

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

MICHAEL YOUNG,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION
and SATURN CORPORATION,

Defendants-Appellees.

UNPUBLISHED

November 22, 1996

No. 183382

LC No. 94-475530-NZ

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet*, JJ.

PER CURIAM.

Plaintiff alleged in the complaint filed in this case that defendants violated the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*; MAS 3.548 (101) *et seq.*, by making adverse employment decisions against plaintiff on the basis of his age and race. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

Plaintiff is an African-American and was forty-five years old when he was discharged from defendants' employ. He began working for General Motors Corporation in 1972, and remained there until 1987, when he transferred to Saturn Corporation, a General Motors subsidiary. Plaintiff alleged that he was repeatedly passed over for promotions while he worked for Saturn, and lost his job in 1993. At that time, Saturn was downsizing and shifting employees in its People Systems division from Michigan to Tennessee. Plaintiff filed a complaint alleging that the failure to promote him and his ultimate discharge were based on age and race in violation of the Civil Rights Act. The trial court ruled that plaintiff had not established a prima facie case of age discrimination. The court further ruled that plaintiff had not presented any evidence to show that race was a factor in the challenged employment decisions or that Saturn's work force reduction was a pretext to discriminate against him because of his race.

We review a trial court's decision on a motion for summary disposition de novo. *Ladd v Ford Consumer Finance Co, Inc*, 217 Mich App 119, 124; 550 NW2d 826 (1996). After considering all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the

parties in a light most favorable to the non-moving party, the trial court may grant summary disposition under MCR 2.116(C)(10) if the evidence demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position with the documentary evidence, and then the opposing party has the burden to prove the existence of a genuine issue of disputed fact. *Id.* The non-moving party, in satisfying its burden of setting forth disputed questions of fact, is not permitted to rely on mere allegations or denials in the pleadings, but must set forth specific facts. *Id.* If that party fails to present documentary evidence demonstrating the existence of a dispute as to a material fact, grant summary disposition pursuant to MCR 2.116(C)(10) is proper. *Id.* at 362-363.

As an initial matter, we note that in an attempt to show that there were material issues of fact in both his age and race discrimination claims, plaintiff expanded his arguments on appeal and supplemented the record with deposition testimony that was not produced in the trial court. This testimony and evidence will not be considered by this Court because it was not before the trial court and this Court may consider only the record upon which the trial court made its decision. MCR 7.210(A)(1); *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994); *Truby v Farm Bureau Gen Ins of Mich*, 175 Mich App 569, 571 n 1; 438 NW2d 249 (1988).

A claim of age discrimination can be premised on two theories: disparate treatment or disparate impact. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995). The former theory requires the plaintiff to demonstrate “either a pattern of intentional discrimination against protected employees, e.g., employees aged forty to seventy years, or against an individual plaintiff.” *Id.* Under the latter theory, the plaintiff must demonstrate that an otherwise facially neutral employment policy has a discriminatory effect on a class of protected employees. *Id.*

To establish a prima facie case of age discrimination to survive summary disposition, the plaintiff must demonstrate by a preponderance of the evidence that (1) he was a member of a protected class of employees and was subject to an adverse employment decision; (2) that he was qualified for the position at the time of the adverse decision; and (3) that age was a determining factor in the employer’s decision. *Id.* at 185-186. Where an age discrimination case involves an economically motivated reduction in force, a plaintiff must show more than that the employer retained a younger employee while discharging an older employee. *Id.* at 186. However, where the case does not involve a reduction in force, the plaintiff must show that he was (1) a member of a protected class; (2) was qualified for the job; and (3) was replaced by a substantially younger person. *Id.* at 186 n. 2.

In response to defendant’s motion for summary disposition, plaintiff failed to specifically argue his age discrimination claim in his brief. The only statements regarding that claim made at oral argument and generally touched upon in his brief in opposition to summary disposition were that only he and three other “older” employees were offered buyouts. The trial court essentially dismissed this claim on the basis that plaintiff failed to address the age discrimination claim and provided no evidence to support his assertions. We note that plaintiff has provided no evidence beyond his conclusions that he and the three

named employees were the only employees offered buyouts. Moreover, the employment histories of these three employees and several others, which plaintiff provided below, demonstrate that two of defendants' professed "older" employees were younger than two employees that apparently were not offered buyouts. Thus, we conclude that plaintiff failed to show that defendants discriminated against him on the basis of age or that his age was a determining factor in defendants' employment decision that ultimately resulted in plaintiff's discharge.

Although not presented in his brief before the trial court, plaintiff set forth an additional claim of age discrimination in his complaint. This alleged discrimination related to defendants' promotion of other persons who were younger and less qualified than plaintiff. To set forth a prima facie case of age discrimination, plaintiff was required to demonstrate that he was qualified for those higher level positions. *Lytle, supra* at 185-186. Lacking in the record is any evidence of plaintiff's personal qualifications and the requirements of those positions. Plaintiff has merely stated that he received bachelor's and master's degrees, but has provided no evidence of this. Although he attached copies of employment histories of his co-workers, specifically those who were allegedly promoted over him, he has provided no similar information regarding himself. We find that plaintiff failed to establish that he was qualified for the positions he asserts he should have been promoted to. Therefore, summary disposition was properly granted in defendants' favor.

A plaintiff may set forth a prima facie case of race discrimination under the Civil Rights Act by showing either intentional discrimination or disparate treatment. *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). Intentional discrimination may be established by demonstrating that the plaintiff was a member of the affected class, was subject to an adverse employment decision, and that the person making the adverse decision was predisposed to discriminate against persons in the affected class and actually acted on that predisposition in making the decision against the plaintiff. *Id.* A plaintiff may prove disparate treatment by establishing that he or she was a member of a protected class and was treated differently than persons in a different class for the same or similar conduct. *Id.*

The plaintiff bears this initial burden of proof and must set forth the prima facie case by a preponderance of the evidence. *Betty v Brooks & Perkins*, 446 Mich 270, 294; 521 NW2d 518 (1994). Upon this burden being met, the defendant must

articulate a legitimate, non discriminatory reason for its actions. If the defendant is able to articulate such a reason, the plaintiff must then be given the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons but were mere pretext for the discrimination. [*Id.* at 294-295, quoting *Slayton v Michigan Host*, 144 Mich App 535, 541; 376 NW2d 664 (1985).]

Plaintiff failed to establish a prima facie case of race discrimination based on disparate treatment. As an African-American, plaintiff is a member of a protected class. See *Sisson v Board of Regents of Univ of Mich*, 174 Mich App 742, 747; 436 NW2d 747 (1989). However, plaintiff did not demonstrate that he was treated differently than white employees for the same or similar conduct.

Although he alleged that he was not promoted while less qualified white employees were, plaintiff offered no evidence to demonstrate that his qualifications placed him in the same or similar position as those who were promoted. His own statements of belief that he was more qualified for those positions, without more, were inadequate to create material issues of fact to defeat summary disposition.

Plaintiff also failed to present a prima facie case of intentional discrimination. Although a co-worker testified in her deposition that plaintiff's supervisor treated plaintiff less fairly than other employees, plaintiff provided no evidence that his supervisor was predisposed to discriminate against African-Americans. We find that summary disposition was appropriate for plaintiff's failure to set forth a prima facie case of discrimination.

Affirmed.

/s/ Michael J. Kelly

/s/ Harold Hood

/s/ H. David Soet