STATE OF MICHIGAN

COURT OF APPEALS

DENNIS E. HOLTON,

Plaintiff-Appellant,

v

LOBDELL EMERY CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 9, 2000

No. 211298
Gratiot Circuit Court
LC No. 96-004183 CZ

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

In this action alleging age discrimination, plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff was terminated from employment on September 7, 1993, having worked for defendant since 1963. Plaintiff subsequently filed the instant lawsuit, claiming that his employment was terminated based on his age, in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Plaintiff was fifty years old at the time he was discharged. The trial court granted defendant's motion for summary disposition, finding that while plaintiff established a prima facie case of age discrimination, he did not present sufficient evidence to show that defendant's proffered reason for terminating plaintiff, a reduction in work force, was a pretext for discrimination.

This Court reviews the grant or denial of a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim in light of the pleadings, affidavits, depositions, admissions, and other documentary evidence available to the court. *Id.* Drawing all inferences in favor of the nonmoving party, summary disposition under MCR 2.116(C)(10) should be denied if a record might be developed that will leave open an issue on which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995); *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

Michigan's Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), provides in relevant part:

(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 religion, race, color, national origin, age, sex, height, weight, or marital status.

To establish a prima facie case of discrimination, the plaintiff must show by a preponderance of the evidence that: (1) he was a member of a protected class, here, age; (2) he suffered an adverse employment action, here, discharge; (3) he was qualified for the position; and (4) he was discharged under circumstances inferring unlawful discrimination, for example, being replaced by a younger worker. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Under the *McDonnell Douglas* burden-shifting analysis, where a plaintiff presents circumstantial evidence of unlawful discrimination sufficient to constitute a prima facie case, a rebuttable presumption arises that the defendant acted due to a discriminatory animus, and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Harrison, supra* at 607-608. If that articulation is made, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the defendant's articulated reason was a mere pretext for discrimination. *Id.* at 608.

However, the *McDonnell Douglas* burden-shifting analysis does not apply in cases where the plaintiff presents direct evidence of his employer's discriminatory animus:

> [W]hile the *McDonnell Douglas* burden-shifting analysis is appropriate in cases without direct evidence of discrimination, this case presents a different situation. Federal case law holds, and we agree, that the *McDonnell Douglas* evidentiary framework does not apply when a plaintiff presents direct evidence of discriminatory animus. [*Harrison, supra* at 609.][1]

The *Harrison* Court further described what constitutes direct evidence of discrimination:

> "Direct evidence" has been defined in the Sixth Circuit Court of Appeals as evidence that, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor' [in the adverse employment decision.] For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination that is 'sufficient to get the plaintiff's case to the jury.' [*Id.* at 610, quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327 (WD Mich, 1997); citations omitted.][2]

In the present case, plaintiff provided direct evidence of discrimination with deposition testimony indicating that age may have been a motivating factor in the plant manager's decision to fire plaintiff. This testimony included statements indicating a preference for young, single females; statements indicating a belief that older workers could not learn and that age interfered with performance; statements that the plant needed some "new blood" and "new faces" and that the individuals being terminated had been there too long; and testimony that younger workers may have received preferential

treatment. The evidence before the trial court also indicated that plaintiff's actual qualifications to perform the job as restructured were not even considered.

Direct proof of discriminatory animus ordinarily precludes a grant of summary disposition. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 807; 584 NW2d 589 (1998), vacated on other grounds 230 Mich App 801 (1998), adopted in relevant part by *Lamoria v Health Care & Retirement Corp*, 233 Mich App 560; 593 NW2d 699 (1999). In light of plaintiff's direct evidence of age-based discriminatory animus by defendant, plaintiff presented sufficient evidence to raise a genuine issue of material fact regarding whether he was discharged by defendant because of his age. Accordingly, summary disposition was improper. See *Lamoria, supra* at 810-811; *Harrison, supra* at 612-613.

Defendant alternatively argues that plaintiff failed to meet his initial burden of establishing a prima facie case. In the absence of a cross-appeal, defendant's claim is not properly before this Court. *Bhama v Bhama*, 169 Mich App 73, 83; 425 NW2d 733 (1988).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh

[1] Direct evidence of discrimination removes the case from *McDonnell Douglas* because the plaintiff no longer requires the inference of discrimination provided by the *McDonnell Douglas* "presumptive" prima facie case. *Harrison, supra* at 610, n 10, citing *Terbovitz v Fiscal Court of Adair Co, Kentucky*, 825 F2d 111, 114-115 (CA 6, 1987).

[2] Cases involving direct evidence of discriminatory animus are sometimes called "mixed motives" cases in light of the presentation of such evidence by the alleged victim of discrimination ordinarily coupled with the presentation of other evidence by the employer of legally permissible motives for an adverse employment-related decision. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 807; 584 NW2d 589 (1998), vacated on other grounds 230 Mich App 801 (1998), adopted in relevant part by *Lamoria v Health Care & Retirement Corp*, 233 Mich App 560; 593 NW2d 6994 (1999); *Harrison, supra* at 610.