STATE OF MICHIGAN

COURT OF APPEALS

PAUL ZIMMERMAN, DAVID MICHAEL, ALAN ZAMPICH, FREDERICK HARDER, JOHN FLORKOWSKI, HARRY ROBERTS, III, DOUGLAS ROBOTHAM, ERIC RICH, RANDY HANVEY, BRYAN HILL, CLYDE GROVES, JOHN DiVICO, SAM TEST, TOM BRODEUR, JOHN JARRETT, GILBERT KOPACKI, PAMELA MYERS, GARY TAYLOR, TIMOTHY BUBACK, CARL MILLER, JOHN STOCKOWSKI, LYNNE SCHLARB, KIRK REVITZER, STEVE MUNGER, WILLIAM BUTTERWORTH, ANITA DAWKINS, DEBRA BOUSSON, KENNETH MILTON, CONSTANT RUSIS, JR., JACKIE JORDAN, and PAT ELDRED, individuals,

Plaintiffs-Appellants,

v

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, a foreign corporation, and MARIO IONTA, an individual,

Defendants-Appellees.

UNPUBLISHED
July 1, 1997

No. 190768
Wayne Circuit Court
LC No. 91-133113-NZ

AFTER REMAND

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) dismissing with prejudice plaintiffs' age discrimination claims brought under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq.*; MSA 3.548(101), *et seq*. We affirm.

Plaintiffs alleged in their complaint that defendants discriminated against them based on age when AT&T reorganized and renamed job titles. Plaintiffs argued that defendants' discriminartary

actions effectively removed their bumping rights and therefore, when AT&T closed its Detroit Customer Service Center, where plaintiffs were employed, they could not bump into any other organization within AT&T, specifically the International Group or the Ford-Network Management Center, and were terminated. We find that plaintiffs failed to present a prima facie case of age discrimination. The evidence established that defendants' motive in reorganizing and renaming job titles was to circumvent plaintiffs' bumping rights, however, that motive was not age based. Therefore, defendants were entitled to summary disposition as a matter of law. *Glancy v Roseville*, 216 Mich App 397, 398; 549 NW2d 78 (1996).

Under the Elliott-Larsen Civil Rights Act,

> (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 . . . age. [MCL 37.2202; MSA 3.548(202).]

Age discrimination claims may be based on two theories: disparate treatment and disparate impact. *Lytle v Malady Howmet Corp*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), lv gtd 451 Mich 920 (1996). In a disparate treatment case, a plaintiff must show a pattern of intentional discrimination against protected employees or against the individual plaintiff. In a disparate impact case, a plaintiff must show that an otherwise facially neutral employment policy has a discriminating effect on members of a protected class. *Id*. In general, in order to establish a prima facie case of age discrimination, a plaintiff must show: (1) he is 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. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Once the plaintiff establishes a prima facie case by the preponderance of the evidence, the burden of proof shifts to the defendant, who must articulate a legitimate, nondiscriminatory reason for his actions. Then, once the defendant articulates a legitimate, nondiscriminatory reason, the plaintiff has the burden of showing that the legitimate reason offered by the defendant is pretext. *Plieth v St. Raymond Church*, 210 Mich App 568, 571-572; 534 NW2d 164 (1995).

Where an employer makes cutbacks due to economic necessity or there is a reduction in force due to economic reasons, however, the *McDonnell Douglas* standard may not be automatically applied. *Matras, supra* at 684. Rather, to establish a prima facie case of age discrimination, a plaintiff must "present sufficient evidence on the ultimate question -- whether age was a determining factor in the decision to discharge the older protected employee." *Matras, supra* at 684. If the discharge of the plaintiff would have taken place without regard to the alleged age discrimination, then age was not a determining factor in the discharge. *Matras, supra* at 691. It is not enough for a plaintiff to base his theory of age discrimination on his or other employees' seniority. There is no age discrimination when an employer acts on the basis of a factor, such as the employees' pension status or seniority, that is

empirically correlated with age. *Plieth, supra* at 573; *Hazen Paper Co v Biggins*, 507 US 604; 113 S Ct 1701; 123 L Ed 2d, 338, 345-346 (1993).

In the instant case, the evidence presented by plaintiffs established that defendants did reorganize and rename job titles to protect some employees, thereby depriving plaintiffs of bumping rights. However, defendants actions and motives were not based on age. The documents presented established that defendants were attempting to maintain a balance among seniority levels and protect AT&T's contracts with its customers, such as Ford, when it reorganized and renamed job titles. We find no evidence of age being a determining factor in defendants' actions. We also find no evidence of age discrimination in the deposition testimony. With the exception of plaintiff Pamela Myers' testimony, who testified that defendant Mario Ionta stated that older workers could not change, there is no evidence that defendants held an age animus or stereotype of older people. An isolated remark such as cited here by someone that did not make or participate in the making of a decision that adversely affected plaintiffs is insufficient to establish an age discrimination claim. See, generally, *Gagne v Northwestern Nat Ins Co*, 881 F2d 309, 314 (CA 6, 1989). Therefore, because plaintiffs did not present any evidence that age was a determining factor in their discharges, defendants were entitled to judgment as a matter of law. The trial court did not err granting defendants summary disposition.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad