

STATE OF MICHIGAN
COURT OF APPEALS

TROY LEWIS and LOLA LEWIS,

UNPUBLISHED

Plaintiffs-Appellees/Cross-Appellants,

v

No. 196683

Washtenaw Circuit Court

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

LC No. 94-003333 CZ

Defendants-Appellants/Cross-Appellees.

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

WHITE, J. (concurring in part, dissenting in part).

I agree that the trial court's determination that Mrs. Lewis suffered no loss of consortium damages is not clearly erroneous.

I also agree that the trial court did not err in finding that age discrimination was a motivating factor in defendant's decision to demote plaintiff for the second time, from his position of supervisor of camera/opticopy.

However, I do not agree that plaintiff failed to prove age discrimination in his initial demotion from the Plant Manager position, and thus dissent from sections I(A) and IV of the majority opinion.

Regarding plaintiff's discrimination claim, the trial court found:

ELCRA prohibits employment discrimination based on age. MCL 37.2202. Plaintiff need not prove that age was the only factor in an adverse decision, but that age was a factor that made a difference. *Matras v Amoco Oil Co.*, 424 Mich 675 (1986).

Regarding Plaintiff's claim of age discrimination due to the elimination of his Plant Manager position, Plaintiff has shown that more likely than not, the new position of Operations Manager was, in fact, just a new title for his old position, and he has proven that he was qualified to assume the duties of Operations Manager. Even though Groeber, the person appointed as Operations Manager, was older than Lewis, this fact

alone, though mitigating against age discrimination, does not defeat a claim of age discrimination.

Groeber was hired to implement the *Theory of Constraints*, streamline production and weed out those persons unable to face and implement high velocity cultural change. Though these goals are legitimate, a predisposition existed at BBI that older, senior supervisors would be resistant to change.

There was insufficient evidence presented to establish a factual basis for that predisposition.

In particular, Lewis had performed competently as Plant Manager for a number of years. Even when he reported to Zirolì, he was never given a poor evaluation or warned about deficient performance. Rather, Zirolì reached a broad conclusion that Lewis must step aside.

This conclusion reflected a pervasive attitude at BBI that older, senior supervisors would not fit into the new culture.

BBI made no attempt to educate the older employees in the new theories, even though it provided such education for younger employees.

BBI disposed of older supervisors either by demotion, elimination of position or streamlining production while continuing to perform most of the same tasks under a new structure.

Together with the restructuring of the pay scale, minimizing long-tenured service, the failure to assist or educate older employees while providing such to younger employees establishes that it is more likely than not that age was a factor that made a difference in the adverse decisions affecting Lewis.

All of the substantive duties of the Operations Manager position were those Lewis had competently performed as Plant Manager.

Although Zirolì asserted Lewis was not a good communicator and had misled him regarding the success of a quad shift in production tried earlier, these complaints about Lewis were unsubstantiated and were insufficient in severity to warrant the adverse decisions affecting Lewis. Further, Zirolì's failure to provide Lewis with performance evaluations deprived Lewis of the opportunity of meeting the reasonable expectations of his employer.

* * *

The tasks of the Operations Manager, to the extent they coincide with the plant manager's duties, continue to be performed at BBI by younger supervisors, including the production manager, age 34.

The fact that the instrument for change and implementation of the *Theory of Constraints* together with disparate treatment of older employees, was a man older than Lewis is further evidence that BBI's view of the necessary cultural change to improve the value of the company necessitated the replacement of senior people in management positions. Groeber's tenure was limited and his task well defined. The Court does not consider him a true replacement for Lewis in any of the positions he lost.

The ultimate fact is that after 1994 and the departure of a number of senior supervisors, BBI is a company managed by much younger supervisors, including the positions held by Lewis. [Emphasis in original.]

The trial court's conclusion that plaintiff established that defendant was predisposed to discriminate against older employees is not clearly erroneous. Plaintiff presented evidence that Zirolì determined that plaintiff was not suitable to lead the company in the *Theory of Constraints* as Operations Manager even though Lewis had never been given the opportunity for education or training in the theory, unlike a number of younger employees. Plaintiff presented evidence that Groeber, who was hired by defendant in May 1994, was alerted before being hired that several senior supervisors, including plaintiff, were likely to resist change, although there was insufficient evidence to establish a factual basis for the predisposition to believe that senior supervisors would resist change.

I agree with the majority that an age discrimination plaintiff seeking to establish a prima facie case under *McDonnell Douglas* must show that he or she was replaced by a younger person.¹ I also agree that, generally, a plaintiff's replacement 1 ½ years later by a younger person is too attenuated a connection to satisfy this element. However, in the instant case, plaintiff presented evidence that Zirolì, defendant's President, and Groeber, who assumed the Operations Manager position for about seven months, were not his true replacements, in that each assumed plaintiff's duties for a limited time, Zirolì had his own duties as President and could be seen as simply "holding the fort," and Groeber was brought in from the outside to implement the theory of constraints. The trial court's conclusion that Whitley was plaintiff's true replacement was not clearly erroneous.

I would affirm.

/s/ Helene N. White

¹ Defendant asserts that the positions at issue were eliminated. Where positions are eliminated, a plaintiff need not show that he or she was replaced by a younger person, a plaintiff must show that age was a factor in his or her selection for termination or other adverse employment action, *Matras v Amoco Oil Co*, 424 Mich 675, 682-685; 385 NW2d 586 (1986), and that he or she had skills,

experience, background, or qualifications comparable to the retained employee, *Featherly v Teledyne*, 194 Mich App 352, 358-359; 486 NW2d 361 (1992); *Meeka v D & F Corp*, 158 Mich App 688, 692-693; 405 NW2d 125 (1987); *Bouwman v Chrysler Corp*, 114 Mich App 670, 678-680; 319 NW2d 621 (1982). The trial court's conclusions that plaintiff established both that age was a factor in defendant's adverse employment actions and that he was as least comparably qualified to perform the Operations Manager and Prepress Supervisor positions, were not clearly erroneous.