# STATE OF MICHIGAN

# COURT OF APPEALS

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HOWARD STEPHENS,

Plaintiff-Appellant,

v

ELECTRONIC DATA SYSTEMS CORPORATION and STEVEN BLOMFIELD,

Defendants-Appellees.

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UNPUBLISHED
February 25, 2000

No. 210060
Wayne Circuit Court
LC No. 96-627977-CZ

Before: Meter, P.J., and Griffin and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the order granting defendants' motion for summary disposition and dismissing plaintiff's age discrimination claim in its entirety. We affirm.

On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

See also *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999).

To establish a prima facie case of age discrimination, the plaintiff must show that (1) he was a member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). A plaintiff must present sufficient evidence to raise a triable issue of fact that his position would not have been eliminated but for his age. *Id*. 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, 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. *Meagher v Wayne State Univ*, 222 Mich App 700, 708-709; 565 NW2d 401 (1997); *Farmington Ed Ass'n v Farmington School Dist*, 133 Mich App 566; 351 NW2d 242 (1984). In this case, plaintiff has presented competent evidence only of a disparate treatment claim because he has not identified any EDS employment policy having a disparate impact on older workers.

To establish a claim for disparate treatment, a plaintiff must show that he was treated differently from similarly situated employees. *Lytle, supra* at 178. In *Lytle*, the Supreme Court rejected the plaintiff's evidence, finding that the comparison to younger employees who were not terminated was flawed for two reasons: first, because the other employees were not similarly situated to the plaintiff "in terms of job qualifications and functions," and second, because the individual responsible for eliminating the plaintiff's position did not take part in the decision to hire or retain the other employees. *Id*. at 179. Thus, plaintiff's statistical evidence encompassing all of the layoffs necessitated by the June 1993 reduction in force in EDS' North American Operations is irrelevant because plaintiff's supervisor, Steven Blomfield, who was alone responsible for making the decision to terminate plaintiff's employment, had no input with regard to the terminations of other EDS employees outside his own management unit.

In addition, plaintiff has not shown that the other employees involved in the reduction in force, either in his own unit or in EDS' North American Operations in general, were similarly situated to him with regard to job functions and qualifications. Two under-forty employees with lower rankings who were retained were not similarly situated to plaintiff because they were not supervisory personnel. Cf. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361 (1992), in which the statistical evidence found by this Court to be acceptable took into consideration only comparably-situated supervisory personnel. Consequently, the trial court did not err in refusing to consider plaintiff's statistical evidence because the particular statistical evidence offered in this case did not meet the necessary criteria for relevance.

The need for the group on which the statistical evidence is based to be similarly situated to the plaintiff is demonstrated by the fact that, in the absence of such a rule, a plaintiff could use a completely unrelated group sampling to support a claim that his own termination was because of unlawful discrimination. In this case, there is no evidence whatsoever connecting the statistical pattern of discharges in unrelated EDS divisions with plaintiff's discharge. Plaintiff's reliance on *Town v Michigan Bell Telephone Co*, 455 Mich 688; 568 NW2d 64 (1997), for the proposition that he need only show that other employees outside the protected class were unaffected by the employer's conduct, is

misplaced because plaintiff has failed to acknowledge that those employees must also be similarly situated. See *Lytle*, *supra* at 179; *Town*, *supra* at 699-700.

Finally, even if plaintiff's statistical evidence involved similarly situated employees, plaintiff's prima facie case fails because he has presented no evidence to show that he was replaced by a younger person. Rather, it is undisputed that plaintiff's duties were reassigned to existing employees to perform in addition to their preexisting responsibilities. See *Lytle*, *supra* at 177-178, n 27, quoting *Barnes v Gencorp Inc*, 896 F2d 1457, 1465 (CA 6, 1990) ("[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"). See also *Sahadi v Reynolds Chemical*, 636 F2d 1116 (CA 6, 1980). Therefore, the trial court did not err in finding that plaintiff failed to establish a prima facie case of age discrimination.

Furthermore, even if the statistics calculated by plaintiff's expert were sufficient to establish a prima facie case of a corporate conspiracy to reduce the age of the EDS workforce in general, plaintiff has not shown that age discrimination played a role in his own discharge. In this case, defendants submitted undisputed evidence in their motion for summary disposition demonstrating that a reduction in force was necessary due to economic concerns. "Once the defendant produces such evidence, . . . the presumption [of discriminatory intent] drops away, and the burden of proof shifts back to plaintiff." *Lytle*, *supra* at 174. At this point, the plaintiff must show by a preponderance of the evidence that the employer's proffered reasons were merely a pretext for discrimination. *Id*. at 174, 180. "[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus [based on age] was a motivating factor underlying the employer's adverse action." *Id*. at 175. In other words, the plaintiff must introduce evidence demonstrating by a preponderance of the evidence that discriminatory animus played a role in his particular situation.

It is undisputed that all four of the persons who were initially recommended for termination in Blomfield's management unit were younger than two of the employees who were retained. Two non-supervisory employees under Blomfield were fifty-three and fifty-one years of age, respectively, at the time of the reduction in force, and both scored highly under Blomfield's evaluative criteria and were retained. In fact, the fifty-three-year-old received the highest score of all Blomfield's workers. Consequently, even if plaintiff had established a prima facie case, he has not shown that Blomfield's decision to terminate him was motivated by a desire to eliminate older employees. *Town*, *supra* at 706; see also *Barnes*, *supra* at 1469. Although plaintiff has presented evidence that tends to call into question defendants' reasons for his termination, the evidence does not demonstrate that age discrimination was a motivating factor underlying the decision. The fact that Blomfield's superiors required him to make greater cuts in staffing than other managers merely calls into question defendants' business judgment; it does not lead to an inference of age discrimination because there is no evidence that Blomfield's superiors knew that these additional cuts would result in plaintiff's discharge.

Plaintiff does not dispute that Blomfield's choice was between two equally qualified supervisory employees, himself and Marie Kaufman. In a case involving an employer's reduction in force, it is insufficient for a plaintiff to show merely that the employer retained a younger employee while

discharging an equally qualified older employee. *Town*, *supra* at 704; *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986); *Featherly*, *supra* at 359. Although plaintiff claims that Kaufman should have been laid off instead of him, he admits that her management duties had been reassigned in January 1993 so that she could work on a special project, which she remained on throughout the reduction in force. Thus, Kaufman cannot be compared to plaintiff because she and plaintiff were not similarly situated where her job functions were different. *Town, supra* at 699-700.

With regard to plaintiff's claim that he should have been placed on the list of employees eligible for transfer to other departments rather than the list of employees who were to be laid off for performance reasons, there is no evidence that Blomfield's failure to place plaintiff on the transfer list was motivated by age discrimination. Plaintiff has not shown that any of Blomfield's employees were placed on the transfer list. Furthermore, "[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. Consequently, plaintiff has not shown that defendants' failure to include him on the transfer list is actionable.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Donald S. Owens