STATE OF MICHIGAN

COURT OF APPEALS

CARL WOJCIK,

Plaintiff-Appellant,

v

ELECTRONIC DATA SYSTEMS CORPORATION and DON MacDONALD,

Defendants-Appellees.

UNPUBLISHED
December 3, 1999

No. 213359
Saginaw Circuit Court
LC No. 96-014735 CZ

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

Plaintiff Carl Wojcik appeals as of right from an order granting summary disposition for defendants Electronic Data System Corporation ("EDS") and Don MacDonald, pursuant to MCR 2.116(C)(10), in this age discrimination suit. The case arose when EDS discharged forty-seven-year-old Wojcik, allegedly at MacDonald's direction. The trial court granted summary disposition for defendants, concluding that Wojcik had failed to present evidence that defendants' proffered reasons for this discharge—poor performance and workforce reduction—were mere pretext. We affirm.

I. Issues On Appeal

Wojcik raises three issues on appeal: (1) whether statistical evidence may be used as evidence of age discrimination; (2) whether he established a prima facie case of age discrimination; and (3) whether he provided sufficient evidence to show that defendants' proffered reason for his termination was mere pretext for age discrimination. There is precedent for using statistical evidence to establish a prima facie case of discrimination and to show that the proffered reasons for a defendant's conduct are pretextual. *McDonnell Douglas Corp v Green*, 411 US 792, 804-805; 93 S Ct 1817, 36 L Ed 2d 668 (1973); *Dixon v WW Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1987). However, we believe that the best which in which to analyze this case is first to look at the elements of a prima facie case.

II. Standard Of Review

A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim in light of the pleadings, affidavits, depositions, admissions, and other documentary evidence available to the court. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Drawing all inferences in favor of the nonmoving party, the court should deny the motion if a record might be developed that will leave open an issue on which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). It is insufficient for the nonmoving party to promise to offer factual support for its claims at trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). Rather, the nonmoving party must "present evidentiary proofs creating a genuine issue of material fact for trial" to survive a motion for summary disposition. *Id.* This Court reviews the grant or denial of the motion de novo. *Spiek, supra* at 337.

III. The Legal Standard

A. Statutory Provisions

Michigan's Civil Rights Act, MCL 37.2202; MSA 3.548(202), provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).]

Age discrimination claims may be based on one of two theories:

> (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees, e.g., employees aged forty to seventy years, 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. [*Lytle v Malady (On Rehearing)*, 458 Mich 153, 177 n 26; 579 NW2d 906 (1998), quoting with approval *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995).]

Here, Wojcik's claims appear to fall within each of these theories. Wojcik claimed that defendants employed a pattern of intentional discrimination against older workers (disparate treatment) and that the policies of EDS also had disparate impact on these older workers.

B. Disparate Treatment

(1) *Wilcoxon And The Elements Of A Disparate Treatment Case*

In *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347; 597 NW2d 250 (1999), this Court explained that disparate treatment cases typically fall within two categories: mixed motive claims and pretextual claims. *Id.* at 359-360. "Where a plaintiff can present ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action . . . [then the] defendant's articulation of a nondiscriminatory purpose creates a 'mixed motive' case." *Id.* at 360. "Pretextual" claims, on the other hand, are established by satisfying the *McDonnell-Douglas* burden-shifting analysis. *Id.* at 361, citing *McDonnell-Douglas Corp, supra*.

Under either a mixed motive or pretextual discrimination theory, a plaintiff must show (1) that he or she was within a protected class, and (2) that he or she suffered an adverse employment action. *Wilcoxon, supra* at 360-361. However, we address only the pretext theory of discrimination in light of the arguments Wojcik makes on appeal. A plaintiff attempting to prove disparate treatment must satisfy the *McDonnell-Douglas* burden-shifting analysis. In addition to the two universal elements, expressed above, the plaintiff must show (3) that he or she was qualified for the position; and (4) that he or she was discharged under circumstances suggesting unlawful discrimination, such as being replaced by a younger worker. *Lytle (On Rehearing), supra* at 172-173, citing *McDonnell-Douglas, supra*. Once a plaintiff satisfies these four elements, the burden shifts to the defendant to provide a legitimate, non-discriminatory reason for the adverse employment action. *Lytle (On Rehearing), supra* at 173, citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981). If the defendant can do so, the presumption of discrimination "drops away," and the burden shifts back to the plaintiff to show, by a preponderance of the evidence, that the defendant's proffered reasons were mere pretext for discrimination. *Lytle (On Rehearing), supra* at 174.

There is no dispute that Wojcik proved the first two elements that apply to both the mixed motive and pretextual theories. Wojcik, aged forty-seven,[1] was a member of a protected class of "older" workers when he suffered an adverse employment action: termination. As noted above, to prove "pretext," Wojcik had to show that he was qualified for the position and that he was replaced by a younger worker or other circumstances that logically suggest unlawful discrimination. *Lytle (On Rehearing), supra* at 172-173.

(2) *Qualifications*

With respect to Wojcik's qualifications, defendants presented testimony that Theodore Corey, Wojcik's replacement, assumed not only Wojcik's duties but additional work responsibilities as well.[2] Wojcik presented no evidence indicating that he was qualified to perform these additional duties and he testified that his poor performance evaluation was based, at least in part, on defendants' unreasonable work load demands. Furthermore, there was ample evidence that Wojcik was not handling his own job responsibilities well, contradicting any automatic inference that he would have been able to perform those additional duties.

For instance, defendants provided a copy of Wojcik's September 1992 performance evaluation, indicating significant shortcomings in his on-the-job performance. Defendants also provided testimony from McDonald, Wojcik's supervisor, as well as Patricia Cauchi, and Theodore Corey, the employee who ultimately assumed Wojcik's duties. All three testified that Wojcik had a negative attitude, was slow to adapt to change, and was not an extremely valuable worker.

Although Wojcik argues that inconsistencies in McDonald, Cauchi, and Corey's testimony were sufficient to find the witnesses lacked credibility, his own testimony supported the same conclusion the witnesses reached. For instance, Wojcik testified that he disagreed with company policies, disagreed with the changes made in his department, was unhappy that he was not allowed to transfer to another position, and was too busy to spend adequate time with the managers he supported. In response to recommendations in the evaluation that he take additional computer training, Wojcik responded that he should have been *teaching* the class instead of taking it. While he may have been sufficiently competent in certain technical aspects of his job, we conclude that Wojcik failed to demonstrate that he was qualified to fulfill all the expectations of a person in his position, much less a person expected to take on additional responsibilities.[3]

(3) *Replacement*

With respect to replacement, Wojcik also failed to show that he was "replaced" by a younger worker to satisfy this fourth element. Although he claims that Corey was younger and had less experience, the testimony indicated that Corey may have worked at EDS as long as Wojcik. More importantly, Corey did not replace Wojcik in the literal sense. Rather, Corey replaced Terri McQueen and then took on Wojcik's duties when he left, performing *both* employees' duties.

The broader scope in Corey's responsibilities is consistent with the line our Supreme Court draws between a potentially illegal "replacement" and a proper workforce reduction under the *McDonnell-Douglas* analysis. As the Court has said:

> "It is important to clarify what constitutes a true work force reduction case. A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge. However, a person is not *replaced* when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. A person is replaced only when another employee is hired or reassigned to perform plaintiff's duties." [*Lytle (On Rehearing), supra* at 178-179 n 27, quoting *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990) (emphasis added).]

The Court in *Lytle (On Rehearing)* went on to note that the plaintiff was not *replaced*; rather, "her job duties were reassigned to other employees to assume in addition to their other work." *Id.*, citing *Sahadi v Reynolds Chemical*, 636 F2d 1116 (CA 6, 1980). That is precisely what happened in this case. Therefore, we conclude that EDS did not cross the line from permissible management practices

affecting work assignments and workforce reduction to impermissibly replacing Wojcik because of his age.

C. Disparate Impact

A prima facie case of discrimination under a disparate impact theory requires a showing that a facially neutral employment practice burdens a protected class of persons more harshly than others. *Farmington Ed Ass'n v Farmington School Dist*, 133 Mich App 566, 571; 351 NW2d 242 (1984). Again, Wojcik presented no evidence showing that any EDS policy affected members of the protected class, i.e., those aged forty to seventy, more severely than the younger members of the non-protected class.[4] Although he attempted to use statistical data to show that the EDS policies related to discharge only affected older people in the protected class, the evidence ultimately failed to make this point.[5] Moreover, we see no inconsistency in defendants' firing practices solely because there were other, younger people who received Wojcik's performance rating who were not fired given our analysis of his individual qualifications. We conclude that Wojcik failed to meet his burden with respect to his claim of disparate impact.

Affirmed.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ William C. Whitbeck

[1] We note that documentation provided to this Court indicates Wojcik may have actually been forty-six in June 1993, not turning forty-seven until September.

[2] The testimony indicated that Corey took over the position of another person, Terri McQueen, and ultimately took on Wojcik's responsibilities as well. Significantly, Wojcik did not dispute this testimony. Further, the testimony consistently indicated that Terri McQueen had additional responsibilities above and beyond the duties she shared with Wojcik. Corey, Cauchi, and MacDonald all testified that, in addition to supporting various managers, McQueen also provided support to Chuck Mills, who was responsible for overseeing all managers supported by Wojcik and McQueen. Cauchi testified that, contrary to Wojcik's claims, McQueen actually had a heavier work load than Wojcik and that she also performed a consolidation function each month, in which she compiled her own work product with Wojcik's work product and presented it to her supervisors.

[3] Wojcik's statistical "evidence" would be of no help in these circumstances where his individual performance was in question. Wojcik submitted an affidavit from Dennis Brady containing statistics. The affidavit merely states that an unknown individual from West Virginia allegedly examined unidentified termination documentation concerning an EDS financial organization and conducted a statistical analysis of this information. There was no indication that the affiant would be qualified to testify as an expert witness, that his methodology had been approved as scientific evidence in this state,

where he obtained his data, or that the employees within the control group were similarly situated to Wojcik.

[4] Wojcik was hired in May 1985, and claims he was forty-seven years old at the time of his discharge in June 1993. He was, therefore, approximately thirty-nine years old when he was actively recruited and hired in 1985. This at least suggests that Wojcik's age was not a factor with respect to his employment status.

[5] Dennis Brady's affidavit stated that he performed a statistical analysis with respect to the terminations within the department in which Wojcik worked. Brady compared the age of terminated employees with the age of those retained, and concluded that "the average age of those laid-off is 37.77, and the average of those retained is 33.31." He concluded that, "based on this result, terminations of EDS employees in 1993 adversely impacted older employees." He also noted that this pattern of adverse impact "is similar to statistical analyses I have performed of the 1993 Resource Alignment layoffs in at least four other EDS areas."