STATE OF MICHIGAN

COURT OF APPEALS

JOYCE A.GARNEY,

Plaintiff-Appellant,

v

LADCO INTERNATIONAL, LTD.,

Defendant-Appellee.

UNPUBLISHED

No. 194311
Oakland County Circuit
LC No. 95-492846 CZ

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

KELLY, J. (dissenting).

I respectfully dissent.

The trial court ruled with respect to the discrimination claim that plaintiff had established a prima facie case. The majority agrees with the trial court ruling that once the defendant articulates a legitimate nondiscriminatory reason for its terminating decision, in this case plaintiff's bad attitude and her inability to get along with others, then the burden shifts to plaintiff who must demonstrate that defendant's proffered reason is a pretext for it's discrimination. I believe plaintiff offered sufficient evidence which, when view in a light most favorable to her, could have established such pretext. Although summary disposition was granted pursuant to MCR 2.116(C)(10), I do not believe the trial court assessed the plaintiff's allegations in a light most favorable to her. In my opinion, a trier of fact should weigh the evidence since reasonable minds could differ.

At the time of her termination, plaintiff had been employed by defendant for fourteen years and had never received a negative evaluation for bad attitude or inability to get along with others until two weeks prior to her termination. Plaintiff was forty-six years of age when hired and approximately sixty years old at the time of her termination. She was replaced by a person thirty-three years old and not nearly as capable or qualified as plaintiff. Also, defendant hired three more people to perform duties that plaintiff had previously performed. Further, plaintiff presented affidavits of former employees that she was competent, friendly, reasonable and polite. Plaintiff also countered defendant's claims of long-standing difficulty by noting that she was left in charge of the company for extended periods of time.

In my opinion, no weight should be given to the Bauter affidavit because, taking the evidence in the light most favorable to the plaintiff, Bauter never complained about plaintiff's temperament. Nor should weight be given to defendant's claim that several vendors expressed gratification at plaintiff's termination because those vendors were not identified and plaintiff was given no opportunity to rebut the implications.

It is true that plaintiff admitted she was unable to testify to a pattern of defendant firing older employees, but does that mean whenever a plaintiff is the first to be discriminated against, he or she has no remedy[1]? I would reverse.

/s/ Michael J. Kelly

[1] The Supreme Court recently stated in *Town v Michigan Bell*, that even if plaintiff produces factual evidence that an employers stated reason is a pretext, summary judgment is not necessarily precluded. "Thus, plaintiff will not *always* present a triable fact merely by rebutting the employers stated reason(s); put differently, that there maybe a triable question of *falsity* does not necessarily mean that there is a triable question of discrimination." *Town v Michigan Bell*, 455 Mich 688, 698 (1997). That sounds like what we used to call in Philosophy101, sophistry, or at the very least, specious reasoning. At least in *Town* the plaintiff had a trial. After the jury returned a verdict in favor of the plaintiff, the trial court, on proper motion, entered a directed verdict for the defendant. Although the standards seem to be malleable and mercurial, the quoted language is an invitation to busy trial judges deprive plaintiffs who have presented appropriate issues of fact to be tossed out of court on summary disposition motions. If we are going to make it impossible for the first age discrimination case to be brought to trial against an employer, we ought to make it clear to bench and bar that an employer gets the first one free.