STATE OF MICHIGAN

COURT OF APPEALS

TROY LEWIS and LOLA LEWIS,

Plaintiffs-Appellees/
Cross-Appellants,

v

BRAUN-BRUMFIELD, INC., and DAVID P. GROEBER,

Defendants-Appellants/
Cross-Appellees.

UNPUBLISHED
May 22, 1998

No. 196683
Washtenaw Circuit Court
LC No. 94-003333-CZ

Before: Young, Jr., P.J., and Wahls and White, JJ.

PER CURIAM.

Plaintiff Troy Lewis sued his former employer, defendant Braun-Brumfield, Inc. (BBI), and its former operations manager, David P. Groeber, for age discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Lola Lewis, plaintiff's wife, asserted a derivative claim for loss of consortium.[1] Following a bench trial, the court found that BBI had discriminated against plaintiff based upon his age in violation of the Civil Rights Act. The trial court awarded plaintiff $309,000 in damages for lost earnings, benefits, and emotional distress, but rejected Mrs. Lewis' claim for loss of consortium as well as plaintiff's claims brought against Groeber individually.[2] BBI appeals as of right from that judgment. Plaintiffs cross-appeal the trial court's determination of damages as well the dismissal of Mrs. Lewis' loss of consortium claim. We affirm in part, reverse in part, and remand for recalculation of damages.

BBI is a book manufacturing company located in Ann Arbor. Plaintiff had been employed at BBI since 1963. He progressed steadily through BBI's production department and was promoted to plant manager in 1989. As plant manager, he reported directly to BBI's president. Plaintiff received excellent performance reviews from 1989 through 1991, and presented additional evidence that he performed his job in a commendable manner through February 1994. He received raises and year-end bonuses each year he served as plant manager, including 1993. In 1993 plaintiff's plant manager salary was $67,700, plus a $15,000 bonus for 1992.

In 1988, BBI was acquired by Sheridan Press. Sheridan made Arnold Ziroli president of BBI in 1992. In August 1993, Ziroli told plaintiff that he was looking for an operations manager for the BBI plant. The operations manager job appeared virtually identical to the plant manager position. In February 1994, Ziroli asked plaintiff to step down as plant manager and offered him the job of supervisor of camera/opticopy, which was two management levels lower than the plant manager position and paid $45,500 per year. Plaintiff accepted this new position in February 1994. Ziroli himself assumed the plant/operations manager duties until May 1994, when he hired David Groeber as operations manager. At the time of this first demotion, plaintiff was fifty-four years old, Ziroli was fifty years old, and Groeber was fifty-nine years old. After a dispute with Ziroli, Groeber left BBI in December 1994, and Ziroli again took over the plant/operations manager's duties until August 1995, when thirty-four-year-old Carl Whitley was promoted to production manager.

On September 13, 1994, Groeber told plaintiff that they were reorganizing the prepress department at BBI and eliminating the supervisor of camera/opticopy position. Plaintiff was offered one of two entry-level jobs, both of which paid less than $30,000 per year. The camera/opticopy supervisors job duties were assumed by the prepress supervisor, a new position. In November 1994, BBI hired a thirty-seven-year-old as prepress supervisor. Plaintiff was not offered the new job of prepress supervisor, which was not posted at the time he was demoted from his position as supervisor of camera/opticopy. Plaintiff had previously worked as prepress supervisor for seventeen years, and was quite familiar with the current technologies in use for that job. In fact, plaintiff had asked to be made prepress supervisor after his first demotion. Rather than take one of the hourly jobs offered to him, plaintiff tendered his resignation.

In November 1994, plaintiff accepted an offer to work as a manufacturing consultant for Prizma Industries, a Colorado book printer, at $52,000 per year. Plaintiff was still employed at Prizma at the time of trial. In contrast to his employment at BBI, plaintiff received limited health benefits at Prizma and no pension benefits.

Following a bench trial, the court found that defendant had discriminated against plaintiff based upon his age by replacing him as plant manager and by demoting him from the subsequent supervisor job. The court ruled that the fact that Groeber was older than plaintiff did not defeat plaintiff's age discrimination claim with respect to plaintiff's demotion from the plant manager job. The trial court awarded damages in the amount of $309,000, including $50,000 for "[e]motional distress and embarassment and humiliation," as well as attorney fees of $45,000, costs of $7,798.19, and statutory prejudgment interest. However, the court declined to award damages either for a bonus that plaintiff claimed he earned in 1993 as plant manager, or for bonuses that plaintiff claimed he would have been entitled to in the future. The trial court also dismissed Mrs. Lewis' loss of consortium claim, as well as plaintiff's claims brought against Groeber individually. The trial court denied BBI's motion for new trial, but granted its motion for mediation sanctions, awarding sanctions in the amount of $4,000.

I

BBI first disputes the trial court's factual findings, arguing that plaintiff failed to prove that either of his demotions were a result of age discrimination. A trial court's findings of fact in a bench trial will

not be set aside unless clearly erroneous. MCR 2.613(C); *Phardel v Michigan*, 120 Mich App 806, 812; 328 NW2d 108 (1982). Findings are clearly erroneous when, although there is evidence to support them, the reviewing court is left with a firm conviction that a mistake has been made. *Phardel*, *supra*.

A

We agree with BBI that plaintiff failed to prove age discrimination in his initial demotion from the plant manager position.

Because plaintiff introduced no direct evidence of age discrimination, in order to prove his claim, plaintiff was obligated to establish a prima facie case under the familiar approach established in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).[3] Under the *McDonnell Douglas* approach, when the plaintiff's claim is based on discharge from employment, a prima facie case creating a rebuttable presumption of age discrimination requires a showing by the plaintiff that "(1) the plaintiff is a member of a protected class, (2) the plaintiff was discharged, (3) the plaintiff was qualified for the position, and (4) the plaintiff was replaced by a younger person." *Meagher v Wayne State University*, 222 Mich App 700, 711; 565 NW2d 401 (1997).[4] If the plaintiff is successful in establishing a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its decision. *Id*. If the defendant makes such an articulation, the plaintiff bears the burden of persuading the factfinder that the employer's proferred reason was merely a pretext to discrimination. *Id*.

Plaintiff argued, and the trial court agreed, that plaintiff was "replaced" as plant manager by thirty-four-year-old Whitley, who, as stated, became plant/operations manager in August 1995, ten months after plaintiff terminated his employment with BBI and eighteen months after plaintiff was demoted, during which time the job was exclusively performed by Ziroli (fifty years old) and Groeber (fifty-nine years old).[5] In order to overcome this obvious problem in his proofs under the "replaced by a younger person" element of the *McDonnell Douglas* paradigm, plaintiff argues that he was "older" than Ziroli, and further that Groeber's tenure was limited and he was not a true replacement for plaintiff. We find the four year age difference between plaintiff and Ziroli (respectively aged fifty-four and fifty) to be legally insignificant giving rise to no presumption of discrimination.[6] Further, we reject as too attenuated plaintiff's claim that he was "replaced" by Whitley when (1) Whitley was placed *1 ½ years* after plaintiff was demoted, and (2) previous to this placement, the plant manager position was held by persons who were either very close to plaintiff's age (Ziroli) or older (Groeber). The trial court clearly erred in finding that plaintiff established that his demotion from the plant manager position was a result of unlawful age discrimination.

B

BBI contends that plaintiff failed to carry his burden of rebutting BBI's proffered nondiscriminatory reasons behind his demotion from the supervisor of camera/opticopy position and proving that age discrimination was a motivating factor in that decision. We disagree.

BBI's primary nondiscriminatory reason proffered for its action was that it was reorganizing the company in order to achieve maximum efficiency and so acting out of economic necessity, and that the thirty-seven-year-old it hired to replace plaintiff was the better candidate. However, the record contains circumstantial evidence from which it is reasonable to infer that BBI used its reorganizations to remove or demote its older production supervisors. BBI claimed that plaintiff was demoted because he failed as supervisor of camera/opticopy. However, the record reveals little or no evidence which would indicate that plaintiff's performance was substandard. We are not persuaded that the trial court clearly erred in finding that age discrimination was a motivating factor behind BBI's decision to demote plaintiff from his supervisory position.

II

We have reviewed the remainder of BBI's claims of error and conclude that none of them require reversal.

III

On cross-appeal, plaintiffs argue that the trial court erred in finding that Mrs. Lewis did not suffer loss of consortium due to BBI's actions. We disagree. While Mrs. Lewis may have suffered mental anguish and disruption to her life caused by the loss of plaintiff's job and the family's subsequent move to Colorado, we are not persuaded that this species of injury falls within the ambit of those normally associated with loss of consortium damages under Michigan law, such as loss of conjugal fellowship, companionship, services, or other "incidents of the marriage relationship." See *Berryman v Kmart*, 193 Mich App 88, 94; 483 NW2d 642 (1992). The trial court did not clearly err in finding no loss of consortium. MCR 2.613(C); *Triple E v Mastronardi*, 209 Mich App 165, 171; 530 NW2d 772 (1995).

IV

Plaintiffs next contend that the trial court erred in failing to consider the regular year-end bonuses which plaintiff received as plant manager when calculating his damages for lost earnings. However, this issue is moot because we are reversing the trial court's finding that plaintiff's demotion from the plant manager position was motivated by age discrimination. On remand, the trial court is directed to recalculate economic damages based upon plaintiff's compensation as supervisor of camera/opticopy.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Robert P. Young, Jr.

[1] Because Mrs. Lewis' claim was merely derivative, any reference to "plaintiff" in the singular will be to Mr. Lewis only.

[2] In addition to the civil rights claim made against Groeber individually, plaintiffs also alleged that Groeber tortiously interfered with a contractual relationship between plaintiff and BBI. Plaintiffs do not appeal the trial court's judgment of no cause of action on those claims.

[3] "'Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant's discriminatory intent.'" *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997) (citation omitted).

[4] The *McDonnell Douglas* approach was adopted by our Supreme Court in *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986), and recently has been reaffirmed. See *Lytle v Malady*, 456 Mich 1, 27-30; 566 NW2d 582 (1997); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-696; 568 NW2d 64 (1997).

[5] Plaintiff conceded at oral argument that the duties of the plant/operations manager position from February 1994 (after plaintiff was demoted) until August 1995 (when Whitley was promoted) were performed only by Ziroli or Groeber.

[6] BBI, relying on *Lytle*, *supra* at 35-36, urges that a plaintiff in an age discrimination case must prove that he was replaced by a "substantially younger" person. While we note that our Supreme Court was careful to indicate that this standard was particularly relevant in a reduction in force case, the rationale for employing this standard is equally applicable in the garden variety age discrimination suit. Such a conclusion is aptly illustrated by the weakness of plaintiff's argument in this case. Unlike the analogous federal Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq*., the Civil Rights Act contains no designated protected group (i.e., persons older than forty), but merely prohibits discrimination on the basis of age. Consequently, given that the *McDonnell Douglas* paradigm creates a presumption of unlawful discrimination in the absence of an articulated legitimate, nondiscriminatory business reason, see *Lytle*, *supra* at 29, we conclude that de minimus differentials in age between the plaintiff and the purported replacement cannot give rise to a presumption of age discrimination.