STATE OF MICHIGAN

COURT OF APPEALS

STANLEY ALEXANDER, DAPHNE FENSTER, RALPH FORBES, CATHY HEARD, SUSAN R. HUDDLESTON, HENRY HUTCHERSON, DAVID KELLER, JERRY COLBERT, DAVID R. KOVL, JUDSON COTTERMAN, RONALD REGINA, MADALINE SATKIEWICZ, RACHEL WILKS, NETTIE WILLIAMS, RITCHIE BYSTEMS FARRIOR, and GERALD C. GOUAN,

Plaintiffs,

and

ESTHER ORTIZ and LINDA YELDER,

Plaintiffs-Appellants,

v

ELECTRONIC DATA SYSTEMS CORPORATION, JOSEPH BLASCIK, STEVE BLOMFIELD, PRUDENCE COLE, JOHN GALECKI, LORI HANSEN, DOUGLAS HEATH, MARTIN JONES, JOHN KRAMB, MARK MCCLOY, MARK MOLL, ALEX REDFEARN, MARK SCHRAUBEN, HARRIET SHAKIR, DAN SHUBERT, SID VAIDYA, BOB VUJOVICH, and LAWRENCE WEHNER,

Defendants-Appellees.

UNPUBLISHED
June 20, 1997

No. 189496
Wayne Circuit Court
LC No. 93-325481 CZ

Before: Wahls, P.J., and Gage and W.J. Nykamp,* JJ.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

PER CURIAM.

Plaintiffs Linda Yelder and Esther Ortiz appeal as of right from orders of summary disposition, entered in favor of defendants, Electronic Data Systems Corporation ("EDS") *et al.*, pursuant to MCR 2.116(C)(10) in this employment discrimination case. We affirm.

I

Plaintiffs argue that the trial court erred in finding an absence of any genuine issue of material fact with regard to their claims of discrimination. We disagree. A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Lytle v Malady*, 209 Mich App 179, 183; 530 NW2d 135 (1995). In reviewing a grant of summary disposition, we must independently determine, giving the benefit of doubt to the nonmovant, whether the movant would have been entitled to judgment as a matter of law. *Id.* This Court reviews a summary disposition determination de novo as a matter of law. *Id.*, pp 183-184.

Both plaintiffs made claims of age discrimination pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* An age discrimination claim can be based on two theories: (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees, or against an individual plaintiff; or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Id.*, pp 184-185.

Once established, a prima facie case of age discrimination creates a rebuttable presumption of disparate treatment and the burden of production shifts to the defendant employer to rebut the presumption by articulating some legitimate, nondiscriminatory purpose for the employment decision. *Id.*, pp 186-187. The defendant's explanation must be clear and reasonably specific. *Id.*, p 187. If the defendant carries its burden of production and rebuts the presumption, the burden shifts back to the plaintiff to prove that the proffered explanation was mere pretext and that illegal discrimination was more likely the defendant's true motivation in discharging or demoting the plaintiff. *Id.*

Assuming arguendo that Yelder and Ortiz established a prima facie case of age discrimination on their disparate treatment claims, EDS rebutted the presumption of disparate treatment by articulating a legitimate, nondiscriminatory purpose for its employment decisions. The evidence presented to the trial court showed that the decisions to terminate Yelder's and Ortiz' employment were made in conjunction with a workforce reduction scheme and upon review of their individual work performance history. Neither Yelder nor Ortiz earned high marks in performance appraisals. Both had been advised by their respective supervisors of the need to improve their work performance. Consequently, Yelder and Ortiz were identified as low-end performers for purposes of the workforce reduction. Therefore, EDS presented legitimate, non-discriminatory reasons for its decision to terminate plaintiffs' employment and thus successfully rebutted the presumption of discrimination. *Id.*

Plaintiffs argue that the statistical disparity between older and younger employees that were terminated created a genuine issue of material fact that EDS' nondiscriminatory explanation was pretextual. We disagree. In a reduction in workforce case, a defendant's decision to discharge qualified, older employees is not inherently suspicious but rather readily explainable in terms of its economic situation. *Id.*, p 189. The poor performance evaluations of Yelder and Ortiz distinguish them from the plaintiff in *Lytle*. That plaintiff had many years of positive performance appraisals and several promotions and was discharged despite the defendant's retention and hiring of younger, less senior, and allegedly less qualified employees. See *id.*, pp 182-183, 189-190.

In addition, while this Court is not bound by federal precedent on Title VII, those precedents analogous to questions presented under the Civil Rights Act are highly persuasive and will be considered. *Id.*, p 184; *McCalla v Ellis*, 180 Mich App 372, 377-378; 446 NW2d 904 (1989). In an analogous case, *Barnes v GenCorp Inc.*, 896 F2d 1457.2, 1468-1469 (CA 6, 1990), the Sixth Circuit disallowed the use of statistics to show that the defendants' proffered reasons for discharges were pretextual:

> The plaintiffs argue that the statistics used to establish a prima facie case would allow a jury to find that the defendants' proffered reasons for all of the discharges are pretextual. The defendants counter that statistics can never be used to show pretext. We are unwilling to hold that statistics could never form the basis for a rebuttal, but we do not believe that the statistics presented in this case provide an adequate response to the defendants' explanations.
>
> When a plaintiff's statistics indicate a disproportionate discharge rate for a protected group there are three possible explanations for the discrepancy: the operation of legitimate selection criteria, chance, or the defendant's bias. . . . When a plaintiff demonstrates a significant statistical disparity in the discharge rate, he or she has provided strong evidence that chance alone is not the cause of the discharge. The statistics do not and can not determine whether the more likely cause is the defendant's bias or a legitimate selection criterion.
>
> * * *
>
> [One method of attacking a prima facie case established by statistics] is the one actually chosen by the defendants in this case. They have chosen to demonstrate that even if the plaintiffs' statistics and the court's assumption tend to indicate that bias could have played a role in some of the decisions, that bias did not play a role in the particular decision to discharge each of the plaintiffs. *By presenting evidence that each plaintiff was less qualified than others occupying comparable positions, the defendants have undercut the importance of the plaintiffs' statistical proof. This method of attacking a statistical prima facie case cannot be rebutted by reference to the statistics already presented since the statistics here do not tend to establish that age played a factor in any particular decision.* Unless the plaintiffs can show that the

> defendants' explanations are inherently suspect or can present other direct or circumstantial evidence suggesting that the proffered reasons are not true, then the defendants are entitled to summary judgment. [Emphasis added.]

We are persuaded by this reasoning and adopt it here. Like the defendant in *Barnes*, EDS countered plaintiffs' evidence with evidence that plaintiffs were less qualified than others occupying comparable positions. In light of plaintiffs' performance history, their use of statistics was insufficient to create a genuine issue of material fact that age played a factor in their particular cases. Accordingly, the trial court did not err in granting defendants' motion for summary disposition on plaintiffs' disparate treatment claims. *Id.*

Ortiz contends that, although defendants argued that her position was eliminated, she was actually replaced by a younger employee. In a workforce reduction case, it is insufficient for a plaintiff merely to show that the employer retained a younger employee while discharging an older employee. *Lytle, supra*, p 186. Instead, the plaintiff must produce sufficient evidence from which a trier of fact could reasonably conclude that the employer intended to discriminate on the basis of age in reaching its decision. *Id.*, p 186 n 2. As explained above, Ortiz has failed to do so.

Plaintiffs have failed to cite authority to support their argument that EDS' failure to conduct an economic benefit analysis following the 1993 workforce reduction leads to an inference that EDS' proffered reasons for the termination decisions were pretextual. Therefore, we need not address this argument. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 643; 552 NW2d 671 (1996).

Because there was no genuine issue of material fact that EDS' stated nondiscriminatory reasons for terminating plaintiffs' employment were pretextual, the trial court did not err in granting defendants' motion for summary disposition as to plaintiffs' claim of age discrimination on a disparate treatment theory. MCR 2.116(C)(10); *Lytle, supra*, pp 183-184.

II

Plaintiffs argue that there was sufficient evidence to create a genuine issue of material fact under a disparate impact theory of age discrimination. We disagree. Assuming arguendo that EDS' decision to allow its managers to make subjective decisions as to who would be laid off constituted a "specific employment practice," and assuming that plaintiffs presented a prima facie case on a disparate impact theory, our review of the record shows that EDS articulated a legitimate, nondiscriminatory reason for its "employment practice." Consequently, the burden shifted back to plaintiffs to show either that EDS' reason was a pretext for discrimination or that there existed an alternative employment practice, without the disparate impact, that also served EDS' interests. *Abbott v Federal Forge, Inc*, 912 F2d 867, 872 (CA 6, 1990).

Here, plaintiffs argue that use of EDS' normal performance review process would have eliminated the discriminatory impact with respect to age, and the "vast majority" of the discriminatory impact with respect to race. However, under the "normal" process, plaintiffs had repeatedly received poor ratings and been warned that they must improve their performance. After reviewing the record,

we do not believe that plaintiffs have created a genuine issue of material fact that EDS' decision to grant managerial discretion caused plaintiffs to lose their jobs. Accordingly, plaintiffs did not satisfy their burden of showing pretext or an alternative employment practice. *Id.* Thus, the trial court did not err in granting defendants' motion for summary disposition.

III

Yelder argues that the trial court erred in granting defendants' motion for summary disposition as to her race discrimination claim pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. Again, we disagree. As is the case with an age discrimination claim, once a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to articulate some nondiscriminatory reasons for the discharge. *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538; 470 NW2d 678 (1991). If the defendant is able to meet this burden, the plaintiff must have the chance to prove that the reasons offered by the defendant were pretextual. *Id.*, p 539.

Under a disparate treatment theory, in light of Yelder's poor performance history, assuming arguendo that Yelder established a prima facie case of race discrimination, Yelder's statistical evidence of race discrimination was insufficient to create a genuine issue of material fact that EDS' proffered justification for terminating Yelder's employment was mere pretext. *Barnes*, *supra*, p 1469. Similarly, under a disparate impact theory, Yelder has failed to create a genuine issue of material fact that an alternative employment practice would have served EDS' interests at the same time as saving her job. *Abbott*, *supra*, p 872. Consequently, the trial court did not err in granting defendants' motion for summary disposition as to Yelder's race discrimination claim. MCR 2.116(C)(10); *Lytle*, *supra*, pp 183, 187.

IV

Ortiz argues that the trial court erred in granting defendants' motion for summary disposition as to her claim pursuant to the Michigan Handicappers' Civil Rights Act ("HCRA"), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq*. We disagree. To establish a prima facie case of handicap discrimination, the plaintiff must establish: (1) the plaintiff is handicapped as defined by the HCRA; (2) the plaintiff's handicap is unrelated to the plaintiff's ability to perform the duties of the particular job or position; and (3) the plaintiff has been discriminated against in one of the ways set forth in the HCRA. *Gazette v City of Pontiac*, 212 Mich App 162, 168; 536 NW2d 854 (1995).

Here, the evidence showed that Ortiz' condition resulted in absences from her place of employment to such an extent that she requested that a personal computer be installed in her home to permit her to discharge her duties, that she was frequently absent from work as a result of appointments with physicians, and that her medical condition interfered with her ability to perform her duties. A disability that is related to one's ability to perform the duties of one's employment is not a "handicap" within the meaning of the HCRA. *Rymar v Mich Bell Telephone Co*, 190 Mich App 504, 506; 476 NW2d 451 (1991). This is not a case where Ortiz was denied medical leave under like conditions as

other employees. See *id.*, p 507. Because Ortiz has not created a genuine issue of material fact that she had a handicap within the meaning of the HCRA, the trial court did not err in granting defendants' motion for summary disposition as to Ortiz' HCRA claim. *Id.*

Affirmed.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp