

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT C. BERUBE,

Plaintiff-Appellant,

v

NORTHWEST AIRLINES, INC. and JAY
JENNINGS,

Defendants-Appellees.

UNPUBLISHED

May 29, 1998

No. 201405

Oakland Circuit Court

LC No. 96-524329 NZ

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals by right summary disposition in this action for age discrimination in employment, based on the Civil Rights Act, MCL 37.2202; MSA 3.548(202). Defendant sought summary disposition on two grounds: (1) that this state law action is preempted by the Airlines Deregulation Act, 49 USC § 41713(b), and (2) based on lack of a genuine issue of material fact, MCR 2.116(C)(10). Finding the action preempted, the circuit court did not reach the second issue.

In finding preemption, the circuit court relied on *Fitzpatrick v Simmons Airlines*, 218 Mich App 689; 555 NW2d 479 (1996). However, by its terms *Fitzpatrick* applies only to claims of employment discrimination, based on state law, which arise from protected physical characteristics, such as height and weight, because the physical capabilities and good health of the workforce has an effect upon the “services” rendered by an airline. *Belgard v United Airlines*, 857 P2d 467, 471 (Colo App, 1992). Discrimination on the basis of nonphysical personal characteristics, such as age, race, or gender, has no similar effect upon airlines service, as contrasted, for example, with state law requirements affecting the frequency of airline service, whether service is nonstop, providing conditions for preferential seating, *Butcher v City of Houston*, 813 F Supp 515 (SD Tex, 1993), mandating courteous service, *Anderson v U S Air, Inc*, 818 F2d 49 (DC Cir, 1987), imposing obligations on an airline to prevent assaults of one passenger by another, *Stone v Continental Airlines, Inc*, 905 F Supp 823 (Hawaii, 1995), or to

provide medical care or attendance prior to, during, or at the culmination of a flight, *Howard v Northwest Airlines, Inc*, 793 F Supp 129 (SD Tex, 1992). Particularly as age, race, and gender discrimination are also prohibited by various federal laws, there can be no inconsistency between the requirement of federal and state law in this regard and the terms of the Airline Deregulation Act do not appear to warrant a finding of preemption. *Salley v Trans World Airlines, Inc*, 723 F Supp 1164, 1166 (ED La, 1989); *Colorado Anti-Discrimination Comm v Continental Air Lines, Inc*, 372 US 714; 83 S Ct 1022; 10 L Ed 2d 84 (1963).

However, as plaintiff correctly recognizes, despite not having filed a cross appeal, defendants may urge alternate grounds for affirmance, based on its (C)(10) summary disposition motion. *Bostrom v Jennings*, 326 Mich 146, 157-158; 40 NW2d 97 (1949). In considering a motion for summary disposition under MCR 2.116(C)(10), the record evidence, and all reasonable inferences therefrom, are viewed in favor of the nonmoving party to determine whether there is a genuine issue of material fact warranting trial. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; ___ NW2d ___ (1997). Plaintiff's prima facie case of age discrimination rests on the fact that he is within the protected class and was replaced by a significantly younger employee, thirty-four years of age. Plaintiff argues that such a significant age disparity is a "reliable indicator of age discrimination," citing *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308; 116 S Ct 1307; 134 L Ed 433 (1996). *O'Connor*, however, does not stand for that proposition; in context, the Court in *O'Connor* asserted only that a significant age disparity is a "far more reliable indicator of age discrimination" than is the fact that an employee has been replaced by someone outside the protected class, which the Court deemed a wholly unreliable indicator of age discrimination. It did not purport to hold that age disparity is itself a reliable indicator, only that it is more reliable than an indicator which the Court held was in no way reliable.

Here, plaintiff was discharged because of his supervisor's requirement that he be in his office every Monday morning at 8:30 a.m. Plaintiff acknowledges that many times he was late, due to the fact that he commuted from his home in Florida to his office in Michigan. Defendant Jennings, plaintiff's supervisor, eventually gave plaintiff an ultimatum to relocate his domicile to the vicinity of his office or be terminated. When plaintiff failed to do so by the deadline fixed by his supervisor, he was discharged. Plaintiff makes no suggestion that this policy was applied to him but not to younger employees, or that this policy, either facially or in application, could be shown to affect only older workers. Rather, the policy is neutral on its face and, insofar as appears on this record, neutral in its application with respect to the age of the employee. Because there was no direct evidence of discriminatory animus based on age, this case is properly analyzed under the "prima facie case" framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) and its progeny. *Harrison, supra* at 606-607, 609-610. Even assuming for purposes of discussion that plaintiff presented sufficient evidence to establish a prima facie case of discrimination, there is not sufficient evidence to raise a genuine issue of material fact regarding whether defendants' articulated nondiscriminatory reason for plaintiff's discharge was pretextual. *Id.* at 608-609. The evidence presented simply does not provide a sufficient basis for a factfinder to reasonably determine that the application of the policy regarding being to work by

8:30 a.m. on Mondays was pretextual. Thus, the trial court properly granted summary disposition to defendants. The circuit court therefore reached the correct result, albeit for an erroneous reason.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy