaintiff failed to establish the existence of a genuine issue of material fact regarding whether defendants' nondiscriminatory reason for his termination was a pretext for illegal age discrimination. Plaintiff's acknowledgment that his sales were ailing when he was terminated establishes, as the trial court recognized, that defendants' reason for terminating him was based in fact. Plaintiff further argued that defendants should not have terminated him because his low numbers were not his fault and because he was performing at a better rate than other similarly situated finance and insurance managers. Plaintiff's argument asks this Court to second-guess defendants' business judgment with respect to market trends and in light of the actions of other area businesses, which we will not do. *Dubey*, *supra* at 566. Hence, plaintiff failed to submit evidence to rebut defendants' proffered legitimate reason for his termination.

Additionally, defendants sought to justify plaintiff's termination by stating that he was fired because he produced shoddy paperwork, received customer complaints, and maintained excessive absenteeism. Although plaintiff argued that defendants suspiciously changed their reason for terminating him from low sales figures to these other complaints, this is not so. Defendants never changed their reasons for terminating plaintiff. Rather, defendants sought to justify their decision on additional grounds, as well as on the basis of his declining sales figures. Moreover, plaintiff has not submitted evidence to raise a genuine issue of material fact regarding whether these other reasons for his termination were pretextual. Although plaintiff submitted a coworker's statement that "plaintiff did very well for the dealership" and that he was not abnormally absent from work, there is no indication that she was plaintiff's supervisor or ever in a position to oversee his job performance. Hence, this coworker's statement cannot be used to establish the existence of a material issue of fact as to the pretextual nature of defendants' proffered reasons, because she lacks either personal knowledge or experience to testify regarding plaintiff's job performance. *Gagne v Northwestern National Ins Co*, 881 F2d 309, 316 (CA 6, 1990).[2]

Plaintiff submitted additional evidence which he claims establishes, alternately, either the pretextual nature of defendants' proffered reasons for his termination or direct proof of discriminatory intent. First, plaintiff points to comments that a coworker and Riehl made to him concerning his gray hair and argues that these statements evidence defendants' tendency to discriminate on the basis of age.[3]

Generally, however, comments made by coemployees are not sufficient to establish an employer's discriminatory intent. *McDonald v Union Camp Corp*, 898 F2d 1155, 1161 (CA 6, 1990). Therefore, the coworker's statement is of little value in establishing the existence of defendants' discriminatory intent. Furthermore, Riehl's comment was entirely ambiguous and isolated, and certainly cannot reasonably be interpreted as discriminatory or somehow related to plaintiff's termination. See *Phelps v Yale Security, Inc*, 986 F2d 1020, 1025-1026 (1993); *Gagne*, *supra* at 314.

Second, plaintiff argues that statements Riehl made about getting rid of him because he was paid too much establishes that defendants fired him because of his age so that they could replace him with a younger, lower-paid employee. However, plaintiff admitted at his deposition that Riehl made these comments facetiously. Moreover, defendants correctly assert that there is no disparate treatment when the factor motivating the employer is something other than the employee's age, even if the motivating factor is empirically correlated with age. *Plieth*, *supra* at 573-574. Hence, if this Court were to accept as true that defendants terminated plaintiff in order to replace him with a lower-paid employee, plaintiff would still be unable to establish that he was discriminated against on the basis of age. *Id.*

Finally, plaintiff argues that defendants violated their progressive disciplinary policy when they fired him. Plaintiff, however, failed to present evidence that defendants had a progressive disciplinary policy. Although plaintiff stated that a management consultant firm instructed defendants not to terminate any employee until after the employee had been counseled and the disciplinary action had been documented, plaintiff's allegation does not evidence that defendants actually adopted such a policy. Plaintiff also submitted a coworker's statement in support of his assertion that defendants violated their progressive discipline policy when they terminated him. The coworker stated, "In [plaintiff's] case, I don't think that [the progressive discipline policy] was followed." Because this is mere conjecture on the coworker's part, it is insufficient to establish the existence of a material issue of fact regarding whether defendants violated their alleged progressive disciplinary policy when they terminated plaintiff. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). Furthermore, even if defendants had instituted such a policy, their failure to follow it in plaintiff's case is not indicative of discriminatory intent or pretext. See *Barnell*, *supra* at 121. In light of these considerations, the trial court correctly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Maureen Pulte Reilly
/s/ David H. Sawyer
/s/ William E. Collette

[1] *Paulitch v Detroit Edison Co*, 208 Mich App 656, 658; 528 NW2d 200 (1995).

[2] This Court has stated that Michigan courts may consider federal law interpreting the Age Discrimination in Employment Act of 1967 (ADEA), 29 USC § 621 *et seq.*, when reviewing claims of age discrimination based on state law. *Plieth, supra* at 573.

[3] After plaintiff stopped dying his gray hair, James Nahas, a coworker, commented that plaintiff needed "some shoe polish" because his gray hair was showing. On another occasion, Riehl pointed to plaintiff's hair and said something which plaintiff interpreted as an inquiry into when he would be coloring his hair again.