

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD DRAZIN,

Plaintiff-Appellant,

v

BINSON'S HOSPITAL SUPPLIES, INC., d/b/a
BINSON'S HOME HEALTH CARE CENTERS,

Defendant-Appellee.

UNPUBLISHED
January 21, 2014

No. 312978
Macomb Circuit Court
LC No. 2011-003753-CL

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition in plaintiff's age discrimination case brought under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.* We affirm.

I. BASIC FACTS

Plaintiff was 59 years old when his employment with defendant was terminated. Plaintiff is a Certified Prosthetist and Orthotist (CPO) and had an extensive work history dating back to 1976. He began his employment with defendant in January 2007. Defendant is a retail supplier of medical devices, especially orthotic and prosthetic devices, to the public. During plaintiff's employment, plaintiff received mainly positive performance reviews and several recognitions of good customer service. In 2009, Dennis Ryba was hired as the Director of Orthotics for defendant and served as plaintiff's direct supervisor. According to Robbyn Martin, defendant's Director of Human Resources, plaintiff and Ryba did not get along. Plaintiff believed he had been "bypassed" for the Director of Orthotics position, and was offended that he was not considered or asked about the position.

Beginning in 2009, defendant received several customer complaints regarding plaintiff's behavior towards customers. In March 2009, defendant received a complaint from a customer alleging that plaintiff was rude to the customer. As a result of the complaint, defendant issued an Employee Warning Report to plaintiff, indicating that future complaints would result in disciplinary action up to and including termination. In March 2011, defendant received another complaint from a customer that resulted in an Employee Warning Report. The complaint alleged that while a customer was waiting to be helped, plaintiff picked up a phone call from another customer and raised his voice because he felt the customer on the phone was not listening to him.

The customer's complaint stated that plaintiff was "a jerk." As a result of the complaint, defendant placed plaintiff on a 90 day probation.

On July 14, 2011, Ann Marie Rogers, an employee at Crittenton Medical Equipment (CME), sent an email to Karen Kozakowski, a supervisor in the orthotics department with defendant, regarding a negative experience involving plaintiff. Crittenton is a joint venture with defendant, and defendant has approximately a 50 percent ownership stake in CME. Part of Rogers's job is to fit patients with orthotic braces, but in cases where a patient is suffering from an unstable spine fracture, CME's policy is to contact defendant so that a CPO can do the fitting. Rogers estimated that she had contacted plaintiff between 35 and 50 times under these circumstances, and that when she contacted him, plaintiff would travel to the CME office to perform the fitting. Rogers stated that plaintiff generally had a negative attitude whenever he came to CME for a fitting. Rogers stated that "probably a couple weeks" before her July 14, 2011, email to Kozakowski, she contacted plaintiff to perform a fitting on a patient with an unstable spine fracture. When plaintiff arrived at CME, he told Rogers that she should be able to fit the brace herself, and that plaintiff should not be required to travel to CME to perform the fitting. Plaintiff also complained about Ryba, stating that he was "ruining Binson's, upsetting doctors, and losing the company referrals." Plaintiff also stated that Ryba is a "terrible orthotist."

After receiving notice of the incident at CME, Martin convened a meeting of defendant's executive leadership, including Kozakowski, Ryba, and Nick Binson. Martin recommended that plaintiff's employment be terminated, and all present at the meeting agreed.

On the day prior to plaintiff's termination, July 20, 2011, defendant hired Robert Old, a Certified Orthotist, who was 42 years old. As a Certified Orthotist, Old was unable to work with prosthetics in the same way that plaintiff was before his termination. Though some of Old's employment responsibilities overlap with plaintiff's previous duties in the area of orthotics, Old works primarily out of defendant's Royal Oak office, while plaintiff primarily worked out of defendant's Troy office. Defendant also hired another Certified Orthotist, "Jacqueline," who started work in March 2011. Currently, defendant has expanded the orthotics and prosthetics department to include 10 employees, an increase from the three that were employed during and immediately following plaintiff's employment. The 10 employees in the department currently range in age from late 20's to approximately 60 years old.

Plaintiff believes that there has been a pattern of discrimination against him since the time Ryba was hired as Director of Orthotics, and that the hiring of Old near the time plaintiff was terminated is evidence that defendant wanted to terminate plaintiff because of his age. However, the court granted defendant's motion for summary disposition, finding that, although plaintiff presented a prima facie case of age discrimination because he was a member of a protected class, he was terminated, and he qualified for his position, defendant had proffered a legitimate nondiscriminatory reason for the termination of plaintiff.¹ Additionally, the court found that plaintiff failed to present any admissible evidence that defendant's rationale for

¹ The parties agree that there is no direct evidence of discrimination.

termination was a pretext, other than Old was hired close in time to defendant's termination and was younger, which was insufficient to support a claim of age discrimination. Finally, the court concluded that plaintiff's contention that similarly situated younger employees were treated more favorably than plaintiff was meritless because the employees pointed to by plaintiff were not similarly situated, and worked in entirely different capacities.

The trial court denied plaintiff's motion for reconsideration and he now appeals as of right.

II. ANALYSIS

Plaintiff argues that there is a genuine issue of material fact regarding whether plaintiff's termination was the result of age discrimination in violation of ELCRA. Specifically, plaintiff contends that defendant's articulated nondiscriminatory justification for his termination was a pretext for age discrimination. Plaintiff argues that the complaints lodged against him were not the actual reason for the decision to terminate because those complaints were relatively minor, and younger, similarly situated employees were treated more favorably after receiving more numerous complaints. We disagree.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). A motion for summary disposition pursuant to MCR 2.116(C)(10) is a test of the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). This Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition is properly granted "if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Pursuant to the ELCRA, Michigan employers are prohibited from discriminating against employees or potential employees on the basis of membership in a protected class, including age. *Chen v Wayne State Univ*, 284 Mich App 172, 200-201; 771 NW2d 820 (2009). "A claim of age discrimination may be shown under ordinary principles of proof by the use of direct or indirect evidence." *Town v Michigan Bell Tel Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997). Additionally, Michigan Courts recognize the framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), as a method to analyze cases alleging age discrimination involving only indirect evidence. *Town*, 455 Mich at 695. Under that approach, an employee must initially demonstrate a *prima facie* case of age discrimination, which requires a showing that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) other, similarly situated employees outside the protected class were unaffected by the adverse action. *Id.*

After the employee has satisfied the *prima facie* test, the burden of production shifts to the employer to articulate a nondiscriminatory justification for the adverse action. *Id.* However, "even if that reason later turns out to be incredible, the presumption of discrimination

evaporates.” *Id.* Once the employer has met its burden of production, the burden shifts back to the employee to ultimately prove discrimination. *Id.* at 696. To prevail, the employee must submit admissible evidence to prove that the employer’s justification for the adverse action was not the true reason for the action, and that the employee’s age was a motivating factor in the employer’s decision. *Id.* at 697. “Thus, the employee must prove that the employer’s explanation was a pretext for discrimination.” *Id.*

An employee may establish pretext (1) by showing the employer’s justification had no basis in fact, (2) if it has a basis in fact, by showing that it was not the actual factor motivating the adverse action, or (3) if it was a factor, by showing that it was insufficient to justify the decision. *Campbell v Human Servs Dep’t*, 286 Mich App 230, 241; 780 NW2d 586 (2009) (internal quotations omitted). The proofs offered to support the prima facie case may be sufficient to create a triable issue of fact that the employer’s justification is a pretext if the evidence would enable a reasonable factfinder to infer that the employer’s decision had a discriminatory basis. *Town*, 455 Mich at 697. “Ultimately, the plaintiff will have the burden of producing evidence, whether direct or circumstantial, that proves that discrimination was a determining factor in the employer’s decision.” *Id.* In the context of summary disposition, “the evidence must create a material issue of fact on which reasonable minds could conclude that the employer’s stated reason is a pretext for discrimination for summary judgment to be precluded.” *Id.* at 698.

The trial court found, and defendant concedes on appeal, that plaintiff demonstrated a prima facie case of age discrimination because plaintiff is a member of a protected class, he was terminated by defendant, he was qualified for his position as a CPO, and he provided evidence that he was replaced by a younger person. However, the trial court also found that plaintiff failed to show any evidence that defendant’s nondiscriminatory justification for the termination was a pretext for discrimination.

Plaintiff does not argue that defendant’s articulated justification for the termination, that plaintiff received too many customer complaints, had no basis in fact. Instead, plaintiff argues that the customer complaints were not the actual factor motivating defendant’s decision to terminate plaintiff. While it is true that defendant hired Old at the time of plaintiff’s termination and that Old started work the day before plaintiff was terminated, there is no evidence to suggest a discriminatory purpose by defendant. Martin testified that defendant was actively seeking to expand the prosthetics and orthotics department of the company around the time plaintiff was terminated. This intention is supported by the evidence; though defendant only hired one person in the department near the time plaintiff was terminated, the department now has 10 employees, seven more than during most of plaintiff’s tenure. The 10 current employees in the department range widely in age from late 20’s to approximately 60 years old. Additionally, the offer letter to Old, a signal that defendant was prepared to hire Old, was dated July 7, 2011, a full week before Rogers’s email to Kozakowski regarding plaintiff’s negative comments at CME. The decision to hire Old had already been made before defendant’s leadership became aware of the incident that ultimately led to plaintiff’s termination.

Further, the complaints lodged against plaintiff between 2009 and 2011 were based in fact, and plaintiff was warned about his conduct multiple times before he was terminated. Plaintiff then made disparaging comments about Ryba and was negative towards Rogers at

CME. By the time this third complaint was made against plaintiff, a pattern had emerged that plaintiff's conduct was becoming a liability for defendant's business. Though plaintiff is correct to note that he has generally received positive performance reviews during his tenure, the customer complaints are sufficiently serious to justify the decision to terminate.

Plaintiff also argues that younger, similarly situated employees were treated more favorably despite numerous complaints made against them, which shows that the complaints against plaintiff were not the actual factor in the decision to terminate him. Specifically, plaintiff provided evidence attached to his response to defendant's motion for summary disposition that two younger employees, Angelo Chojnowski and Kathryn Verhoye, received more complaints than plaintiff. Chojnowski, a delivery man for defendant, received eight complaints in 16 months of employment, and Verhoye, an employee in defendant's call center, received 16 warnings before she was terminated. The trial court correctly concluded that these employees were not similarly situated to plaintiff. Chojnowski, as a delivery man, received complaints about the cleanliness of his truck and the manner in which he loaded boxes, while Verhoye received mainly warnings for her carelessness with orders on the phone. In any event, these employees were doing drastically different work than plaintiff, and the raw number of warnings issued to those employees does not consider the context of the underlying conduct. As noted, plaintiff's warnings were based on serious complaints, including a customer stating that he would never visit defendant's store again. Plaintiff has not demonstrated any evidence to show that younger, similarly situated employees were treated more favorably, nor has he shown that the articulated justification for the termination was not the actual reason for the decision.

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly