

STATE OF MICHIGAN  
COURT OF APPEALS

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NORMAN HAMMETT,

Plaintiff-Appellant,

v

ROSS MOODY CHEVROLET, INC.,

Defendant-Appellee.

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UNPUBLISHED

May 6, 1997

No. 192343

Lapeer Circuit Court

LC No. 94-020008-CL

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

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition of plaintiff's age discrimination and wrongful discharge claims pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings on plaintiff's wrongful discharge claim.

I

With regard to his age discrimination claim, plaintiff maintains that he presented sufficient rebuttal evidence below to create a question of fact regarding whether defendant's legitimate, non-discriminatory reasons for plaintiff's discharge were a mere pretext for age discrimination. We disagree.

Because an employer "is rarely so blatant as to announce its illegal motives," a plaintiff alleging intentional discrimination need only set forth a prima facie case in order to create a rebuttable presumption of discrimination. *Lytle v Malady*, 209 Mich App 179, 185-186; 530 NW2d 135 (1995). To establish a prima facie case of age discrimination, a 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. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993). Once a prima facie case is established, the burden shifts to a defendant to articulate a legitimate, non-discriminatory reason for its actions. *Id.* Thereafter, the plaintiff must carry the burden to show that such a proffer was mere pretext for age discrimination, and that age was a "determining factor" in plaintiff's discharge. *Id.*, pp 120-121.

For purposes of its summary disposition motion only, defendant conceded that plaintiff could establish a prima facie case. As its legitimate, non-discriminatory reasons for plaintiff's discharge, defendant detailed fifteen performance deficiencies by plaintiff dating back to September of 1993, as well as a specific incident of insubordination by plaintiff toward defendant's owner. Insofar as plaintiff denied that the specific incident of insubordination ever occurred, plaintiff's denial must be accepted as true for purposes of our review of summary disposition. *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435, 437; 549 NW2d 80 (1996). The trial court erred to the extent that it relied on this alleged incident to support its decision. *Id.*

Once defendant articulated that plaintiff's discharge was based in part on the fifteen performance deficiencies, it became incumbent upon plaintiff to show that such a proffer was a mere pretext for age discrimination. Plaintiff did not dispute any of the fifteen deficiencies. Rather, the only evidence of pretext offered by plaintiff with specific regard to the deficiencies was that plaintiff had corrected eleven of them as of the date of his discharge. Even assuming that to be true, we find nothing in the record to suggest that plaintiff's admitted failure to correct the remaining four deficiencies was not sufficient legitimate grounds for his discharge. Plaintiff has cited no authority for the proposition that he only had to "make progress" toward correcting all the deficiencies.

Plaintiff's remaining evidence as to pretext failed to specifically address the fifteen performance deficiencies. Plaintiff's remaining evidence was inapposite in that it either: (1) needlessly recapitulated elements of plaintiff's prima facie case (e.g., that plaintiff was replaced by someone ten years younger);<sup>1</sup> (2) consisted only of plaintiff's irrelevant *perceptions* that defendant generally sought to replace older employees with younger ones as a matter of policy, *Fonseca v Michigan State University*, 214 Mich App 28, 31; 542 NW2d 273 (1995);<sup>2</sup> or (3) detailed outstanding job performance by plaintiff (e.g., numerous awards from Chevrolet Motor Division, etc.) during legally irrelevant time periods. Insofar as defendant proffered the fifteen specific performance deficiencies as a legitimate, non-discriminatory reason for plaintiff's discharge, we find plaintiff's general allegations of satisfactory job performance over the several years prior to 1993 irrelevant to rebut the proffered deficiencies.

Granting the benefit of reasonable doubt to plaintiff, we find that no record could be developed upon which reasonable minds could differ regarding whether defendant's proffered reason for plaintiff's discharge was a mere pretext, or that age was a determining factor in plaintiff's discharge. *Barnell, supra*, pp 120-121. Accordingly, summary disposition for defendant on this claim was proper. *Taylor, supra*, p 437.

## II

With regard to his claim of wrongful discharge, plaintiff maintains that he presented evidence below upon which reasonable minds could differ regarding whether he had been promised that he could not be discharged absent just cause. We agree. Plaintiff testified that, in 1983, he was explicitly promised by defendant's then owner that plaintiff would not be discharged without just cause. In response, defendant countered with evidence that the owner would never have said such a thing to *any* employee, and therefore must not have said such to plaintiff. However, plaintiff's allegation must be

accepted as true for purposes of our review of summary disposition. *Taylor, supra*, p 437. Accordingly, the trial court erred when it granted summary disposition for defendant on this claim. We remand for further proceedings with regard to plaintiff's wrongful discharge claim.

Affirmed in part, reversed in part, and remanded for further proceedings on plaintiff's wrongful discharge claim. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Myron H. Wahls

/s/ Harold Hood

/s/ Kathleen Jansen

<sup>1</sup> We note that defendant originally sought as plaintiff's replacement someone older than plaintiff.

<sup>2</sup> Although plaintiff in his brief claims that he was told by defendant's business manager following his discharge that he was not a manager "for" the 90s (plaintiff's obvious implication being that defendant felt that plaintiff would not be a suitable manager for this decade owing to his age), the record reveals that the statement in question was, in fact, that plaintiff would not be able to make it as manager "through" the 90s (i.e., through the next several years). A reasonable jury could not interpret the actual statement in the manner suggested by plaintiff.