STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH PISTORIO,

Plaintiff-Appellant,

v

WARNER ELECTRIC, INC., COLFAX CORPORATION, and FORMSPRAG CLUTCH,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 254547
Macomb Circuit Court
LC No. 2002-005094-NZ

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In this employment action alleging age discrimination, plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff began working at defendant Formsprag Clutch (Formsprag) in 1960 and eventually worked his way into the position of purchasing manager. In March 2000, Formsprag was sold to defendant Colfax Corporation (Colfax). Plaintiff was terminated approximately two years later, at the age of fifty-nine, and subsequently commenced this action alleging discrimination on the basis of his age. On appeal, plaintiff asserts that the trial court erred in finding that he failed to present direct evidence of age discrimination sufficient to survive a motion for summary disposition. We disagree.

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When reviewing a motion brought under MCR 2.116(C)(10), we must examine the documentary evidence presented below and, drawing all reasonable inferences in favor of the nonmoving party, determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996).

Under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., employers are prohibited from discharging an individual because of the individual's age. MCL 37.2202(1)(a). If a plaintiff is able to offer direct evidence of discrimination in violation of the ELCRA, "the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Direct evidence of discrimination is '"evidence which, if believed, requires the

conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."' *Id*., quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

Plaintiff first argues that Formsprag plant manager Joe Crist's comment that plaintiff had "*old ideas* and needed to change his way of thinking," constitutes direct evidence of a discriminatory motive behind plaintiff's discharge. We disagree. When a plaintiff claims that an employer's remark constituted direct evidence of discrimination, a court must examine the employer's remark in the context in which it was made and determine whether the challenged remark may be characterized as a mere "stray remark," or may properly be viewed as relevant, direct evidence of discriminatory animus. The factors to be considered in making this determination include: (1) whether the alleged discriminatory remarks were made by the person who made the adverse employment decision or by an agent of the employer that was uninvolved in the challenged decision, (2) whether the alleged discriminatory remarks were isolated or part of a pattern of biased comments, (3) whether the alleged discriminatory remarks were made in close temporal proximity to the challenged employment decision, and (4) whether the alleged discriminatory remarks were ambiguous or clearly reflective of discriminatory bias. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292, 624 NW2d 212 (2001); see also *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001).

Here, the evidence shows that although Crist was the plant manager at the time he made the subject statement, he was not involved in the decision to terminate plaintiff's position and was no longer working at the plant when plaintiff was terminated. "Therefore, the proffered remark cannot be attributed to the employer, because it was not made by a person involved in the termination of plaintiff's employment." *Krohn*, *supra* at 301. Moreover, the comment is not clearly reflective of discriminatory bias. In context, the comment merely suggests that Crist felt that plaintiff's way of doing business was outmoded, and does not necessarily imply that the reason his way of doing business was outmoded was because of his age. To the contrary, the comment suggests that despite plaintiff's age he could still change his way of thinking.

The comment also does not appear to be part of a pattern. Indeed, the only other potentially age related comment cited by plaintiff was that made by an unknown person in reference to "senior employees" as a group. Plaintiff could not identify who referred to him as a member of that class and this comment, which could refer to workplace seniority, is even more ambiguous than Crist's "old ideas" comment. Moreover, both comments were made more than two years before plaintiff's termination. Considering all of the foregoing, neither Crist's comment nor the comment concerning "senior employees" requires the conclusion that unlawful discrimination was a motivating factor in plaintiff's termination *Hazle*, *supra*. Consequently, neither comment constitutes direct evidence of age discrimination in violation of the ELCRA. *Id*.

Plaintiff also asserts that a December 2000 e-mail from the human resources manager to Crist detailing equal employment opportunity concerns is direct evidence that age was a motivating factor in the decision to terminate plaintiff's employment. However, this e-mail was written more than one year before plaintiff's termination, and does not mention plaintiff or any other employee by name. Moreover, the evidence presented here does not establish that the focus of the e-mail was on the underlying status of the employees who were to be terminated

(i.e., their age, sex, race, etc.), but on the possibility of a lawsuit. Put differently, the e-mail does not require the conclusion that defendants were discriminating on the basis of age, race, sex, etc. Rather, the e-mail shows that the human resources manager was simply concerned that someone within a protected class might bring a lawsuit, and that the likelihood of such a suit was high because many of those being considered for termination were in protected categories. Consequently, the e-mail is not direct evidence that plaintiff was discriminated against on the basis of his age. *Hazle, supra*.

Plaintiff further asserts that statistical evidence indicating that eleven of thirteen individuals laid off by defendants between March 2000 and August 2002 were over forty years of age is direct evidence of discrimination sufficient to avoid summary disposition. Although we are unable to find any precedent holding that statistical evidence may constitute direct evidence of unlawful discrimination,[1] this Court has previously acknowledged that "the use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual." *Dixon v W W Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1987). Here, however, without additional evidence of discriminatory animus, the mere fact that a substantial number of those employees laid off by defendant were more than forty years of age simply does not require the conclusion that unlawful discrimination was a motivating factor in the employer's actions. *Hazle, supra*.

Plaintiff additionally asserts that the fact that other younger employees were transferred instead of being laid off is direct evidence that he was discriminated against in violation of the ELCRA. Plaintiff specifically cites the transfer to Formsprag of Jean Weniger, who previously worked at Colfax's European plants. However, testimony was presented that plaintiff was not qualified for the position that Weniger filled, and that the onus was on the employees to find transfer opportunities. Considering these facts, we conclude that plaintiff has again failed to prove that "discriminatory animus was more likely than not a 'substantial' or 'motivating' factor" in defendants' decision not to transfer plaintiff. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003). Therefore, the fact that plaintiff was terminated rather than transferred fails as direct evidence of discrimination.

Plaintiff further avers that he presented direct evidence of age discrimination because some of his former co-workers submitted affidavits in which they asserted their belief that Colfax discriminated on the basis of age simply because they knew of other older individuals who were replaced by younger workers. "It is not erroneous for a lay witness to express an opinion regarding discrimination in an employment setting so long as the opinion complies with the requirements of MRE 701." *Wilson v General Motors Corp*, 183 Mich App 21, 35; 454 NW2d 405 (1990). Thus, the Court in *Wilson, supra* at 34-35, held that the plaintiff and a witness were permitted to testify regarding their perception of prejudice in a statement made by the plaintiff's supervisor. However, the testimony profferred by plaintiff's witnesses is

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[1] Cf. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361 (1992) (finding statistical evidence indicating that the oldest supervisors were the employees most affected by a work force reduction to "provide only weak circumstantial evidence of age discrimination").

distinguishable because plaintiff's witnesses have not asserted that they heard any specific statements that could have been interpreted as indicating discriminatory animus. Rather, the affidavits reflect only the authors' opinions that Colfax discriminated against older workers based on their observation that several older employees were terminated. We again conclude that this is not evidence that requires the conclusion that unlawful discrimination was a motivating factor in the employer's actions and is, therefore, not direct evidence of discrimination in violation of the ELCRA. *Hazle*, *supra*.

Because plaintiff failed to present direct evidence of discrimination, we must determine whether he has nonetheless established a prima facie case of discrimination under the test set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973). To do so, plaintiff must prove by a preponderance of the evidence that he was a member of a protected class, that he was terminated, that he was qualified for the position he was terminated from, and that he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 172-173; 579 NW2d 906 (1998). It is undisputed that plaintiff was a member of a protected class, and was terminated from a position for which he was qualified. However, as explained below, plaintiff has failed to show that he was terminated under circumstances giving rise to an inference of discrimination. *Id*.

Although plaintiff alleges that he was replaced by a younger employee, the evidence presented shows that plaintiff's duties were actually divided among several employees. An individual has not been "replaced" for purposes of the ELCRA if "'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.'" *Lytle*, *supra* at 177-178 n 27, quoting *Barnes v GenCorp, Inc*, 896 F2d 1457, 1465 (CA 6, 1990).

Plaintiff also alleges that the fact that he was not transferred to another position gives rise to an inference of unlawful discrimination. However, as discussed above, plaintiff has failed to show that he was treated differently than those outside the protected category in this regard.

Plaintiff further avers that the statistical evidence indicating that eleven of the thirteen employees terminated between March 2000 and August 2002 were over forty years of age gives rise to an inference of unlawful discrimination. As noted above, "the use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual." *Dixon*, *supra*. However, although eighty-five percent of the employees terminated from the time that Colfax purchased Formsprag until plaintiff was terminated were over forty years of age, the comparative statistic is that, of those managers retained at Formsprag, seventy-three percent were forty years of age or older. Thus, from the evidence presented, it appears that Formsprag simply had a somewhat older workforce. Accordingly, when defendants terminated someone, there was a high likelihood that the individual would be in the protected class of older employees. This fact decreases the probative value of plaintiff's proffered statistical evidence because it is not clear, based on the comparison of ages between those retained and those terminated, that there was a discrepancy in defendants' behavior based on age. Consequently, we conclude that the statistical evidence on which plaintiff relies does not give rise to an inference of unlawful discrimination and that, therefore, plaintiff has failed to establish a prima facie case of age discrimination under the *McDonnell Douglas* burden-shifting analysis.

We further conclude that, even had plaintiff presented a prima facie case of discrimination, defendants have nonetheless articulated a legitimate nondiscriminatory reason for plaintiff's termination. *Sniecinski*, *supra* at 134. Defendants asserted below that plaintiff was terminated as part of a reduction in force and the reorganization of Formsprag to eliminate the purchasing and materials manager positions and create a logistics manager position. Defendants supported this assertion with evidence showing declining sales, and with organizational charts depicting a significant reordering of the chain of command. Defendants also submitted a memorandum addressed to the Formsprag plant manager directing him to terminate two individuals under a cost-reduction plan. The plant manager testified that he chose to terminate plaintiff in response to this memorandum. The reorganization and reduction in force were legitimate reasons for plaintiff's termination.

A plaintiff can establish that a defendant's proffered reasons for an adverse employment action were pretext by showing that the reasons lack a factual basis, that the proffered reasons were not the actual factors motivating the adverse employment action, or that the proffered reasons were insufficient to justify the adverse employment action. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Plaintiff has attempted to show that defendants' stated reasons for plaintiff's termination are mere pretext by noting that there was actually an increase in the number of Formsprag employees from 2002 to 2003. However, defendants assert that this rise in the number of employees is the result of the absorption into Formsprag of another Colfax company, and that this change comports with defendants' claimed reorganization rather than rebutting it. We agree. We further note that the fact that some younger employees were hired shortly before or shortly after plaintiff was terminated does not indicate that defendants' stated reasons for plaintiff's termination were pretextual, as plaintiff has not established that he was qualified for those positions. Accordingly, plaintiff has failed to show that the reasons defendants gave for terminating his employment lacked a factual basis, that the proffered reasons were not the actual factors motivating the termination, or that the proffered reasons were insufficient to justify the termination. Therefore, plaintiff has failed to show that the reasons were pretextual. *Id*.

Finally, plaintiff asserts that defendants have failed to produce certain documents. Although "an adverse inference may [generally] be drawn against a party who fails to produce evidence within its control," *Grossheim v Associated Truck Lines, Inc*, 181 Mich App 712, 715; 450 NW2d 40 (1989), plaintiff did not object to the non-production of the performance evaluation charts in the trial court. Therefore, this issue has not been properly preserved. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Nor has plaintiff shown that defendants failed to produce documents within their control related to the December 2000 e-mail. However, even drawing an adverse inference against defendants on this basis, we conclude that plaintiff has nonetheless failed to show that there is a genuine issue of material fact regarding whether age discrimination was a motivating factor in defendants' decision to terminate his employment.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder