

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT BORTHWICK,

Plaintiff-Appellant,

v

R. L. POLK & CO.,

Defendant-Appellee.

UNPUBLISHED
October 28, 1997

No. 197146
Wayne Circuit Court
LC No. 95-516477-NZ

Before: Corrigan, C.J., and Griffin and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) in this employment discrimination and wrongful discharge action. We affirm.

I

Plaintiff presents two issues on appeal. First, plaintiff argues that the trial court abused its discretion in refusing to compel one of plaintiff's former coworkers to submit to a deposition. Plaintiff contends that the former coworker had valuable knowledge of defendant's employees' intent to discriminate against older employees. We conclude that the trial court may have abused its discretion in denying plaintiff's motion to compel. Nevertheless, we hold that the error, if any, was harmless in view of other testimony presented to the court. MCR 2.613(H).

An employee of defendant corporation compiled a financial planning chart that compared the current median ages of personnel in defendant's automotive sales group to median ages expected after a new hiring plan had been put into effect. Plaintiff was told about the chart in the spring of 1994 by a coworker who had attended a February, 1993, meeting at which the chart was presented. The coworker told plaintiff that he thought the chart was incriminating to defendant but refused to give plaintiff a copy because the coworker had signed a confidentiality agreement with defendant when he accepted benefits under an early retirement program. The coworker also told plaintiff that after the chart was presented at the meeting, defendant's president remarked that defendant had "a problem . . . with the aging sales management group." Defendant's general counsel responded that while defendant

might want to prepare an employment plan that reflected an age shift, he thought it unwise to have such a plan in writing. All participants at the meeting were then requested to throw their copy of the chart into the middle of the table to be collected. The coworker kept his chart which, later introduced as an exhibit, in fact showed an increase in median age among several job categories.

Plaintiff attempted to depose the coworker, who refused to testify, citing the confidentiality agreement and his fear that he would lose his retirement benefits if he breached the agreement. Defendant's counsel refused to release the coworker from the confidentiality agreement on grounds that defendant was entitled to protection from the release of trade secrets afforded by it. Moreover, defendant argued that the chart preceded defendant's reorganization plans and only related to the automotive sales group, not plaintiff's marketing services group, and a number of its employees who would soon be retiring. The trial court agreed with defendant and denied plaintiff's motion to compel the deposition.

Michigan law generally provides for the discovery of any relevant, nonprivileged matter. MCR 2.302(B)(1); *Michigan Millers Mutual Ins Co v Bronson Plating Co*, 197 Mich App 482, 494; 496 NW2d 373 (1992), aff'd 445 Mich 558 (1994); *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334; 471 NW2d 666 (1991). This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513; 564 NW2d 532 (1997); *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994).

Given the broad scope of permissible discovery, we conclude that the trial court may have abused its discretion in finding that the coworker's projected testimony was not relevant to plaintiff's age discrimination claim. The coworker's remark to plaintiff that the sales staff age comparison chart would be incriminating to defendant raised a question as to whether anything untoward occurred at this meeting which indicated a corporate predisposition to discriminate against plaintiff and others similarly situated on the basis of age. Further, as plaintiff contended, defendant's confidentiality agreement was meant to protect defendant from loss of business information, not to shield it from inquiry into discriminatory hiring practices. Plaintiff sought only the discovery of information related to the coworker's knowledge of the February, 1993, meeting, not trade secrets.

However, the error, if any, arising out of the trial court's preclusion of evidence was harmless in view of other testimony which came to light during the motion proceedings. Plaintiff testified extensively regarding what the coworker told him about the meeting. Although the coworker told plaintiff that the chart could be incriminating to defendant, this remark was made at a time when the coworker was uncertain whether he would be retained by defendant and was frustrated by that fact. In fact, the comparison chart showed an increase in median age in several job categories. When questioned about the chart at his deposition, plaintiff conceded that it related to only one group within his division, and that the group was not his own. The employee who compiled the chart similarly testified that the automotive group was the focus of his analysis.

Further, the discussion at the meeting regarding reduction of the age of the automotive sales group staff revolved around people who would be retiring soon. Plaintiff conceded that the expressed "problem" with an aging sales staff might have related to the fact that many of defendant's most

experienced salespeople were expected to retire within the next few years. Both plaintiff and the employee who compiled the chart testified that defendant's general counsel asked that the charts be collected at the end of the meeting because they could be "misinterpreted." However, neither one of them opined that this action had its basis in discriminatory animus, as opposed to a legitimate business concern that a document relating only to attrition through retirement would be misconstrued.

Therefore, we hold that the trial court's error, if any, in denying plaintiff's motion to compel the coworker's deposition was harmless in light of the above testimony concerning the February, 1993, meeting. MCR 2.613(A). The former coworker's projected deposition testimony would have been cumulative of information provided by plaintiff and the employee who prepared the chart. Moreover, the comparison chart did not pertain to plaintiff's automotive replacement marketing services group.

II

Plaintiff's second issue on appeal is whether the trial court erred in granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff argues that a genuine issue of material fact existed regarding whether defendant refused to hire plaintiff for any of the jobs for which he applied because of plaintiff's age. We disagree.

Plaintiff's age discrimination claim, based on the Michigan's Civil Rights Act, MCL 37.2202; MSA 3.548(202), requires that he prove that the prohibited discriminatory treatment by the employer was a determining factor used in its decision to discharge. *Lytle v Malady*, 456 Mich 1; 566 NW2d 582 (1997). There are three stages of proof required to prevail on such a claim. First, plaintiff must establish a prima facie case in order to create a rebuttable presumption of discrimination. The prima facie showing itself involves four parts. The plaintiff must show that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in defendant's adverse conduct toward the plaintiff. *Id.* at 29. In the second stage, assuming the plaintiff establishes a prima facie case, the burden shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its decision. If the defendant rebuts the presumption, the burden of production then shifts back to the plaintiff to prove that the employer's articulation was merely a pretext to discrimination. *Id.*

In order for a plaintiff to survive summary disposition, "the bottom line is that there must always be evidence upon which reasonable minds could conclude that discrimination was the true motive for the decision." *Id.* at 33. At summary proceedings, the evidence must always be taken in the light most favorable to the nonmoving party. *Id.* at 33.

Plaintiff, at age fifty-seven, was unquestionably within the protected class at the time of defendant's hiring decisions and was also qualified for the positions he sought because of his long experience in promoting and developing defendant's after-market business. Evidence also suggested that other younger persons not within the protected class were hired for positions applied for by plaintiff during the course of defendant's reorganization.

However, assuming arguendo that plaintiff has established a prima facie case pursuant to *Lytle, supra*, defendant has asserted legitimate nondiscriminatory reasons to support its hiring decisions. Plaintiff applied but was not hired for three positions during the course of defendant's corporate reorganization. All employees who wished to remain in an executive position within the reorganized company had to apply for new positions. Plaintiff conceded that the man hired as defendant's after-market managing director had extensive skills in direct mail sales, which plaintiff did not and which were necessary for the job, and had brought a five million dollar account to defendant. Further, when interviewing for this job, a member of the screening committee stated that plaintiff appeared unwilling to learn new skills and refused to focus on defendant's business as a whole rather than on after-market statistical product sales, which had been his forte. As for the man hired to manage defendant's after-market sales to the Ford Motor Company, defendant presented testimony that the man had shown great success in developing and increasing direct marketing sales for defendant in California. No one was hired for the third job for which plaintiff applied, the post of after-market product manager, so plaintiff cannot claim he lost this job because of his age.

Plaintiff failed to rebut defendant's nondiscriminatory reasons for its hiring decisions. *Lytle, supra* at 36. Plaintiff testified that during his search for a job after defendant's reorganization, no one ever mentioned his age and no one ever told him that he was passed over for a job because of his age. Plaintiff also conceded that he had no evidence that anyone on the applicant selection committees was predisposed to discriminate against him because of his age. *Paulitch v Detroit Edison Co*, 208 Mich App 656, 658; 528 NW2d 200 (1995). Plaintiff's attempt to characterize defendant's early retirement program as evidence of discriminatory animus also fails. The mere existence of a bona fide early retirement plan is not evidence of discrimination. *Zoppi v Chrysler Corp*, 206 Mich App 172, 177; 520 NW2d 378 (1994). We conclude that plaintiff has not provided evidence upon which reasonable minds could conclude that discrimination was the true motive for defendant's hiring decisions during its reorganization. *Lytle, supra*.

Similarly, we conclude that plaintiff failed to establish that a genuine issue of material fact existed regarding whether defendant's offer of a job as an account manager, or salesman, for the reorganized company amounted to a constructive discharge. Constructive discharge occurs when "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985); *Mollett v Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992). The offer provided plaintiff with a base salary comparable to the \$76,000 salary plaintiff earned as vice president of defendant's automotive replacement marketing services group, plus a quarterly incentive payment of \$4,812.50 guaranteed for the first two quarters that plaintiff held the job. Plaintiff was asked to take the job by defendant's president and chairman of the board, who told plaintiff that he was extremely valuable to defendant. Plaintiff rejected defendant's offer in part because he was worried by the offer's lack of a promise of job security, but mostly because the offer wounded plaintiff's pride. As a mere salesman, plaintiff would no longer be known as the "sire" of defendant's after-market business. Further, plaintiff found it degrading and "insulting" to have to teach statistical product development and sales to the new after-market managing director. Plaintiff presented no evidence that any of defendant's employees made his working conditions so intolerable that plaintiff

was forced to resign, particularly when he expressly conceded that no one harassed him during his job search or forced him to make his decision to leave defendant. *Jenkins, supra*; *LeGalley v Bronson Community Schools*, 127 Mich App 482, 486-487; 339 NW2d 223 (1983).

After thorough review, we hold that the trial court properly granted defendant's motion for summary disposition. Plaintiff failed to establish that a genuine issue of material fact existed regarding age discrimination or constructive discharge. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991); *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 243; 492 NW2d 512 (1992); *Porter v Royal Oak*, 214 Mich App 478, 484-485; 542 NW2d 905 (1995).

Affirmed.

/s/ Maura D. Corrigan
/s/ Richard Allen Griffin
/s/ Joel P. Hoekstra