STATE OF MICHIGAN

COURT OF APPEALS

STEVEN R. LARSON,

Plaintiff-Appellant,

v

FIRST OF AMERICA BANK CORPORATION,

Defendant-Appellee.

UNPUBLISHED
February 7, 1997

No. 189717
LC No. 94-431875

Before: Smolenski, P.J., and Michael J. Kelly and J.R. Weber,* JJ.

PER CURIAM.

Plaintiff, appeals as of right from an order of the circuit court granting summary disposition in favor of defendant, in this age discrimination action We affirm.

Plaintiff argues that summary disposition should not have been granted under MCR 2.116(C)(10) because a question of fact existed as to whether the reasons proffered by defendant for terminating plaintiff were a pretext for age discrimination. Plaintiff further argues that even if he did engage in the conduct alleged by defendant, a question of fact was established by evidence showing that defendant treated him different than similarly situated employees. We disagree.

A motion for summary disposition may be granted when "[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This subsection of the court rules tests whether there is a factual basis for the claim. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and any other documentary evidence in favor of the party opposing the motion. *Id*. The nonmovant may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts which establish that there is a genuine issue for trial. MCR 2.116(G)(4). This Court's review of a trial court's decision whether to grant summary disposition is de

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

novo. *Pickney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

MCL 37.2202; MSA 3.548(202) of the Elliott-Larsen Civil Rights Act provides in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, *age*, sex, height, weight, or marital status. [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) (emphasis added).]

Although this Court is not bound by federal precedent, those case are persuasive in interpreting and applying the Elliott-Larsen Civil Rights Act. *Florence v Department of Social Services*, 215 Mich App 211, 215; 544 NW2d 723 (1996). A plaintiff may bring an age discrimination claim under one of two theories:

> (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees, e.g., employees aged forty to seventy years, or against an individual plaintiff; or (2) disparate impact . . . . [*Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995).]

"[I]ntentional discrimination is not a separate theory but rather another name for the disparate treatment theory." *Lytle, supra,* 209 Mich App 185 n 1. Thus, to establish a prima facie case of *intentional* discrimination under the disparate treatment theory, the plaintiff must show that (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Moody v Pepsi-Cola Metropolitan Bottling Co, Inc*, 915 F2d 201, 208 (CA 6, 1990); *Zoppi v Chrysler Corp*, 206 Mich App 172, 175; 520 NW2d 378 (1994). With regard to the third element needed to establish a prima facie case of intentional age discrimination, "the issue is whether the employee was performing well at the time of his termination." *Karazanos v Navistar Int'l Trans Corp*, 948 F2d 332, 336 (CA 7, 1991). Indeed, "whether one is qualified may change from time to time." *Id*., 336 (citations omitted)." "The fact that an individual may have been qualified in the past does not mean that he is qualified at a later time." *Id.*

In order to prove disparate treatment, the plaintiff must prove that he was within the protected class and that he was treated differently than persons of a different class for the same or similar conduct. *Plieth v St Raymond Church*, 210 Mich App 568, 572; 534 NW2d 164 (1995). According to the Sixth Circuit:

> It is fundamental that to make a comparison of a discrimination plaintiff's treatment . . ., the plaintiff must show that the "comparables" are similarly-situated *in all respects.* [T]o be deemed "similarly-situated", the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject

> to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. [*Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992) (citation omitted; emphasis in original).]

Once the plaintiff has made a prima facie showing of age discrimination, the burden shifts to the employer to provide a legitimate, nondiscriminatory explanation for adverse actions. *MacDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Moody*, *supra*, 915 F2d 208. If the employer is able to provide a nondiscriminatory explanation, the burden of proving that the proffered reason was a pretext for discrimination shifts to the plaintiff and merges with his ultimate burden of persuasion. *St Mary's Honor Center v Hicks*, 509 US 502, 5 07-508; 113 S Ct 2742; 125 L Ed 2d 407 (1993).

In order "to survive a summary disposition motion, [however,] [the] [plaintiff] need only tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's proffered reasons are a pretext for age discrimination." *Lytle*, *supra*, 209 Mich App 188. "[C]onclusory allegations are insufficient to rebut evidence of nondiscriminatory conduct." *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 363; 486 NW2d 361 (1992) (citation omitted). Thus, a plaintiff in an action brought under MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. must demonstrate that his former employer's proffered reasons for discharging him "are unworthy of credence, *and* that illegal age discrimination was more likely the defendant's true motivation in discharging or demoting her." *Lytle*, *supra*, 209 Mich App 188 (emphasis in original).

Viewing all of the evidence presented by the parties in a light most favorable to plaintiff, we find that plaintiff failed to establish a prima facie case of intentional age discrimination. Whether the first two elements were satisfied was not disputed by the parties. The fourth element, although disputed, was satisfied by defendant's admission that at least a portion of plaintiff's former job responsibilities were assumed by someone who was twenty years younger than plaintiff. Thus, the only question to be answered is whether at the time of his termination, plaintiff was qualified for the Assistant Manager Position from which he was terminated. Our review of the evidence reveals defendant's proofs show that plaintiff was not performing at the level required for his position. Plaintiff has not rebutted those proofs.

The evidence established that in four internal memos, plaintiff's former supervisor had detailed plaintiff's mistakes and deficiencies and recommended that plaintiff be demoted and placed at another of defendant's sites. Additionally, several of defendant's undisputed answers to plaintiff's interrogatories made it quite clear that at the time of his discharge, plaintiff was not meeting the requirements of the position he held. Furthermore, whether during the period of January 1, 1991, to December 21, 1991, plaintiff was performing at a level that exceeded the level at which he was performing at the time of his May 1987 promotion was irrelevant to the question of whether plaintiff was qualified for his position at the time of his discharge. *Karazanos, supra*, 948 F2d 336. We reach that conclusion even if the two memos to plaintiff's personnel file -- which plaintiff argues were written after his termination -- were not

taken into consideration. In addition, plaintiff never produced any evidence in contravention of defendant's assertion that he was not adequately performing the responsibilities of his position at the time of his termination. MCR 2.116(G)(4); *Karazanos, supra*, 948 F2d 336.

In addition to his failure to make a prima facie showing of intentional age discrimination, plaintiff did not establish the existence of a material fact with regard to whether defendant's proffered reasons for discharging him were a pretext for age discrimination. Plaintiff's only evidence in support of his pretextual discharge argument was a remark made by his former supervisor in one of the two memos she wrote to his personnel file and statements made by plaintiff in his deposition denying having engaged in the alleged misconduct. Because the pages of his deposition to which plaintiff cites were not part of the record below, we have disregarded any reference to those pages. *Isagholian v Transamerica Insurance Corp*, 208 Mich App 9, 18; 527 NW2d 213 (1994); *Amorello v Monsanto Corp*, 186 Mich App 324, 330-331; 463 NW2d 487 (1991).. Additionally, the challenged statement by plaintiff's former supervisor that she "fel[t] that [he] [was] simply putting in time for retirement" was not sufficient to establish that defendant's reasons for discharging him were a pretext for discrimination. *Birbeck v Marvel Lighting Corp*, 30 F2d 507, 511-512 (CA 4, 1994); *Waggoner v City of Garland, Texas*, 987 F2d 1160, 1166 (CA 5, 1993); *Gagne v Northwestern National Insurance Co*, 881 F2d 309, 314 (CA 6, 1989). Furthermore, plaintiff conceded that he had told potential employers that defendant terminated him because of inadequate performance.

Plaintiff's claim under the disparate treatment theory of age discrimination is also without merit because he failed to show that any of the employees he listed, other than Mark Ossowski, were at all similarly situated to him. *Mitchell, supra*, 964 F2d 583. Moreover, although Ossowski was arguably similarly situated to plaintiff -- he held the same position and worked for the same person -- beyond bare allegations based upon inadmissible hearsay, plaintiff never produced any evidence to refute defendant's contention that Ossowski had never engaged in the same or similar conduct that lead to plaintiff's termination. MCR 2.116(G)(4); *Mitchell, supra*, 964 F2d 583; *Featherly, supra*, 194 Mich App 363. Accordingly, because defendant failed to establish the existence of a genuine issue of material fact, summary disposition in favor of defendant was appropriate.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael R. Smolenski
/s/ John R. Weber