STATE OF MICHIGAN

COURT OF APPEALS

VIOLET JONES and GREGORY D. RANDALL,

Plaintiffs-Appellees,

v

AMERITECH SERVICES, INC., and PAMELA COLTON,

Defendants-Appellants,

and

WILLIAM OLIVER and THOMAS YAMBASKY,

Defendants.

.

UNPUBLISHED
March 23, 1999

No. 198013
Wayne Circuit Court
LC No. 93-317724 CL

Before: Murphy, P.J., and Fitzgerald and Gage, JJ.

GAGE, J (dissenting).

Because I believe the statement of Jim Goetz was erroneously admitted, that its admission severely prejudiced defendants-appellants, and that plaintiffs' verdicts were otherwise unsupported by sufficient evidence, I respectfully dissent. To permit these verdicts to stand would constitute a manifest injustice. I would grant defendants-appellants JNOV with respect to all of plaintiffs' discrimination claims.

This case arises out of the termination of plaintiffs' employment with ASI as part of an involuntary reduction-in-force program known as CRESP [Company RESizing Plan]. While the majority fails to describe the steps involved in the CRESP process, I note them briefly because an understanding of these steps is important to an understanding of what I believe is the proper outcome of this case. CRESP was implemented in two stages. Stage I ranked employee performance using numerical information (e.g., an employee's merit pay for calendar years 1990 and 1991), but allowed adjustments to individual rankings for anomalies that were not accounted for by this process (e.g., recent promotions). A goal of Stage I was to target about thirty percent of employees for an in-depth

evaluation of their performance. In Stage II, committees evaluated employees at the bottom of the Stage I rankings in groups established using such factors as departmental boundaries and the employees' salary grades. The committees ranked employees in each Stage II group using criteria established by a training manual. ASI officers then reviewed these Stage II rankings and determined how many employees in each group should be discharged.

After the plaintiffs, both of whom are African-Americans and over the age of forty, were discharged during 1992 as part of this CRESP process, they filed the instant action against ASI for age and race discrimination under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Other defendants were also named in the action, but only plaintiffs' race and age discrimination claims against ASI and plaintiff Randall's race discrimination claim against a former supervisor, defendant Colton, are at issue in this appeal. Specifically, the questions before us concern a jury's special verdict for plaintiff Randall of $570,000 against the defendants-appellants, Colton and ASI, for race discrimination and against ASI for age discrimination, jointly and severally, and a jury's special verdict for plaintiff Jones of $650,000 against ASI for age and race discrimination.

I.

Regarding defendants' first issue on appeal, I believe the admission of the Goetz statement was a critical error. This Court does not disturb a trial court's evidentiary ruling absent an abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). In the case at bar, the trial court abused its discretion in ruling to admit the challenged evidence because plaintiffs did not present a sufficient foundation to establish the relevancy of Goetz's prior statement under MRE 401. Alternatively, the evidence should have been excluded under MRE 403.

The trial record reflects that Goetz made the statement in question during a videoconference held after plaintiffs were discharged. Prior to the videoconference, ASI, which had functioned as a service corporation for other companies of the Ameritech Corporation, underwent further organizational restructuring. According to Goetz's testimony, ASI became part of a restructured Network Services Unit, which included employees from both the former ASI and the Ameritech Corporation. Goetz further testified that he was the vice-president for the information technology (IT) organization of the restructured Network Services Unit when he held a videoconference in September of 1993 for the purpose of communicating with employees within the IT organization as whole. During the videoconference, Goetz stated that the IT organization had open positions and would do selective hiring from outside of this organization. In response to a question about the job skills that would be sought from outside, Goetz made the following statement on an intent to hire employees, which is the subject of this issue:

> There are somewhat I would call professional skills that we are looking for. Eric mentioned a couple. Evelyn Woods is always looking for a few good marketing data based people.

> So, there are those professional skills, but part of these open positions are just our solid professional openings that we would recruit from college or recruit your friends and neighbors who want to develop into super IT professionals.
>
> So, some of them are specialty skills, professional skills . . . , marketing, client service, in some cases some technologies . . . .
>
> So, some of those type professional skills, but some of this you'll see are just analysts, entry level analyst jobs *where we want to get back and start bringing in some folks that are under 45 years old*.
>
> * * *
>
> Before I close, every now and then I say something really stupid, and when my wife isn't around to tell me what it is, somebody else is.
>
> My comment earlier looking for people under 45, all I mean is that we want to be open to hiring people from colleges again. That's all I mean. It's my view that hiring professionals is also something we are going to do, and if that professional is of any age, we are open to that as well. Sorry about that comment. Without my wife to kick me, someone here at the table took care of it. [Emphasis added.]

When an evidentiary issue concerns the relevancy of evidence, the starting point is MRE 401, which defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Two separate questions must be answered, namely, the materiality of the evidence (e.g., was it of consequence to the determination of the action) and its probative force (e.g., whether it makes a fact of consequence to the action more or less probable without the evidence). *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996). The proponent of evidence has the burden to establish a proper foundation. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989).

Because Goetz's "under 45 years old" statement could only pertain to age discrimination, the issue of consequence to plaintiffs' action is whether age was a determining factor in the ASI employment decision to select plaintiffs for discharge under the CRESP plan applied to them during 1992. See *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997). Plaintiffs correctly argue that proof of motive would be relevant evidence. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). However, the material issue is ASI's motive, and it would defy reason to impute Goetz's statement of intent to hire employees under the age of forty-five years to ASI based on disconnected facts. *Cf. Adams v National Bank of Detroit*, 444 Mich 329, 366-368; 508 NW2d 464 (1993). Isolated comments, unrelated to the challenged action, do not show discriminatory animus in termination decisions. *Cone v Longmont United Hosp Ass'n*, 14 F3d 526, 531 (CA 10, 1994).

Hence, Goetz' statement of an intent to hire employees under the age of forty-five years has probative force relative to ASI's motive only if Goetz's statement can be imputed to ASI at the time that the decision to discharge plaintiffs was made. Weighing against finding a sufficient nexus between Goetz's statement and the discharge decision to impute the statement to ASI was plaintiffs' failure to show that Goetz had a role in either developing the CRESP plan under which they were discharged or in applying that CRESP plan to their particular circumstances. Neither the fact that plaintiffs were employed in the IT organization of ASI that became a part of the restructured Network Service Unit, nor Goetz's position when plaintiffs were discharged, establishes a sufficient nexus. Although Goetz himself was employed in the IT organization of ASI when plaintiffs were discharged, the trial evidence does not establish that Goetz was the vice-president at that time.

Another factor weighing against finding a sufficient nexus between Goetz's statement and plaintiffs' discharges to satisfy the probative force standard for relevant evidence was plaintiffs' failure to present evidence that ASI intended to create any of the possible open positions mentioned by Goetz at the time that plaintiffs were discharged. Although plaintiffs claim that Goetz's statement was made in the midst of the same downsizing plan under which they were terminated, the trial evidence infers only that a number of voluntary and involuntary downsizing plans were implemented over a number of years. Plaintiffs did not present evidence that the particular CRESP process under which they were terminated was still in effect when Goetz made his statement or that Goetz was otherwise speaking to the intent of a plan in existence as part of that CRESP process when he said that "we want to get back and start bringing in some folks that are under 45 years old."

Adding to these deficiencies in plaintiffs' foundational facts is trial evidence that plaintiff Jones was forty-five years old when she was discharged and that plaintiff Randall would actually fit under the age limit mentioned by Goetz when he was discharged because plaintiff Randall was under forty-five years old. Goetz's age statement, thus, does not apply to plaintiff Randall's age and, at best, marginally applies to plaintiff Jones. Of further significance is the fact that plaintiffs' age discrimination claims were not based on a failure to rehire them and that plaintiffs offered no evidence on younger employees actually being hired by the restructured Network Services Unit. In a typical case involving an employer's claim of a bona fide reduction in work force, the actual replacement of an eliminated employee raises a question of fact about the bona fide nature of the work force reductions. See *Lytle (On Rehearing)*, *supra* at 177-178 n 27. Hence, it is important to emphasize that the evidence before us does not concern the actual conduct of the restructured Network Services Unit. It is properly viewed as proffered evidence on the issue of corporate intent. Indeed, plaintiffs' attorney used evidence of Goetz's statement of intent during closing arguments to argue that Goetz "let the corporate cat out of the corporate bag" and "told you what they *intended* to do" (emphasis added).

A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Gore*, *supra* at 27. Because plaintiffs did not show a logical nexus between their discharges under CRESP and Goetz's statement of intent that justified imputing discriminatory animus to their discharges, or otherwise making it more probable than not that they were discharged for the purpose of being replaced by employees

under the age of forty-five years, I must conclude that the trial court abused its discretion in admitting the evidence of Goetz's statement.

Alternatively, I would hold that the trial court should have excluded the evidence under MRE 403 because any diminutive probative value of Goetz's statement was substantially outweighed by the danger of unfair prejudice. Under the circumstances of this case, a danger existed that Goetz's statement would have been given undue or preemptive weight by the jury. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

I would further hold that the trial court's error requires that we vacate the jury's special verdict findings that ASI discriminated against the older portion of its work force (including plaintiffs) and that ASI intentionally discriminated against plaintiffs based upon age. Having assessed the error in light of the weakness of the untainted evidence on age discrimination and the entire record, *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998), it is clear that ASI was prejudiced by the erroneously admitted evidence. Indeed, as discussed in Part III of my opinion, ASI should have been granted judgment notwithstanding the verdict because, as a matter of law, plaintiffs did not prove age discrimination with admissible evidence. I would find, however, that the trial court's evidentiary error was harmless relative to Colton because she was not charged with age discrimination. Hence, Colton's substantial rights were not affected by the error. MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 329; 454 NW2d 610 (1990).

II.

Regarding defendants' allegations of improper remarks by plaintiffs' counsel, I concur with the majority's conclusion that none of these challenged remarks warranted reversal.

III.

Defendants-appellants also contend that the trial court erred in denying their motions for a directed verdict and judgment notwithstanding the verdict (JNOV). For reasons to be discussed below, I would hold that the defendants-appellants were entitled, as a matter of law, to JNOV on all of plaintiffs' theories of liability. Defendants-appellants' attorney did not state specific reasons for a directed verdict as required by MCR 2.515. The specific reasons were presented to the trial court in the motion for JNOV. Because this Court only reviews grounds for sustaining a directed verdict that were articulated to the trial court, *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995), and the same standards apply to motions for directed verdicts and JNOV, *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 427; 468 NW2d 64 (1991), I have limited my review to the trial court's denial of the motion for JNOV. This Court's review of a trial court's decision regarding a motion for JNOV is de novo because we must determine whether, on reviewing the evidence and all legitimate inferences in the light most favorable to plaintiffs, plaintiffs established their discrimination claims as a matter of law. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If plaintiffs did not establish their discrimination claims, then the claims should not have been submitted to the jury.

Although the jury was asked to decide claims of race and age discrimination, all of plaintiffs' theories of liability were based on the same statute, which provides that an employer shall not:

> [f]ail 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 . . . race . . . , age . . . . [MCL 37.2202(1)(a); MSA 3.548 (202)(1)(a).]

Discrimination under this statutory provision may be proven using different methods of proof, but the inquiry is always the same, namely, whether the employment action was because of the impermissible consideration. See *Meagher, supra* at 710. This inquiry essentially presents an issue of causation. *Harrison v Olde Financial Corp,* 225 Mich App 601, 610 n 12; 572 NW2d 679 (1997). The impermissible consideration must be a determining factor in the employment decision. *Meagher, supra* at 710.

A. RACIAL DISCRIMINATION - DISPARATE TREATMENT

In determining if JNOV was proper on plaintiff Randall's claim against Colton, I note that the theory for liability brought against Colton was that she discriminated against plaintiff Randall because of race in determining that he should receive no merit pay for calendar year 1991. If proven, Colton's conduct would be causally linked to his discharge because merit pay was used in the CRESP process to determine if an employee should be placed in Stage II for further evaluation.

Although plaintiff Randall argues on appeal that direct evidence of racial discrimination was proven at trial, I find no record support for this argument. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employment decision. *Harrison, supra* at 610. The disparate treatment theory of intentional race discrimination claimed by plaintiff Randall gives rise to the three-stage method of proof, which affords a plaintiff the ability to establish a prima facie case of discrimination with the aid of a presumption. *Meagher, supra* at 709-710.

"Prima facie case" in this context does not mean that a plaintiff produced sufficient evidence to allow a case to go to a jury, but rather that enough evidence was produced to create a rebuttable presumption of discrimination based on the claimed impermissible factor. See *Lytle (On Rehearing), supra* at 173, and *Meagher, supra* at 710-711. Typically, under the disparate treatment method of proof applied to employment terminations, the plaintiff establishes the prima facie case by showing that he or she (1) was a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was discharged under circumstances giving rise to an inference of unlawful discrimination. *Lytle (On Rehearing), supra* at 172-173. As the term "prima facie" suggests there must at least be a logical connection between each element of the prima facie case and the illegal discrimination. *Meagher, supra* at 711.

If a prima facie case is established, the burden shifts to the defendant to articulate a legitimate nondiscriminatory reason for the employment action. *Lytle (On Rehearing), supra* at 173. If the

defendant produces such evidence, even if it is later refuted or disbelieved, the presumption drops away and the burden of proof shifts back to plaintiff. *Id.* at 174. Plaintiff must then show that there was a triable issue that the defendant's proffered reasons were not true reasons, but rather a pretext for discrimination. *Id.* at 174. In the context of a motion for summary disposition under MCR 2.116(C)(10), this burden is met when the plaintiff presents "admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.* at 176. Plaintiff must present sufficient admissible evidence to create a reasonable factual dispute that the proffered reason for the employment action was a mere pretext and that discrimination based on the impermissible factor was a true motivation behind the employment action. *Id.* at 157.

Although the instant case involved a motion for JNOV, the test in *Lytle (On Rehearing)* is appropriate because a motion for JNOV, like a motion for summary disposition under MCR 2.116(C)(10), is subject to de novo review and is only appropriate if the claim is insupportable at trial. *Cf. Lytle (On Rehearing), supra* at 176-177, to *Forge, supra* at 204. The only significant difference is that the motion for JNOV is decided with the benefit of the full factual development on the plaintiff's case presented at trial. It is not a pretrial motion that is viewed liberally by a court to determine if a genuine issue of material fact is shown. *Lytle (On Rehearing), supra* at 176-177.

Because this is a reduction in work force case, I have assumed that plaintiff Randall established a prima facie case of race discrimination arising from his discharge by establishing his membership in a protected class [African-American], an adverse employment action [plaintiff Randall was discharged], his qualifications for the position, and the retention of similarly situated Caucasian employees by ASI. I also believe that ASI effectively rebutted the presumption of discrimination with the evidence on the reduction in force explanation for plaintiff Randall's discharge. *Cf. Lytle v Malady*, 456 Mich 1, 34; 566 NW2d 582 (1997) wherein Justice Riley relied on *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986), as standing for the proposition that, "in the context of an RIF we assume that the burdens of production required by the parties under the approach have already been met. As a result, because the burden of production has been satisfied, all its presumptions 'drop out' . . . ." See also *Matras, supra* at 684 (in a reduction in force case, sufficient evidence must be presented on the ultimate question of whether the unlawful consideration was a determining factor in the decision to discharge).

However, the factual circumstances of this case are unusual because, while plaintiff Randall's prima facie case of race discrimination claim against Colton arises from the termination of his employment under the CRESP process, plaintiff Randall attempts to causally link Colton to the termination by attacking her decision that he receive no merit pay for calendar year 1991. Thus, it is necessary that plaintiff Randall establish race discrimination in the determination of that merit pay. Colton's proffered reasons for no merit pay must be considered in analyzing this claim, which included evidence that, while plaintiff Randall's work in the latter part of 1991 was satisfactory, plaintiff Randall was a recent transferee to her Problem and Change Management Control Center (PCMCC) group and plaintiff Randall's supervisor before the transfer did not recommend merit pay for calendar year 1991. I

will assume for purposes of analysis that, as with the broader CRESP process that underlies plaintiff Randall's claim, that the proofs were sufficient for all presumptions to drop out.

The dispositive question before us concerns the third stage of the disparate treatment test addressed in *Lytle (On Rehearing)*. Hence, determinations are required regarding whether plaintiff Randall presented sufficient admissible evidence to create a reasonable factual dispute on whether Colton's proffered reason for no merit pay was a mere pretext and whether race discrimination was a true motivation behind her recommendation. Viewing the evidence in a light most favorably to plaintiff Randall, I would hold that he failed to meet this burden. Even if the jury disbelieved Colton's testimony that she relied on the recommendation of plaintiff Randall's prior supervisor, plaintiff Randall would be left with entirely circumstantial and comparative evidence about a small group of employees in the PCMCC whose merit pay was determined by Colton. Neither the evidence on how Colton assigned work to employees having the same salary grade as plaintiff Randall, nor the evidence on the merit pay received by the other employees for calendar year 1991, reasonably infers that race discrimination was a true motivation for Colton's determination that plaintiff Randall should receive no merit pay.

Viewed most favorably to plaintiffs, the evidence established that both African-American and Caucasian employees received merit pay, but that Colton determined that certain male employees of both races should receive no merit pay. The employee receiving the highest merit pay of $2,400 in plaintiff Randall's salary grade was a Caucasian female who assisted Colton develop a standard for change management in the PCMCC. A Caucasian male employee, who helped develop standards in problem management, received the second highest merit pay of $1,800. The other female employees, all of whom were Caucasian, received merit pay, but there was some testimony that females were assigned to visible jobs that result in more merit pay. Although male employees also received merit pay, one Caucasian male [Leon Terry] and two African-American males [plaintiff Randall and Kenneth McClendon] received no merit pay. McClendon, like plaintiff Randall, transferred to the PCMCC during the latter part of 1991. There was no evidence of other employees transferring into the PCMCC during 1991 under circumstances similar to McClendon and Randall.

Although these proofs as a whole may raise a question on whether Colton had an inclination to favor female employees during calendar year 1991, I would conclude that reasonable persons could not find that race was a determining factor in how Colton determined merit pay. Hence, I would reverse the trial court's denial of JNOV as to defendant Colton. [1] Plaintiff presented insufficient evidence to submit Randall's race discrimination claim to the jury.

With regard to plaintiff Randall's race discrimination claim against ASI, I believe that the trial court erred in denying JNOV in favor of ASI to the extent that the jury's finding that ASI intentionally discriminated against plaintiff Randall based on race may have been based on Colton's conduct. Further, I am not persuaded that plaintiff Randall presented any theory of race discrimination against ASI at the trial, independent of Colton's conduct, that established an issue of fact for the jury. Although there was exhibit evidence of a letter addressed to an Ameritech Bell Group president, which stated that it was from "employees of ASI/IT" and expressed concerns about the treatment of minority employees, the trial record does not establish that the concerns expressed in that letter were offered and admissible as substantive evidence of the truth of the matters asserted consistent with the Michigan Rules of

Evidence. See eg., MRE 801 *et seq*. Without this showing, neither the letter, nor any legitimate inferences that could be drawn from it, established sufficient admissible evidence to create a reasonable factual dispute on race discrimination for the jury.

Further, I am not persuaded that plaintiff Randall's layperson analysis on certain documentation on merit pay for 1990 and 1991 was sufficient admissible evidence to establish a reasonable factual dispute for the jury. Plaintiff Randall's testimony reflects that he reviewed the documentation to identify younger male employees with less merit pay than he received for 1990 and 1991. Although plaintiff Randall did not use race to identify employees whom he believed were treated differently than he was for purposes of being placed in Stage II, plaintiff Randall's testimony indicates that most of the younger males he identified were Caucasian. Plaintiff Randall argues that this evidence creates an issue for the jury on race discrimination.

Plaintiff Randall's argument is similar to his theory raised with regard Colton's determination of merit pay because plaintiff Randall is attempting to establish race discrimination relative to the point where he was placed in Stage II and then to causally link that discrimination to the discharge decision. But for his placement in Stage II, plaintiff Randall's theory is that he would not have been discharged. At the same time, plaintiff Randall's argument is distinguishable from his theory raised with regard to Colton because plaintiff Randall's layperson analysis was limited to numerical information (e.g., how much merit pay was received and the percentage of target that merit pay represents) and traits (e.g., age and gender) about employees having the same salary grade as he did within the larger IT organization. Plaintiff Randall did not make an individualized and fact-specific analysis of the employees' situation in the smaller units within the IT organization where they were assigned to work. Where, as in this case, an attempt is made to have the jury infer race discrimination from such numerical information, it is incumbent upon the plaintiff to establish its statistical value.

While statistical evidence can be used to prove a claim of disparate treatment, *Phelps v Yale Security, Inc*, 986 F2d 1020, 1023 (CA 6, 1993), and *Dixon v W W Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1987), there are many ways to assess the significance or relevancy of statistic evidence. For instance, a question can be raised on whether proper groups were used for a comparison. See *Abbott v Federal Forge, Inc*, 912 F2d 867 (CA 6, 1990) (discussing the use of statistic evidence in a disparate impact case). Courts decide on a case-by-case basis if the statistics are up to the task. *Id.*

In the case at bar, plaintiff Randall's layperson analysis was not shown to have statistical significance and no expert testimony was presented to establish same. Further, plaintiff Randall's layperson analysis was not relevant because it was based on age and gender, rather than race. A reasonable juror could not infer from plaintiff Randall's layperson analysis of the documentation that race discrimination was a determining factor in the decision to have plaintiff Randall placed in Stage II. Plaintiff Randall also failed to otherwise establish any conduct on the part of ASI which supports a reasonable inference that he was discharged because of his race. Therefore, I would hold, as a matter of law, that the trial court erred in denying ASI's motion for JNOV on plaintiff Randall's race discrimination claim

Similarly, with regard to plaintiff Jones' race discrimination claim against ASI, I would find that plaintiff Jones established no reasonable factual dispute for the jury on her claim. Like plaintiff Randall, plaintiff Jones attempted to show that a prior supervisor [William Oliver] engaged in race discrimination when determining that she should receive no merit pay for one of the calendar years [1990] used in the CRESP process to determine if employees should be placed in Stage II. However, viewed most favorably to plaintiff Jones, she did not present sufficient admissible evidence from which reasonable minds could infer that Oliver treated her differently from other employees within his group, because of race, when determining merit pay or that race discrimination was otherwise a true motivation behind his decision.

Finally, as with plaintiff Randall, I would find that plaintiff Jones has not established any theory of race discrimination against ASI, independent of Oliver's conduct, that established an issue of fact for the jury. Hence, I would reverse the trial court's denial of ASI's motion for JNOV on plaintiff Jones' claim of race discrimination.

B. AGE DISCRIMINATION - DISPARATE TREATMENT

I next address whether the trial court erred in denying JNOV as to both plaintiffs based on a disparate treatment method of proving age discrimination. Unlike the race discrimination theories, plaintiffs' age discrimination case rested largely on statistical evidence presented by their expert witness. Although statistical evidence can be relevant in establishing a prima facie case or that proffered reasons for a defendant's conduct are pretextual, *Dixon, supra* at 118, in this case, plaintiffs' statistical evidence was insufficient to create a reasonable factual dispute for the jury.

Plaintiffs did not establish the prima facie case for age discrimination set forth in *Lytle (On Rehearing), supra* at 177, because they did not present evidence that they were replaced by younger employees. However, even assuming that plaintiffs sufficiently established some other circumstance giving rise to an inference of unlawful age discrimination so as to establish a prima facie case, they did not meet the standards at the third stage of proof to establish that the CRESP reduction-in-force process was a mere pretext to discriminate and that age discrimination was the true motivation behind their discharge.

Statistical evidence that fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext. See *Furr v Seagate Technology, Inc*, 82 F3d 980, 986 (CA 10, 1996) (discussing intentional age discrimination claim under the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 *et seq.*). When an employment decision is based upon an age-correlated but analytically distinct factor, there must be additional evidence that the employer was motivated by discriminatory animus. *Bramble v American Postal Workers Union*, 135 F3d 21, 26 (CA 1, 1998), and *Hazen Paper Co v Biggins*, 507 US 604; 113 S Ct 1701; 123 L Ed 2d 338 (1993). "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with age." *Hazen Paper Co, supra*, 507 US at 609. Employees are to be evaluated on their merits, and not their age. *Id.* at 610-611. However, the mere use of subjective criteria will not prove intentional age discrimination. *Furr, supra* at 987.

The statistical evidence presented by plaintiffs' expert, standing alone, does not infer that age was a determining factor in the decision to discharge plaintiffs because the correlation that he drew between age and termination merely shows that CRESP had a disproportionate effect on employees who were forty years of age or older. It did not infer that age was a criterion applied within ASI to determine the merit pay used to rank employees for the CRESP process. Nor did it infer that ASI decided merit pay based on age, rather than performance.

Weighing against finding a reasonable factual dispute for the jury is the evidence that plaintiffs' ages were very close to the forty-year division used by their expert to analyze the impact of age. Indeed, while plaintiffs' expert charted the correlation between terminations and age in ten-year increments for plaintiff's' salary grade in the IT organization at ASI, the only substantial disparity shown was for employees in their fifties where the termination rate reached forty percent. The small group of employees in their sixties had a termination rate of zero percent, while the termination rate for larger groups of employees in the thirties and forties were 20.5 and 22.8 percent, respectively. Because discrimination based on age, and not class membership, is prohibited, substantial age differences would have been a more reliable indicator of intentional age discrimination. *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 312-313; 116 S Ct 1307; 134 L Ed 2d 433 (1996).

In sum, because plaintiffs' expert conducted a single-factor analysis based on age and plaintiffs' ages were close to the forty-year line drawn by plaintiffs' expert for their "protected class," I believe the statistical evidence was insufficient to create a reasonable factual dispute for the jury on age discrimination, even assuming that a prima facie case was established. Thus, the trial court should have granted JNOV on this method of proof.

C. AGE DISCRIMINATION - DISPARATE IMPACT

Finally, I find merit in ASI's claim that the trial court erred in denying its motion for JNOV as to both plaintiffs based on a disparate impact method of proving age discrimination. For purposes of this issue, I have assumed that a disparate impact method of proof is cognizable under MCL 37.2202, MSA 3.548(202) for age discrimination, consistent with Michigan cases that have recognized this method of proof, albeit, the cases do not involve circumstances where evidence was found to support the legal theory. *Lytle (On Rehearing), supra* at 177 n 26; *Meagher, supra* at 708-709.[2]

A disparate impact theory differs from a disparate treatment because no discriminatory motive is required. *Smith v Consolidated Rail Corp*, 168 Mich App 773, 776; 425 NW2d 220 (1988). Disparate impact involves employment practices that are facially neutral in their treatment of different groups but, in fact, fall more harshly on one group than on another and cannot be justified by business necessity. *Id*. at 776. However, a completely neutral practice will always have a disparate impact on some group, and discrimination need not always be inferred from such consequences. *Id.* at 776.

Looking for guidance to how a disparate impact test has been applied to age discrimination when that test has been recognized as a cognizable method of proof for the ADEA, 29 USC 623, I conclude that plaintiffs' proofs do not meet the threshold requirements for establishing a prima facie case based on statistical evidence and, accordingly, reverse the denial of ASI's motion for JNOV based on

this method of proof. To establish the prima facie case, a plaintiff must identify a specific employment practice used by the employer. *Abbott, supra* at 872. Next, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that that the employment practice caused an adverse effect because plaintiffs were in a protected group. *Id.* at 872. As with any prima facie case, there must be at least a logical connection between the elements of the prima facie case and the illegal discrimination to establish "a legally mandatory, rebuttable presumption." *Meagher, supra* at 711, citing *O'Conner, supra*.

The employment practice in the case at bar was the CRESP reduction-in-force process, and the protected age group was identified as persons who were forty years and older. However, the adverse effect (discharge) was correlated with age by plaintiffs' expert without taking into account nondiscriminatory explanations for the CRESP process. Plaintiffs' expert also failed to show a substantial disparity between plaintiffs' ages and the line drawn for his analysis at forty years. Viewed most favorably to plaintiffs, this is insufficient statistical evidence, in kind and degree, to show that the CRESP process caused plaintiffs' discharge because they were over forty years of age. Hence, because plaintiffs did not prove a prima facie case of disparate impact, the trial court erred in denying JNOV on the disparate impact method of proof. There was insufficient evidence to have the jury consider this claim.

IV.

Finally, I address defendants' argument that the trial court improperly read SJI2d 6.01 to the jury. In the event a party fails to produce a witness or piece of evidence, this instruction permits the jury to "infer that the evidence would have been adverse" to the nonproducing party. The court gave SJI2d 6.01 for defendants' failure to produce certain records on anomalies used to exclude employees from Stage II evaluations in the CRESP process. In the absence of other evidence supporting plaintiffs' race and age discrimination claims, the adverse inference instruction alone is insufficient to create a triable issue for a jury. *Cf. Stanojev v Ebasco Services, Inc*, 643 F2d 914, 924 n 7 (CA 2, 1981), wherein the second circuit observed the following when finding that an adverse inference instruction for an employer's nonproduction of certain personnel records did not alone support an inference of age discrimination:

> If it were assumed that the other evidence was sufficient to make out a prima facie case, the jury could have been allowed to draw such an adverse inference. See *San Antonio v Timko*, 368 F2d 983, 985 (CA 2, 1966). But that inference could not serve to supply the missing element of a prima facie case, namely, replacement of Stanojev by a younger employee or keeping the post open to receive one.
>
> The charge was not helpful because it did not say what inference could be drawn. Considering what inference may be drawn in the analogous case of failure of a party to call a witness that would ordinarily be favorable to him, Judge Friendly made the perspicacious observation:

> It would have been more accurate to characterize the inference . . . as permitting the jury "to give the strongest weight to the evidence already in the case in favor of the other side . . . ." The jury should not be encouraged to base its verdict on what it speculates the absent witnesses would have testified to, in the absence of some direct evidence. *Felice v Long Island Railroad Co*, 426 F2d 192, 195 n 2 (CA 2, 1970), cert den 400 US 820; 91 S Ct 37; 27 L Ed 2d 47 (1970) (citations omitted).

It is my belief that the adverse inference permitted by SJI2d 6.01 cannot by itself preclude JNOV for defendants regarding plaintiffs' race and age discrimination claims.

The defendants-appellants were entitled to JNOV on all of plaintiffs' methods of proof for establishing liability, and therefore I find it unnecessary to address the remaining issues raised by the defendants-appellants.

I would reverse.

/s/ Hilda R. Gage

[1] Although Colton served on the committee that evaluated plaintiffs' performance in Stage II of the CRESP progress, plaintiff Randall also failed to present evidence at trial to establish a claim of race discrimination against Colton based on this conduct.

[2] My resolution of this issue makes it unnecessary to address ASI's claim, which has been raised in the context of a challenge to the trial court's denial of a motion for summary disposition, that a disparate impact method of proving age discrimination should not be recognized in Michigan as a matter of law. I note that Michigan courts have looked to § 703 of Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2, for guidance in construing Michigan's statute, MCL 37.2202; MSA 3.548(202), because it is modeled after §703 of Title VII. *Farmington Education Ass'n v Farmington School Dist*, 133 Mich App 566, 575; 351 NW2d 242 (1984). However, a significant difference between these statutes is that Title VII does not address age discrimination. Age discrimination is the subject matter of the ADEA, 29 USC 623. Differences between the ADEA and Tittle VII is a factor that caused at least one federal court to conclude that a disparate impact theory is not cognizable under the ADEA. See *Ellis v United Airlines, Inc*, 73 F3d 999 (CA 10, 1996). This rationale is not easily extended to MCL 37.2202; MSA 3.548(202) because Michigan has a single statute covering discrimination based on race, age and other unlawful considerations. At the same time, there is nothing in MCL 37.2202; MSA 3.548(202) to foreclose taking into account the distinctions between the various unlawful considerations listed in the statute. As was observed in *Ellis, supra* at 1009, a disparate impact analysis in race cases is not easily extended to age cases given that challenged facially neutral factors almost certainly will generate different impacts for different age groups because each point in the life cycle tends to be associated with different distributions. Further, as was noted in *Meagher, supra at* 710, what suffices in one factual situation may be inadequate in other factual situations to meet the burden of proof. Hence, as long as a disparate impact theory continues to be recognized as a possible method of proof for any of the unlawful considerations in MCL 37.2202; MSA 3.548(202), I believe that it is

appropriate to resolve the issue on a case by case basis, rather than to dismiss a particular method of proof as a matter of law.