STATE OF MICHIGAN

COURT OF APPEALS

ROY[1] BANKHEAD, JR., BENJAMIN COCROFT, PAUL COLLUCCI, and WILLIAM PIGGOTT,

Plaintiffs-Appellants,

and

SHIRLEY ANN CLAIRBORNE, CORAL GOULBORNE, JOE PARKS, LARRY SCRUGGS, and MARY MULLINS,

Plaintiffs,

v

TEXTRON AUTOMOTIVE COMPANY,

Defendant-Appellee.

UNPUBLISHED
June 19, 2001

No. 218021
Wayne Circuit Court
LC No. 97-716427-NZ

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Plaintiffs appeal by right the trial court's orders granting defendant summary disposition pursuant to MCR 2.116(C)(7) and (10) because plaintiff Collucci's claim was barred by a valid release and because plaintiffs Bankhead, Cocroft, and Piggott failed to establish a material fact question regarding their race and age discrimination claims. We affirm.

Plaintiffs allege violations of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. Specifically, Bankhead and Cocroft claim racial discrimination and Cocroft, Piggott, and Collucci claim age discrimination. The statute in question is MCL 37.2202; MSA 3.548(202), which provides in pertinent part:

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[1] We note that Roy Bankhead is incorrectly referred to as "Ray" in the record.

(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 . . . because of . . . *race*, *color*, . . . [or] *age* . . . [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) (emphasis added).]

Bankhead and Cocroft allege that direct evidence of racial discrimination is evidenced by the fact that defendant's employee referred to Bankhead as a "boy" over the company radio and defendant did not investigate Bankhead's complaint. To establish a direct evidence case, a plaintiff

> bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (or other eligibility) and direct proof that the discriminatory animus was causally related to the decisionmaker's action. Upon such a presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Harrison v Olde Financial Corp*, 225 Mich App 601, 612-613; 572 NW2d 679 (1997).]

Bankhead and Cocroft's qualifications are not in dispute – both had worked for defendant for several years[2] and both had worked in the field for at least thirteen years. Therefore, to survive summary disposition, they must allege direct evidence of discrimination by decisionmakers that can be shown to have been causally related to their discharge. *Id*. Plaintiffs contend that addressing Bankhead as "boy" two days before their discharge is direct evidence of discriminatory animus sufficient to show that it was related to defendant's decision to discharge them. We disagree and conclude that this isolated comment does not constitute direct evidence of racial discrimination sufficient to establish that it was causally related to their discharge. Cf. *Graham v Ford*, 237 Mich App 670, 678-681; 604 NW2d 713 (1999).

Defendant articulated and provided evidence of a legitimate business reason for discharging Bankhead and Cocroft. The discharges were in the midst of a reduction in force (RIF). Bankhead and Cocroft were two of eleven supervisors before the RIF. After the RIF was complete, defendant employed six supervisors, all of whom were black. Based on this evidence, no reasonable jury could determine that they were discharged because of racial animus. In addition, Bankhead acknowledged that he was aware of defendant's economic losses and its need to cut costs. To this end, our Supreme Court's decision in *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 111; 469 NW2d 284 (1991), is analogous:

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[2] Cocroft resigned his employment with defendant in March of 1995, but returned shortly thereafter.

> We find that plaintiff failed to show the existence of a genuine issue of fact material to his wrongful discharge claim. Plaintiff conceded that defendant was discharging employees because of economic hardship, and presented no evidence, in response to defendant's summary disposition motion and supporting evidence, sufficient to raise a jury question whether defendant discharged him for bona fide economic reasons.

The same is true in the instant case: defendant provided evidence that the Westland facility had been losing money for years and that Gordon Young, vice president of operations, was brought in to try to make the facility profitable. The RIF saved defendant $1.5 to $ 2 million dollars a year. Bankhead and Cocroft did not provide any evidence sufficient for a jury to determine that they were discharged because of their race and not because of bona-fide economic business concerns. *Id.* Accordingly, summary disposition was appropriately granted to defendant on the racial discrimination claims. In addition, based on defendant's evidence that it had a greater percentage of minority employees, including production supervisors, after the RIF than before the RIF, Bankhead and Cocroft were not able to show that the RIF was a mere pretext for discrimination under an indirect evidence theory.

Piggott and Cocroft brought age discrimination claims against defendant. They alleged that the trial court erred in granting defendant summary disposition because they had established genuine issues of material fact regarding whether defendant discriminated against them because of age. Again, we disagree.

To establish a prima facie case of age discrimination, the plaintiffs must show that (1) they were members of the protected class, (2) they suffered adverse employment action, (3) they were qualified for the position, and (4) they were replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). If Piggott and Cocroft meet this initial prima facie case, then a presumption of discrimination arises and defendant then must articulate a "legitimate, nondiscriminatory reason" for plaintiffs' discharges. *Id*. at 173. If defendant is able to provide such a reason, then Piggott and Cocroft must show by a preponderance of evidence, either direct or circumstantial, that the legitimate reason provided by defendant was mere pretext for discrimination. *Id*. at 174.

In the instant case, Piggott and Cocroft failed to establish a prima facie case of age discrimination because they failed to provide sufficient evidence that they had been *replaced* by younger workers. Before the RIF, there were twenty-two employees in Piggott's division. After the RIF, there were only eight. Similarly, as stated above, Cocroft was one of eleven supervisors before the RIF and defendant only employed six supervisors after the RIF was complete. Furthermore, in *Lytle*, our Supreme Court stated:

> 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 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, supra* at 177-178 n 27, quoting *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990).]

The evidence does not establish that Piggott and Cocroft were "replaced," but rather that their duties were redistributed to several existing employees who were already performing related work or who also continued to perform other duties. *Lytle, supra*. Additionally, evidence that an older employee was terminated while a younger employee was retained is insufficient evidence to establish a prima facie case of age discrimination. *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986). Consequently, plaintiffs have not provided sufficient evidence of replacement to establish a prima facie claim of age discrimination.

The next issue before this Court on appeal is whether plaintiff Collucci's age-discrimination claim was barred because he signed a valid release and failed to tender back the consideration he received under that release. Collucci contends that he signed this agreement under duress and that defendant fraudulently procured this release. We disagree.

This issue has already been adjudicated by this Court in *Collucci v Eklund*, 240 Mich App 654; 613 NW2d 402 (2000). There, this Court held that plaintiff Collucci was barred from bringing a tort action against two of instant defendant's employees because he had signed a valid release and had failed to tender back the consideration before bringing the suit as required by *Stefanac v Cranbrook Educational Community (After Remand)*, 435 Mich 155, 165; 458 NW2d 56 (1990). *Collucci, supra*. Accordingly, the doctrine of res judicata prevents plaintiff from relitigating this issue on appeal. *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999); *VanDeventer v Michigan National Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988).[3]

We affirm.

/s/ Jane E. Markey
/s/ Gary R. McDonald
/s/ Kirsten Frank Kelly

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[3] Furthermore, Collucci argues that our Supreme Court's decision in *Stefanac, supra*, was wrongly decided. However, even if this Court agreed with plaintiff Collucci, the rule of stare decisis requires this Court to follow the decision of the Supreme Court even where we believe the decision was erroneous. *Fletcher v Fletcher*, 200 Mich App 505, 511; 504 NW2d 684 (1993), aff'd in part, rev'd in part on other grds 447 Mich 871; 526 NW2d 889 (1994). Accordingly, we decline to address this issue.