STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
March 21, 1997

WILLIAM R. BEHR,

Plaintiff-Appellant,

v

No. 185685
Oakland Circuit Court
LC No. 94-477913

ROSS ROY, INC.,

Defendant-Appellee.

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant on plaintiff's age discrimination claim. We affirm.

Plaintiff was hired by defendant agency in October 1978 at the age of 49. He was hired as a senior copywriter in the Dodge Truck Group. Plaintiff was hired by Al Hibbert, who informed him that the agency did not hire people over the age of 50. About the same time, Hibbert informed plaintiff that the company was going to be eliminating a lot of "dead wood." Plaintiff assumed that the comment was age related, but conceded that Hibbert could have been referring to eliminating "unproductive people." Plaintiff testified that numerous other people also stated that defendant did not want to hire persons over the age of 50.

In April 1989, plaintiff was promoted by Joe McNeil to the position of Group Creative Director in charge of the copywriters. He also became a vice-president of the agency, but the title did not alter his status as the creative director. In May 1990, McNeil completed plaintiff's first performance evaluation as a Group Creative Director. The evaluation was above average in most categories, but McNeil noted some problems with plaintiff, including punctuality, originality and leadership. In April 1991, plaintiff's employment evaluation again contained evidence of his problem with leadership and stated that "he is functioning more as a Copy Supervisor that as Group Creative Director."

In 1992, Jack Frakes replaced McNeil as the director of the agency. Frakes made numerous organizational changes, including demoting plaintiff to senior copywriter. As a result, plaintiff reported to Cliff Sevakis, and his immediate supervisor was Susan McKay. Plaintiff's work was assigned by McKay and critiqued by Sevakis. Plaintiff admitted that he felt superior to Sevakis in every way even though Sevakis was the boss.

Approximately four months into the new arrangement, Sevakis wrote a memo to plaintiff regarding his performance. The memo outlined several problems with plaintiff, including failure to smoothly integrate client revisions into copy, confusion on issues, failure to take notes regarding projects, plagiarism, lack of initiative and socializing. Plaintiff denied the allegations in a memo. McKay claimed that she had no knowledge of the memo. McKay testified that, although she did not have first hand knowledge regarding some of the allegations, such as the plagiarism, the rest of the memo was invalid. She also testified that plaintiff was well thought of by his coworkers and that everyone who worked for Sevakis believed him to be incompetent.

Frakes intervened and stopped any further exchange of memos. The memos were removed from plaintiff's employment file, and Frakes instructed plaintiff to deal only with McKay in employment matters. McKay evaluated plaintiff at the end of 1992. Plaintiff scored average in most categories, with a noted problem with punctuality.

In November 1993, when Frakes retired, Gary Wolfson became the Executive Vice President and Chief Creative Officer for the agency. Wolfson claimed that he was instructed to implement a reduction of the workforce and to restructure communications in order to improve the overall creative production of the agency. Wolfson averred that the executive committee wanted to eliminate non-productive people when reducing the work force. Plaintiff testified that Wolfson met with him in 1993 and conducted a half hour interview to obtain plaintiff's ideas about how to improve the agency. Plaintiff indicated that his next meeting with Wolfson was on February 8, 1994, when he was terminated. Plaintiff was 65 years old.

In his deposition, Wolfson testified that he gathered information about the people working for the agency and reviewed everyone in the communications group. He reviewed the most recent performance reviews and consulted with senior management and Frakes. According to Wolfson, Sevakis suggested termination of plaintiff's employment and, after conducting his own evaluation, he agreed. Wolfson testified that he terminated plaintiff because, based on the employment evaluations, plaintiff was not producing work commensurate with his salary and his performance was the lowest among his copy writing peers in the group. Immediately after plaintiff's termination, defendant did not hire anyone into plaintiff's department. Instead, plaintiff's duties were redistributed to four other persons in the department.

Plaintiff filed suit against defendant, alleging that he was fired because of age discrimination. Defendant moved for summary disposition, arguing that plaintiff failed to establish a prima facie case of age discrimination. Defendant further argued that the agency underwent a work force reduction, and plaintiff was terminated because of his relatively poor performance. The trial court granted summary

disposition in favor of defendant, finding that plaintiff had failed to establish a prima facie case of age discrimination. The trial court also denied plaintiff's motion for reconsideration.

Plaintiff claims that defendant was not entitled to summary disposition on plaintiff's age discrimination claim. We disagree. We review an order granting summary disposition de novo. *Plieth v St Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.*

Plaintiff's claim of age discrimination is based upon the Civil Rights Act, which provides in relevant part, that an employer shall not:

> (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 . . . age. [MCL 37.2202; MSA 3.548 (202).]

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 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*, *supra* at 571-572; *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993).

An age discrimination claim can be based on 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, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Farmington Ed Ass'n* v *Farmington School Dist*, 133 Mich App 566; 351 NW2d 242 (1984). In this case, plaintiff relies on the disparate treatment theory.

Plaintiff claims that he established his prima facie case under the four-part test set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which requires a plaintiff to 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. See also *Barnell*, *supra*. Where, however, as here, a plaintiff is discharged as a result of an employer's economically motivated reduction in force, a prima facie case of disparate treatment requires a showing, by plaintiff, that age was a *determining* or a *significant* factor in the employer's decision to discharge or demote the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *Plieth*, *supra*. Age

need not be the only reason or the main reason for the discharge, but it must be one of the reasons that made a difference in determining whether to discharge a person. *Plieth, supra* at 121.

We are not convinced that plaintiff has proved a prima facie case of age discrimination. Plaintiff was sixty-five years old when he was discharged, and considering plaintiff's employment and experience, we will accept that he had skills and training to perform certain tasks at the agency. However, plaintiff's allegation that he was replaced by a younger employee was unsupported in his brief to the trial court and in his brief on appeal. Unsupported allegations need not be considered by this Court. *Porter v Royal Oak,* 214 Mich App 478; 542 NW2d 905 (1995). A party may not merely announce his or her position and leave it to us to discover and rationalize the basis for the claim. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

More importantly, we are not persuaded that plaintiff's age was a *significant* reason in determining whether to discharge him. Plaintiff presented evidence that two of the senior managers, who were consulted about plaintiff prior to his discharge, had made age-related remarks to him or in his presence. One of these managers recommended plaintiff and one other 64-year-old employee for termination during defendant's 1994 reorganization. However, there was undisputed evidence that the person who terminated plaintiff reviewed the performance evaluations of the copywriters in plaintiff's group before making a decision. He testified that, based on those evaluations, plaintiff's performance was the lowest in the group. At best, plaintiff has offered evidence that his age may have played some meager part in defendant's decision to terminate him. Plaintiff has made no showing that his age was the motivating factor in that decision.

We further note that plaintiff also has failed to establish a prima facie case that defendant engaged in a pattern of discharging older employees. Plaintiff was required to present evidence that he was qualified for the position and that there was a pattern of discharges of older employees, whose positions were then filled by younger employees. See *Foehr v Republic Automotive Parts, Inc,* 212 Mich App 663, 671; 538 NW2d 420 (1995). In this case, plaintiff provided no evidence that there was a pattern of discharges based on age. In fact, the evidence on which plaintiff relies tends to indicate a discriminatory hiring policy, which did not affect plaintiff. The only evidence offered by plaintiff was the testimony of a co-employee who stated that many other employees felt they were separated from their employment, either by termination or early retirement, because of age. This testimony alone does not establish a pattern of age-related discharges. See *Bouwman v Chrysler Corp,* 114 Mich App 670, 682; 319 NW2d 621 1982). Plaintiff also failed to provide any supporting evidence, by way of testimony or affidavits, from the individuals who believed there was discrimination by the agency even though he was provided with a list of names. Plaintiff's allegations, without supporting authority, are insufficient to survive summary disposition. See *Johnson v Wayne Co,* 213 Mich App 143, 149; 540 NW2d 66 (1995).

Even if we conclude that plaintiff met his burden and proved a prima facie case of age discrimination, the burden of production would shift to defendant to rebut the presumption of disparate treatment by articulating, *not proving*, a legitimate, nondiscriminatory reason for the adverse

employment decision against plaintiff. In rebuttal, defendant states that it underwent a reduction in force and plaintiff was terminated because his performance was the lowest among his peers and because he was not producing work commensurate with his salary.

Defendant having carried its burden of production, plaintiff was required to prove by a preponderance of the evidence that the defendant's proffered reasons are a mere pretext. Plaintiff failed to offer any evidence, beyond mere speculation and unsupported allegations, that defendant did not undergo a reduction in force. Furthermore, although plaintiff offered the testimony of his immediate supervisor that his performance was always of good quality, he did not offer the performance evaluations of the retained employees to demonstrate that, based on written evaluations, he was not the lowest performer in the group. Plaintiff also completely failed to rebut that he was chosen for termination because his productivity level was not commensurate with his salary. A party has to rebut the legitimate, non-discriminatory reasons with supporting evidence to survive summary disposition. *Singal v General Motors Corp,* 179 Mich App 497, 500; 447 NW2d 152 (1989). Because plaintiff has not rebutted defendant's legitimate, nondiscriminatory reasons for his discharge, the trial court properly dismissed his claim of age discrimination.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen