STATE OF MICHIGAN

COURT OF APPEALS

JACQUELINE DAPRA,

Plaintiff-Appellant,

v

HADEN SCHWEITZER CORPORATION, a foreign corporation, and KENNETH DARGATZ, an individual,

Defendants-Appellees.

UNPUBLISHED
May 26, 1998

No. 202883
Oakland Circuit Court
LC No. 96-512047 CZ

Before: Hoekstra, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff commenced employment as a buyer in defendant Haden Schweitzer Corporation's ("Haden") purchasing department in May 1979. In January 1993, defendant Kenneth Dargatz, Haden's president, discharged plaintiff from her position. Plaintiff was fifty-one years old at the time of her discharge. Plaintiff claims that her termination was the result of age discrimination. Defendants claim that plaintiff's termination was motivated by a legitimate reduction in work force (RIF). Plaintiff brought this action pursuant to the Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).

This Court reviews a trial court's determination regarding motions for summary disposition de novo. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether factual support exists for the claim. This Court considers the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence within the action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Our task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial. *Id*. In reviewing a trial court's summary disposition decision, this Court makes all legitimate inferences in favor of the nonmoving party. *Id*. at 162.

In granting summary disposition in favor of defendants, the lower court relied largely upon this Court's decision in *Lytle v Malady*, 209 Mich App 179; 530 NW2d 135 (1995). However, subsequent to the lower court's decision in this case, our Supreme Court reviewed this Court's decision in *Lytle* and issued an opinion partially affirming and reversing the decision. *Lytle v Malady*, 456 Mich 1; 566 NW2d 582 (1997). Therefore, our Supreme Court's decision in *Lytle*, when relevant, should control the discussion of the issues presented in this appeal.

Generally, in order for a plaintiff to make a proper claim of age discrimination, he must establish a "prima facie case," which requires that the plaintive 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) other employees, similarly situated but outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination motivated the defendant's adverse conduct toward the plaintiff. *Id.* at 28-29. Once the plaintiff has established a "prima facie case" of age discrimination, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision to discharge the plaintiff. *Id*. at 29. If the employer fails to do so, it is presumed that the basis of the employer's decision was discriminatory. *Id*. However, if the employer articulates a legitimate, non-discriminatory reason for its decision to discharge the plaintiff, the burden of production shifts back to the plaintiff to establish that the employer's articulated reason was merely a pretext for discrimination. *Id*., 29-30.

In the context of an RIF case, however, our Supreme Court has indicated that the analysis discussed above is abbreviated. *Lytle, supra*, 456 Mich 34, citing *Matros v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). That is, in an RIF case, we assume that the parties have already met their respective burdens of production, thereby leaving the plaintiff "to prove that reasonable persons could draw differing conclusions regarding whether discrimination was the true motivation underlying the employer's adverse action rather than an RIF." *Id*. In other words, in order to avoid summary disposition in an RIF case, the plaintiff must come forward with evidence sufficient to raise triable issues of fact with respect to whether the RIF justification is merely a pretext and whether the true reason for the discharge is discriminatory. *Id*., 36. We believe that plaintiff failed in this burden.

As evidence of age discrimination, plaintiff notes that after her discharge, a substantially younger employee, Robin Cook, assumed her duties as buyer. Although defendant contests this assertion, we need not decide whether plaintiff presented sufficient evidence to show that Cook actually replaced her because this case is postured as an RIF case. As indicated above, when an employer articulates RIF as the reason for an employee's discharge, we presume that that the employee has made a prima facie case and inquire only whether the employee's discharge was part of a legitimate RIF or whether age discrimination was the actual motivation for the decision. *Lytle, supra*, 456 Mich 34-36.

In January 1993, Haden's purchasing department consisted of seven employees, including plaintiff. On January 28, 1993, plaintiff and four other purchasing department employees were laid off. Defendants claim that the layoffs were due to a company-wide RIF necessitated by Haden's recent financial losses. Plaintiff claims, however, that the RIF justification is merely a pretext for age discrimination. In support of this contention, plaintiff offered deposition testimony that showed that Haden's managing director, Richard Taylor, had made discriminatory remarks regarding the ages of recently terminated members of Haden's senior management. However, statements by decisionmakers

unrelated to the decisional process are not sufficient to show that an employment decision was not based on legitimate criteria, see *Price Waterhouse v Hopkins*, 490 US 228, 276; 109 S Ct 1775; 104 L Ed 2d 268 (1989), and our review of the record reveals that Taylor was not related to the decisionmaking process concerning plaintiff's discharge. Rather, the record shows that Haden's president, defendant Kenneth Dargatz, made the decision regarding plaintiff's discharge, and plaintiff admitted in deposition testimony that she knew of no evidence that Dargatz considered her age in making the decision. Accordingly, plaintiff did not show pretext through the deposition testimony concerning Taylor. Plaintiff also attempted to show pretext through statistical evidence relating to the ages of employees laid off as part of Haden's RIF. However, because the evidence shows that the RIF affected older employees to the same degree as younger employees, the evidence is not statistically significant.

In sum, we find that plaintiff failed to come forward with evidence sufficient to raise triable issues of fact with respect to whether defendants' RIF justification is merely a pretext for discrimination.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Richard A. Bandstra