STATE OF MICHIGAN

COURT OF APPEALS

DANIEL R. SWANTEK,

Plaintiff-Appellant,

v

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 20, 1998

No. 204438
Oakland Circuit Court
LC No. 96-513134 CL

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

This lawsuit stems from defendant's termination of plaintiff's employment, on October 5, 1993. At the time, plaintiff was 49 years old and working at defendant's Flint Help Desk. Defendant, pursuant to a general campaign to reduce operating costs, eliminated the entire Flint Help Desk. However, of the several employees involved, only plaintiff was unable to find another position with defendant. Plaintiff filed a complaint, alleging age discrimination, handicap discrimination, and retaliation for opposing a discriminatory practice. The trial court granted defendant's motion, pursuant to MCR 2.116(C)(10), with respect to all three claims. Plaintiff appeals as of right, and we affirm.

In reviewing an order granting summary disposition under MCR 2.116(C)(10), a reviewing court examines all relevant documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). "[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4). A defense motion for summary disposition should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could establish the plaintiff's right to prevail. *Young v Michigan Mutual Ins Co*, 139 Mich App 600, 603; 362 NW2d 844 (1984).

I. Age Discrimination

Plaintiff argues that a question of fact exists concerning whether defendant discriminated against him on the basis of his age. We disagree.

A. Prima Facie Test

A party can establish a prima facie case of discriminatory discharge by showing that the party was (1) a member of a protect class, (2) terminated, (3) qualified for the position, and (4) replaced by a younger person. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986), citing *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973) and *Ackerman v Diamond Shamrock Corp*, 670 F2d 66, 69 (CA 6, 1982). A plaintiff must prove these elements by a preponderance of the evidence. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173 (Weaver, J., joined by Boyle and Taylor, JJ.), 185 (Brickley, J., concurring), 186 (Mallett, C.J., concurring in part and dissenting in part); 579 NW2d 906 (1998).[1] Only the fourth of these elements is in dispute here.

It was the entire Flint Help Desk that defendant discontinued, not just plaintiff's position. The displaced employees ranged in age from several months older than plaintiff to almost twenty-five years younger. Plaintiff has offered no evidence to show that defendant eliminated the entire Flint Help Desk for the purpose of terminating plaintiff. However, plaintiff was the only employee from the Flint Help Desk who was unable to find alternative employment with defendant, thus rendering him in effect the only one discharged. Plaintiff asserts that positions were available with defendant for which he was qualified, but that defendant did not offer plaintiff one because of defendant's age.

Where an employer has reduced the work force generally, if a discharged employee's duties are absorbed by the remaining workers, with no workers hired or transferred for that purpose, there has been no replacement of the terminated worker for purposes of establishing the prima facie case of discrimination. *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465-1466 (CA 6, 1990). Further, an employer has no duty to find an alternative post for an employee whose position has been eliminated through a reduction in the work force. See *Bouwman v Chrysler Corp*, 114 Mich App 670, 681; 319 NW2d 621 (1982). Moreover, "[a]n employer is not required to inform former employees of all openings which the former employee might be qualified to perform in order to avoid liability for an age discrimination charge." *Barnes, supra* at 1472.

According to the evidence in this case, the only member of the Flint Help Desk who was older than plaintiff was in fact able to find another job with defendant after the Flint Help Desk was closed. The evidence further indicates that, all of the positions for which plaintiff alleges he was qualified were filled by employees who were better qualified than plaintiff. Although plaintiff states that he was easily qualified for several positions filled by former members of the Flint Help Desk, he has offered no evidence to show that he was better qualified in any case. Rather, the evidence shows that the employees who were retained had experience that plaintiff lacked in similar positions. Plaintiff has also asserted that defendant retained younger employees who were less qualified than plaintiff for their positions than he would have been, but plaintiff does not argue that the younger workers were

unqualified, only less qualified. We conclude that this scanty evidence, viewed in the light most favorable to plaintiff, fails to measure up to the preponderance required to give rise to an inference that defendant terminated plaintiff an exercise of age discrimination.

B. Direct or Indirect Evidence

As an alternative to the modified *McDonnell Douglas* test for establishing a prima facie case of employment discrimination, a party may proceed "'under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue . . . without resort to any special judicially created presumptions or inferences related to the evidence.'" *Matras, supra* at 683, quoting *Lovelace v Sherwin-Williams Co*, 681 F2d 230, 239 (CA 4, 1982). For direct evidence of age discrimination against him, plaintiff points to several age-related comments made by defendant's management during defendant's resource alignment in 1993. Plaintiff further cites deposition testimony from other lawsuits, plus several newspaper and magazine articles as evidence that he was the victim of defendant's age discrimination.

However, even giving the benefit of any reasonable doubt to plaintiff, this evidence was insufficient to allow reasonable jurors to conclude that age discrimination was a factor in the decision to discharge plaintiff. See *Matras, supra* at 682. None of the articles or testimony directly mentions plaintiff or the subdivision within defendant for which plaintiff worked. Nor does the testimony, or any of the articles, suggest that plaintiff would have been retained but for his advancing age. In fact, plaintiff's evidence does not show that age was a factor in the termination, retention, or hiring of any of defendant's employees, much less that it was a factor in the termination of plaintiff himself.

Two of the articles mention that the average age of defendant's employees was in the mid-thirties. However, presuming the accuracy of those reports, this information does not show that defendant—then a relatively new and growing technology company—engaged in a pattern of age discrimination of which plaintiff was a victim. Nor does the report of defendant's CEO's decision to pander to the perceived youthfulness of the work force in a promotional video bear on the question whether defendant discriminated against plaintiff because of his age.

Regarding other implications from the evidence to which plaintiff points, it is irrelevant to plaintiff's claim of age discrimination that defendant regarded voluntary early retirement as a means of cutting salary costs. It is likewise irrelevant that the manager of a department other than the one for which plaintiff worked, who had no responsibility for plaintiff's termination, commented that younger individuals were quicker and smarter. Finally, that another member of defendant's management team, who also had no direct involvement with plaintiff's unit and did not participate in the decision to discharge plaintiff, simply took cognizance of the ages of the employees who were already on a list to be discharged, is not evidence that defendant discriminated against any of its employees because of age. In short, plaintiff's evidence hardly hints that defendant practices any age discrimination at all, let alone that defendant terminated plaintiff because of his age.

II. Handicapper Discrimination

Plaintiff argues that a question of fact exists concerning whether defendant discriminated against him based on his perceived handicap. We disagree. To recover under the Michigan Handicappers' Civil Rights Act, plaintiff must prove that (1) he has a handicap as statutorily defined, (2) that the handicap is unrelated to his ability to perform his job, and (3) that defendant terminated plaintiff because of that handicap. See *Hall v Hackley Hosp*, 210 Mich App 48, 53-54; 532 NW2d 893 (1995). "Handicap" is statutorily defined, in pertinent part, as follows:

> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> (A) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

or,

> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*). MCL 37.1103(e)(*i*)(A) and (*iii*); MSA 3.550(103)(e)(*i*)(A) and (*iii*).

Plaintiff testified that he was physically able to perform his Help Desk job, and that he was unable to name any major life activity that was limited by his arthritis. Plaintiff's posture on appeal is that he was a handicapper only insofar as defendant perceived him as handicapped and discriminated against him because of that perception. In support of this position, plaintiff testified that in August 1993, when he advised his regional manager of the surgery he required, she "harshly" told him that he "just came up with this" after he had "found out the job was gone." However, because defendant's decision to terminate plaintiff was already in place at the time of the regional manager's remarks, her statement hardly supports plaintiff's argument. Plaintiff offers no additional evidence in support of his claim except for the circular argument that his dismissal itself bespeaks handicapper discrimination. In particular, plaintiff offers no evidence to suggest that any manager considering rehiring him was aware of his arthritic condition. Viewing plaintiff's evidence in the light most favorable to him, we conclude that plaintiff has failed to support his claim that there was a connection between his arthritis and his discharge.

III. Retaliatory Discharge

Plaintiff argues that a question of fact exists concerning whether defendant retaliated against him for his opposition to defendant's discriminatory practices. We disagree.

Section 701 of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., reads as follows:

> Two or more persons shall not conspire to, or a person shall not . . . (a) [r]etaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

Section 801 provides that a person alleging a violation may bring a civil action. To establish a prima facie case of unlawful retaliation, a party must produce evidence (1) that the party engaged in a protected activity, (2) that the employer was aware of the protected activity, (3) that the party was subjected to adverse employment action, and (4) that a causal link exists between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Plaintiff alleges that defendant terminated him in 1993 in retaliation for plaintiff's letter to defendant's CEO of September 19, 1991, in which plaintiff complained of his inability to find a more challenging position and attributed his plight to age discrimination. However, although plaintiff has produced evidence that he engaged in a protected activity of which defendant was aware, he has produced no evidence of a causal link between his protected activity and his discharge two years later. Indeed, plaintiff admitted at deposition that he was unaware of any causal link.

At the time of his termination, plaintiff worked in a unit with defendant other than the one for which he worked when he wrote his letter to defendant's CEO. Although plaintiff testified that he advised his regional manager in 1993 of the letter he wrote to the CEO two years earlier, plaintiff has offered no evidence to suggest that this information had any bearing on defendant's decision to eliminate the Flint Help Desk. Plaintiff alleges that the regional manager treated him coldly, but plaintiff also admitted that she was not a "people person" generally. Viewing the evidence in plaintiff's best light, we conclude that plaintiff has failed to support his theory that the elimination of the Flint Help Desk, or his failure to obtain other work with defendant, was linked to plaintiff's protected activities of two years earlier.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] In this recent case, our Supreme Court restated the test for the prima facie case, referring to adverse employment generally for the second element, and referring to discharge "under circumstances that give rise to an inference of unlawful discrimination" for the fourth element. *Id.*