STATE OF MICHIGAN

COURT OF APPEALS

JAMSHID BHAVNAGRI, M.D., Plaintiff-Appellant,	UNPUBLISHED April 13, 2004
v	No. 245538 Wayne Circuit Court
HENRY FORD HEALTH SYSTEM, Defendant-Appellee.	LC No. 01-142004-CL

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition in this employment discrimination action. On appeal, plaintiff argues the trial court erred in granting summary disposition because genuine issues of material fact existed concerning his age and national origin discrimination claims and that defendant's arguments failed to refute plaintiff's evidence of discrimination. Because the evidence does not support plaintiff's claims, we affirm.

Plaintiff brought this discrimination action under the Civil Rights Act (CRA), MCL 37.2101 *et seq.* Plaintiff is a physician of Indian descent, and at the time of his termination from employment by defendant, was aged fifty-four. Plaintiff contends that defendant discriminated against him in violation of the CRA by terminating his employment and retaining a younger, non-Indian physician during a workforce reduction.

We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Michigan Dept of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

Pursuant to the CRA,

> An employer shall not do any of the following:
>
> 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).]

To establish a prima facie case of discrimination, a plaintiff must prove that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Although an employer may not conduct economically necessary layoffs for illegal reasons, such as unlawful discrimination, evidence that a younger employee was retained when a competent older employee was terminated is insufficient to establish a prima facie case of age discrimination. *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986); *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 355; 486 NW2d 361 (1992). An employee is required to present sufficient evidence on the ultimate question of whether age or national origin were determining factors in the decision to discharge the plaintiff. *Matras*, *supra*, 424 Mich 684.

There is no dispute that plaintiff is a member of a protected class, that he suffered an adverse employment action, and that he was qualified for his position. Plaintiff maintains that he was similarly situated to Dr. Peter Drenchko, a younger non-Indian physician who was unaffected by the layoffs. Drenchko was aged forty-six at the time of the lay-offs. To create an inference of disparate treatment, plaintiff must prove that "all of the relevant aspects" of his employment situation were "nearly identical" to those of Drenchko's employment situation. *Town, supra,* 455 Mich 699-700. Although Drenchko saw patients, Drenchko was division head. Plaintiff reported to Drenchko, and Drenchko conducted plaintiff's performance reviews. After reviewing the evidence, we find that plaintiff failed to present evidence illustrating that all of the relevant aspects of his position were nearly identical to those of Drenchko. We therefore conclude that plaintiff and Drenchko were not similarly situated and plaintiff has not created an inference of disparate treatment. *Id*.

Furthermore, Dr. Bruce Muma hired plaintiff in 1996 and made the decision to terminate him during the workforce reduction in 2001. This creates an inference that plaintiff's age and national origin were not determining factors in Muma's decision because it is unlikely that Muma developed an aversion to fifty-four year-old people of Indian national origin during the five years plaintiff worked for defendant. *Town, supra,* 455 Mich 701.

Michigan courts have considered federal law when reviewing discrimination claims based on state law. *Featherly, supra,* 194 Mich App 358-359. When proving a prima facie case of discrimination in a workforce-reduction case, the plaintiff must offer "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons." *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990). Although plaintiff has presented a chart that lists all of the OB-GYN physicians employed by defendant during the preceding three years, this Court has stated that statistical evidence provided only weak circumstantial evidence of discrimination when the population was 250 people, which is substantially greater than the population of plaintiff's chart. *Featherly, supra,* 194 Mich App 354, 360-361. Because plaintiff has not presented any direct, circumstantial, or statistical evidence that tends to indicate that plaintiff was discharged due to his age or national origin, we conclude plaintiff was not singled out during the workforce reduction.

Plaintiff also argues that defendant had a history of showing favoritism toward Drenchko, evidencing discriminatory intent under *Featherly, supra,* 194 Mich App 360. However, there is no evidence that anyone made discriminatory remarks about plaintiff or that plaintiff had superior qualifications to Drenchko. Additionally, although plaintiff argues he was a better candidate than Drenchko, we will not question the soundness of defendant's selection in a workforce-reduction case. *Town, supra,* 455 Mich 704. As our Supreme Court stated in *Town, supra,* the "plaintiff cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id*. Therefore, whether plaintiff was more qualified than Drenchko is immaterial.

Plaintiff failed to offer direct, circumstantial, or statistical evidence that defendant had a discriminatory animus or singled plaintiff out for termination based on impermissible reasons. Because plaintiff failed to present a prima facie case of either age or national origin discrimination, the trial court did not err in granting defendant's motion for summary disposition. As such, since remand is unnecessary, plaintiff's request to disqualify the trial judge on remand is moot.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio