STATE OF MICHIGAN

COURT OF APPEALS

PAUL E. MATHESON,

Plaintiff-Appellee/Cross-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
August 7, 2001

No. 213957
Ingham Circuit Court
LC No. 96-083519-NZ

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Defendant General Motors Corporation appeals as of right from a judgment in favor of plaintiff Paul E. Matheson following a jury trial in this age discrimination case brought pursuant to the Civil Rights Act (CRA).[1] Matheson cross-appeals as of right challenging an order partially granting and partially denying General Motors' motion for summary disposition under MCR 2.116(C)(10). Matheson also challenges the trial court's decision to award him what he considers an inadequate amount for attorney fees pursuant to MCL 37.2802. We affirm in part and reverse in part.

I. Basic Facts And Procedural History

In early December 1976, Matheson began working at General Motors' Lansing plant as a general laborer. Five months later, Matheson applied for a blacksmith apprenticeship, which General Motors awarded to him in mid-April 1977. In early November 1980, after Matheson completed the apprenticeship program, he began working for General Motors as a journeyman blacksmith. Matheson remained a journeyman blacksmith until April 1, 1990, when he resigned early under General Motor's Voluntary Termination of Employment Program (VTEP) in return for a lump sum payment of $40,000.[2] When he resigned at age forty-four under the VTEP,

[1] MCL 37.2101 *et seq*.

[2] General Motors evidently offered the VTEP to all its hourly employees in order to reduce its workforce.

Matheson claimed, he thought he could return to work for General Motors, but not as a journeyman blacksmith.

Approximately two years after he resigned, Matheson went to General Motor's Lansing apprenticeship office to apply for a sheet metal, wood model making, or carpentry apprenticeship position. According to Matheson, he asked Larry Ford, an associate coordinator of technical training at the Lansing apprenticeship office, for an application. Matheson filled out the application and stated that he had previously worked for General Motors as a journeyman blacksmith. However, Matheson did not reveal his age (then forty-six) on the application and, under the section entitled "reason for leaving," Matheson wrote that he had left his job for personal reasons. Ford reportedly stated that someone would contact him regarding the date of the next test and when to schedule an interview with the Lansing apprenticeship committee.[3] A few months later, Matheson took the test and had an interview with the apprenticeship committee, during which, he claimed, he discussed his General Motors employment history.

An individual named Melcher, who was forty-three years old, earned the highest cumulative score of seventy-two points on the test and in the interview. Forty-six-year-old Matheson earned the second highest cumulative score of seventy points. An individual named Debo,[4] who was forty-four years old, and Rebecca Johnson, who was thirty-five years old, also earned cumulative scores of seventy points. However, General Motors placed Debo and Johnson below Matheson on the selection list according to "tiebreaker" rules, which allegedly had nothing to do with the candidates' respective qualifications.

After Melcher did not fill the sheet metal apprenticeship position, Ford offered Matheson the job in June 1993 because he was the next candidate for the job. At the time Matheson accepted the offer, Ford said, he did not know Matheson's age, nor the next candidate's age. Despite this exchange of offer and acceptance, Dave Purchase, an apprentice coordinator and member of the Lansing apprentice committee, telephoned Matheson shortly thereafter to rescind the employment offer because Matheson had resigned under the VTEP. General Motors ultimately gave the sheet metal apprenticeship position to Johnson.

When Matheson filed suit, he alleged that General Motors' policy against rehiring former employees who had resigned under the VTEP treated employees differently based on their age and that the policy also had a disparate impact on older employees. Before trial, the trial court granted General Motors motion for summary disposition of Matheson's disparate impact claim under MCR 2.116(C)(10), but allowed him to submit the disparate treatment claim to the jury.

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[3] Apparently, General Motors awarded apprenticeships based on the scores a candidate received on a test and in a graded interview. The candidate with the highest score received the first job offer. If the first candidate declined the position, General Motors offered the position to the candidate with the next highest score until it filled the position.

[4] We are unable to ascertain Debo or Melcher's first names from the record.

At trial, a number of General Motors employees who had also resigned under the VTEP and had been rehired testified on behalf of Matheson. For instance, John Geller testified that in July 1991, at age thirty-six, General Motors' Lansing plant rehired him as a toolmaker apprentice. Jacqueline Newberry testified that she was thirty-one years old when General Motors' Toledo plant rehired her as an electrical apprentice in July 1990. James Walker stated that, in February 1994, General Motors' Pontiac plant rehired him as a salaried employee; he was twenty-nine years old at the time. John Strudwick said that General Motors' Flint plant rehired him as a security officer in January 1989, when he was thirty-seven years old.

When Purchase testified, he noted that he was not involved in the Lansing plant's decision to rehire Geller. Further, he was not involved in the decisions to rehire Newberry, Strudwick, and Walker at the other plants. Purchase also explained why he had rescinded the job offer Ford had extended to Matheson. Purchase said that Ford had originally offered the job to Matheson while he, Purchase, was vacationing. When he returned from vacation he learned about the employment offer and Matheson's previous resignation under the VTEP. Purchase was aware of General Motors' employment policy, which prohibited rehiring an employee who had previously resigned under the VTEP unless there were special circumstances. The VTEP stated:

> [A person who has resigned under the VTEP] should not be given consideration for reemployment except under unusual circumstances where the employee is the only qualified candidate available. Should such unusual circumstances arise, please discuss the matter with Employment Relations and Job Security Section prior to making the job offer.

Because he was fairly new to the job and had no experience with this type of situation, Purchase reviewed the pertinent collective bargaining agreement and thought that his next step was to contact the national skilled trades apprentice committee. Accordingly, Purchase called Terry McDougall, assistant director of labor relations for North American operations in Detroit, and told him about the situation, explaining that special circumstances did not exist for General Motors to rehire Matheson. In response, McDougall reportedly told him to contact Matheson and rescind the employment offer. Purchase claimed that did not know Matheson's age, which was consistent with Ford's testimony. Further, Purchase said, he did not discuss Matheson's age with McDougall during their conversation. He was also unaware of the identity of the next candidate on the selection list and did not discuss that person with McDougall. Purchase stated that General Motors ultimately gave the position to Johnson because Debo, the next candidate on the selection list, had declined to accept the position.

McDougall, who had helped to implement certain aspects of the VTEP, testified that, before 1993, General Motors did not have a computer or data system that allowed it to determine whether a person seeking reemployment had previously resigned under the VTEP or whether General Motors had discharged the person. One of McDougall's responsibilities was to ensure that General Motors did not rehire a person who had resigned under the VTEP unless there were special circumstances, which existed only when the candidate for the job had a unique skill. He could not remember any other local apprentice committee contacting him about rehiring an employee who had previously resigned under the VTEP. Like Purchase, McDougall said that he

did not know Matheson's age and did not discuss it with Purchase during their conversation. Nor did he know or discuss the identity of the next candidate on the selection list. McDougall added that, before 1996, federal law allowed General Motors to limit apprenticeship positions by age. General Motors had done so in some states, but had not limited apprenticeship positions by age in Michigan because doing so was illegal.

Kenneth Gallinger, director of industrial relations for General Motors' Lansing small car group, testified that one of his responsibilities was to implement certain aspects of the VTEP regarding the hourly workforce. Gallinger stated that he spoke with McDougall about the situation and ordered Purchase to contact Matheson and rescind the employment offer. Gallinger said that he did not know Matheson's age and did not discuss it with McDougall during their conversation. Gallinger conceded that he learned that the Lansing plant had rehired Geller as a toolmaker's apprentice, but said that he was not involved in that decision and that he did not know Geller's age when he was rehired. Furthermore, Gallinger said, although he had the authority to terminate Geller's employment, he did not do so because Geller had been working as an apprentice for approximately eighteen months and Gallinger did not want to "go back and unscramble the omlet [sic], so to speak." Gallinger also clarified that he was not involved in General Motor's decision to rehire Newberry, Walker, or Strudwick at the other plants.

Apprenticeship office clerk Shirley Shelton testified that she heard Ford state that Matheson was claiming his age was a factor in General Motors' decision not to rehire him as sheet metal apprentice. Shelton, however, had never heard anyone at the Lansing apprenticeship office state that Matheson's age was a factor in the employment decision.

Plaintiff's witness Joe Darden, Ph.D., who had a doctorate in geography and extensive experience in statistical and quantitative analysis, analyzed whether General Motors' employment policy of not rehiring an employee who had previously resigned under the VTEP, unless there were unusual circumstances, had a disparate impact on employees over forty years old. Darden did not consider (1) the age of the employees who were eligible to resign under the VTEP but did not do so, (2) the number of employees who had resigned under the VTEP who wanted to return to General Motors and had applied for work there, or (3) the number of older employees General Motors actually rehired. Darden concluded that the VTEP had a "slight" disparate impact on older employees.

General Motors moved for a directed verdict on the remaining disparate treatment claim, but the trial court denied the motion. The jury returned a verdict in favor of Matheson, awarding him (1) $98,635 for past economic damages, (2) $407,029 for future economic damages, and (3) $50,000 for past mental and emotional distress. The trial court also denied General Motors' postverdict motion for judgment notwithstanding the verdict (JNOV). Subsequently, Matheson moved for attorney fees totaling $201,525 pursuant to MCL 37.2802, but the trial court limited the attorney fees award to $30,000, which permits a trial court to "award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate."

II. Disparate Treatment

A. Standard Of Review

General Motors argues that the trial court erred in denying its motions for directed verdict and for JNOV or new trial[5] on Matheson's disparate treatment claim because the evidence was insufficient for a reasonable jury to conclude that Matheson's age was a motivating factor in its decision not to rehire him as a sheet metal apprentice. This Court reviews de novo a trial court's ruling on a motion for JNOV or a directed verdict.[6]

B. Legal Standards

In reviewing a trial court's denial of JNOV or a directed verdict, this Court examines the testimony and all legitimate inferences therefrom in the light most favorable to the plaintiff.[7] A trial court should grant a motion for JNOV only when there was insufficient evidence to create a factual dispute.[8] Thus, the evidence adduced at trial must be viewed in the statutory framework of the CRA to determine whether there was a question of fact related to one or more elements of proof in this sort of claim for the jury to decide.

The CRA[9] prohibits an employer from discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . , age . . . ." Plaintiffs are free to use ordinary principles of proof and to rely on direct or indirect evidence of discrimination to demonstrate that the defendant violated the CRA.[10] Alternatively, however, a plaintiff may rely on a burden-shifting scheme that uses specific presumptions to prove this discrimination.[11] To establish a prima facie case of disparate treatment discrimination,[12] as opposed to disparate impact discrimination,[13] under this alternative burden shifting scheme,

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[5] General Motors alternatively moved for a new trial. Because of the way we analyze this issue, it is not necessary for us to determine whether the trial court abused its discretion in denying the motion for a new trial. See, generally, *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997).

[6] *Abke v Vandeberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

[7] *Id*.

[8] *Id*.

[9] MCL 37.2202(1)(a).

[10] *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).

[11] *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

[12] Disparate treatment discrimination is also often called intentional discrimination. See *Hall v McRea*, 238 Mich App 361, 370; 605 NW2d 354 (1999).

[13] *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

> a plaintiff must prove by a preponderance of the evidence that (1) [the plaintiff] was a member of the protected class, (2) [the plaintiff] suffered an adverse employment action, (3) [the plaintiff] was qualified for the position, and (4) [the plaintiff] was discharged under circumstances that give rise to an inference of unlawful discrimination.[14]

A plaintiff passes this first element by demonstrating that he or she is in the age group against which the employer discriminates.[15] Proof of the second and third elements depend on the circumstances of the case. One way to satisfy the fourth element of the test is to provide evidence that compares the plaintiff, who is a member of a protected class, and "others similarly situated and outside the protected class, [who] were unaffected by the employer's adverse conduct."[16] In the context of an age discrimination claim, the plaintiff must prove that a younger person replaced him or her.[17] If the plaintiff satisfies each of these elements, a presumption of discrimination exists.[18]

When this presumption of discrimination exists, the burden then shifts to the defendant to articulate a "'legitimate, nondiscriminatory reason'" for the adverse employment action.[19] "Once the defendant produces such evidence, even if later refuted or disbelieved, the presumption drops away, and the burden of proof shifts back to plaintiff."[20] In order to meet this last burden of proof and prevail on the claim, the plaintiff must demonstrate that the legitimate, nondiscriminatory reason for the adverse employment action was "a mere pretext for discrimination."[21] By pretext, courts mean that the plaintiff must prove that "discriminatory animus" was a motivation[22] for the defendant's adverse employment action with respect to the

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[14] *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998) (Weaver, J.).

[15] Previously, this Court followed federal precedent that defined a protected class for age discrimination in the employment context as people between the ages forty and seventy. See *id.* at 177, n 26, quoting *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995); see also *Paulitch v Detroit Edison Co*, 208 Mich App 656, 658; 528 NW2d 200 (1995). Recently, however, this Court in *Zanni v Medaphis Physician Services Corp*, 240 Mich App 472, 476-477; 612 NW2d 845 (2000), determined that the protected class in an age discrimination case under the CRA does not have to fit those strict age limits.

[16] *Town*, *supra* at 695.

[17] *Lytle (On Rehearing)*, *supra* at 177.

[18] *Id*. at 173.

[19] *Id.*, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

[20] *Lytle (On Rehearing)*, *supra* at 174.

[21] *Id.*

[22] See, generally, *Plieth v St Raymond Church*, 210 Mich App 568, 572; 534 NW2d 164 (1995) ("Age need not be the only reason or main reason for the discharge, but it must be one of the reasons that made a difference in determining whether to discharge a person.").

plaintiff.[23] A plaintiff may prove pretext "directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered reason is not worthy of credence."[24]

C. Application

General Motors concedes that Matheson presented a prima facie case of age discrimination under his disparate treatment theory, creating the presumption of discrimination. Matheson proved he was a member of a protected class by demonstrating that he was forty-six years old, within the age class against which General Motors allegedly discriminated, at the time his dispute with General Motors arose. Matheson demonstrated that he suffered an adverse employment action when General Motors rescinded the offer for the sheet metal apprentice position. Matheson established that he was qualified for the position, noting that General Motors actually hired him for the position. Finally, Matheson proved that General Motors replaced him with Johnson, who is eleven years younger than him.

By proving this prima facie case, Matheson shifted the burden to General Motors to articulate a legitimate, nondiscriminatory reason for the adverse employment action to rebut the presumption of discrimination. General Motors claimed that it took this adverse employment action against Matheson because of the VTEP. General Motors presented testimony to the effect that the terms of the VTEP prohibit it, absent special circumstances, from rehiring individuals who had resigned under the VTEP. There is no question that Matheson had resigned under the VTEP. In the absence of an argument and proof that the VTEP exclusion did not apply to him because special circumstances justified General Motors' decision to rehire him, the proofs indicated that Matheson agreed to this limitation on rehiring.[25] More importantly, the VTEP is both legitimate and nondiscrimatory in that General Motors apparently offered the program to almost all its hourly employees.[26] This was a legitimate business objective. General Motors thus met its burden of articulating a legitimate, nondiscriminatory reason for its adverse employment action with respect to Matheson, shifting the burden back to Matheson to prove pretext.

For Matheson to prove pretext, he had to demonstrate that General Motors had not withdrawn the apprenticeship in order to enforce the VTEP's terms, but rather that the VTEP was a ruse for General Motors' intent not to hire a person who was within the protected class of older

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[23] *Lytle (On Rehearing), supra* at 174-175.

[24] *Balwinski v Bay City*, 168 Mich App 766, 768; 425 NW2d 218 (1988).

[25] Though Matheson claims that he was unaware of the VTEP limitation on rehiring, his knowledge of the VTEP's intricacies have no bearing on whether General Motors unlawfully discriminated against him on the basis of age.

[26] Employees with ten years of service who were between the ages of fifty-five and sixty-one years old and employees who were less than fifty-five years old with thirty years of service were not eligible under the VTEP. These limitations related to the opportunity to retire at age sixty-two or under a separate early retirement program.

workers. Matheson attempted to prove pretext by showing that General Motors actually rehired other, younger individuals, some of whom had resigned under the VTEP program at different plants.

While this evidence of different treatment was a critical component of proving pretext,[27] Matheson nevertheless failed to show that he was similarly situated to the other employees of General Motors to whom he compared himself. Johnson, the person General Motor hired for the position that Ford had offered Matheson, had not previously resigned under the VTEP at the time General Motors offered her the sheet metal apprenticeship position. Not only did the VTEP hiring limitation not apply to her specifically, her eligibility was entirely different from Matheson's because he had already resigned under the VTEP.

Even the other employees who had previously resigned under the VTEP and whom General Motors rehired had circumstances that were different from the circumstances surrounding Matheson. General Motors' Lansing plant did not rehire Newberry, Walker and Strudwick. It is not clear whether the special circumstances exception to the hiring limitation applied to them according to the needs of these other plants. While the record is not entirely clear on this point, if these other individuals met the "special circumstances" exception to the VTEP limitation on rehiring when Matheson did not, then General Motors simply applied the VTEP as it was written without discriminating against Matheson. For example, though there was evidence that when General Motors discovered that Geller had previously resigned under the VTEP, he was not discharged from his job because he had already been working for approximately eighteen months. In essence, his work with General Motors had created a special circumstance in that it would have been costly or impractical for General Motors to replace him. In contrast, Matheson was not yet entrenched in this new apprenticeship when General Motors rescinded its offer.

Additionally, contrary to Matheson's argument, Shelton did *not* testify that she heard someone at the Lansing apprenticeship office state that Matheson's age was a factor in the employment decision. Rather, she testified that she heard someone state that Matheson was *claiming* that age was a factor in the employment decision. Nor is it clear how General Motors would have considered Matheson's age when withdrawing the offer. Ford, Purchase, McDougall, and Gallinger each testified that they did not know Matheson's age. While Matheson did demonstrate that McDougall, Gallinger, and Purchase had access to General Motors' records from which they could have determined his age, there was, as General Motors points out, no evidence that they took advantage of that access.

General Motors also proffered uncontested evidence that, from March 1993 to July 1993, it gave apprenticeship positions to seven candidates who were over forty years old. One candidate was forty-seven years old, one year older than Matheson. Moreover, in July 1993, the same month that General Motors initially offered the sheet metal apprenticeship position to Matheson, it gave apprenticeship positions to five candidates who were over forty years old.

[27] See *Lytle (On Rehearing), supra* at 178.

Finally, General Motors gave the sheet metal apprenticeship position to Johnson because the next candidate on the selection list, who was only two years younger than Matheson, had declined to accept the position. Other than Johnson, all the candidates evidently were in the protected class.

We acknowledge that treating other members of a protected class favorably may be used to disguise intentional discrimination.[28] More importantly, General Motors' willingness to hire other members of Matheson's protected class would be of absolutely no value or consolation to him.[29] Similarly, General Motors' proper treatment of other older workers while discriminating against Matheson would not be justifiable in light of the fact that the CRA broadly protects people of all ages and is therefore intended to protect him as well.[30] Consequently, though General Motors' pattern of rehiring older workers does support the defense, we view this evidence in its limited context without elevating it to conclusive proof of nondiscrimination.

Taken as a whole, however, and even when viewing the evidence in Matheson's favor, each of these factors and pieces of evidence indicate that there was no question of fact for the jury to decide with regard to General Motors' alleged discriminatory animus. Therefore, we conclude the trial court erred in denying the motions for a directed verdict and JNOV.

III. Disparate Impact

A. Standard Of Review

In his cross-appeal, Matheson argues that the trial court erred in summarily disposing of his claim that enforcing the VTEP rehiring limitation was discriminatory because it had a disparate impact on older workers. We review de novo a trial court's decision to grant or deny summary disposition pursuant to MCR 2.116(C)(10).[31]

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[28] See, generally, *Brown v McLean*, 159 F3d 898, 905-906 (CA 4, 1998), citing *Jones v Western Geophysical Co*, 669 F2d 280, 284-285 (CA 5, 1982) (a plaintiff may not need to show that a person outside the protected class replaced him "where the employer's hiring of another person within the protected class is calculated to disguise its act of discrimination toward the plaintiff"); see also *Connecticut v Teal*, 457 US 440, 455; 102 S Ct 2525; 73 L Ed 2d 130 (1982) ("It is clear that Congress [in enacting Title VII] never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.").

[29] *Teal*, *supra* at 455, quoting *International Brotherhood of Teamsters v United States*, 431 US 324, 342; 97 S Ct 1843; 52 L Ed 2d 396 (1977) ("[I]rrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be 'of little comfort to the victims of . . . discrimination.'").

[30] See *Zanni*, *supra* at 476.

[31] *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

B. Legal Standards

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages. The deciding court must consider all the evidence, affidavits, pleadings, admissions, and other information available in the record.[32] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[33] Only if there is no factual dispute on any one or more elements of the prima facie case would summary disposition be appropriate.[34] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[35]

To survive summary disposition on his disparate impact claim, Matheson had to establish that there was a question of material fact[36] concerning whether General Motors had a discriminatory motive in enforcing the VTEP rehiring limitation.[37] Rather, Matheson had to demonstrate that a question of fact existed regarding whether (1) he was a member of a protected class, and (2) whether the VTEP, a facially neutral employment practice, burdened this protected class of persons more harshly than others.[38]

C. Quantitative Evidence

There is no dispute that Matheson's proofs met the first element of the test by indicating that he was a member of the class, persons over the age of forty, against which he claimed General Motors discriminated. However, he failed to create a question of fact regarding the second element.

Matheson relied on Darden's testimony and report to establish a quantitative basis for his claim that the VTEP discriminated against workers. Darden examined the age of 14,058 individuals who resigned under the VTEP, determining each individual's age as of a specific date. First, by determining the number of individuals of each age between twenty-eight years old

[32] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[33] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[34] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999); *Richardson v Michigan Humane Society*, 221 Mich App 526, 527-528; 561 NW2d 873 (1997).

[35] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[36] *Richardson*, *supra*.

[37] See *Dep't of Civil Rights v Brighton Area Schools*, 171 Mich App 428, 438; 431 NW2d 65 (1988), quoting *Smith v Consolidated Rail Corp*, 168 Mich App 773, 776; 425 NW2d 220 (1988).

[38] *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 329-330; 559 NW2d 86 (1996).

and seventy-five years old, Darden created a frequency distribution. Darden then calculated the mean age of those who resigned under the VTEP by adding their ages and dividing by 14,058, the total number of individuals who resigned. The mean age, i.e., the average age, of the people who retired was 42.8 years. Darden also calculated the median age of those who resigned as forty-one. This meant that half the people who resigned under the VTEP were older than forty-one and half the people who resigned under the VTEP were younger than forty-one. If this mean and median age coincided exactly on the frequency distribution curve, Darden would have concluded that the VTEP did not affect individuals differently depending on their age. However, because the mean age of those who resigned was 1.8 years higher than the median age of those who resigned under the VTEP, the distribution was skewed and Darden therefore concluded that the VTEP did affect individuals differently on the basis of age, although this difference was "slight." Because the sample of 14,058 VTEP participants was so large, Darden, using a different analysis, determined that the difference between the mean and median ages, and therefore the difference in the way the VTEP treated people on the basis of age, could not be attributed to chance to any significant degree.

We cannot find a flaw with Darden's methodology and have no reason to question his data set. However, there are problems with the question he attempted to answer and the result he found if we are to use his analysis to conclude that there was a question of fact existing concerning whether the VTEP rehiring policy had a disparate impact on older individuals who had resigned under the VTEP and sought to be rehired. Darden's analysis was designed to determine the age characteristics of those persons who voluntarily decided to *resign* under the VTEP.[39] Evidently Matheson's working theory was that he only had to produce evidence concerning the persons who resigned under the VTEP because those were the only persons who could be affected by the VTEP's limitation on rehiring. While this is true, the flaw is that the analysis Matheson asked Darden to perform made no connection to General Motors' pattern of rehiring. On the basis of Darden's calculations, it is impossible to tell who General Motors ever rehired, or refused to rehire, under any circumstances whatsoever. It is therefore impossible to make a comparison between the protected class and others.[40]

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[39] Of course, with the sliding scale of financial incentives according to seniority General Motors offered to its employees to resign under the VTEP, it is easy to understand the probable relationship between age and resignation. In other words, because it is probable that older workers have worked longer for General Motors, the greater amounts of money offered to workers who had worked for longer periods for General Motors were likely to entice those older workers to resign in greater numbers than relatively younger General Motors employees who received less money for resigning because they had fewer credited years of service.

[40] See *Donajkowski v Alpena Power Co*, 219 Mich App 441, 451; 556 NW2d 876 (1996), aff'd on other grounds 460 Mich 243 (summary disposition was improper because the plaintiff provided evidence that the way the employer implemented the pay freeze penalized women more severely than men); *Squire v General Motors Corp*, 174 Mich App 780, 783; 436 NW2d 739 (1989), modified on other grounds 434 Mich 884 (1990) (summary disposition of disparate impact claim was proper because the plaintiff failed to provide evidence of ages of others fired).

As a general proposition, corporate efforts to reduce the size of a workforce are not evidence per se of discrimination,[41] even when the employer does not uses special incentives like the VTEP to convince senior workers to resign voluntarily, because Michigan law presumes that an employment relationship is at will unless there is clear evidence to the contrary.[42] Thus we cannot start with the proposition that the VTEP was somehow suspect even when it successfully persuaded more than 7,000 people over the age of 40 to resign. Further, whether there was a subtle and discriminatory relationship between the age of the individuals the VTEP was designed to entice to resign and an additional discriminatory relationship between the age of those who resigned and those General Motors rehired cannot be determined from the record.

It is possible to speculate at length that the relationships between the VTEP, resignation, and who General Motors rehires depends on age in a variety of ways, supporting a disparate impact claim. For instance, the levels of the financial incentives in the VTEP might be designed specifically to entice older workers to resign so that General Motors can purge its workforce and then, relying on the VTEP's rehiring limitation, refuse to employ these older workers in the future. But, alternatively, there is an equal possibility that the VTEP might actually favor older workers because, having had a longer opportunity to develop critical skills, they might naturally fit in the special circumstances exception to the rehiring limitation more often than younger workers.[43] However, speculation will not defeat a motion for summary disposition.[44] A plaintiff's obligation in the context of defending against a motion for summary disposition is to demonstrate questions of fact by providing supporting evidence.[45] There is no such documentary evidence in the record in this case, making summary disposition of this claim proper.

IV. Attorney Fees

Matheson also argues that the trial court abused its discretion in awarding him only $30,000 in attorney fees. Because we have already determined that Matheson's cause of action is without merit, we need not address this issue.

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[41] See *Teamsters*, *supra* at 335, n 15 (Disparate impact claims involve "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another *and cannot be justified by business necessity*.") (emphasis added).

[42] See, generally, *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 637-638; 473 NW2d 268 (1991).

[43] See *Brighton Area Schools*, *supra* at 440-441 (disparate impact claim proper because disability leave policy, though not facially favoring men, discriminated against women because they bore children and, therefore, were the only group forced to choose between two types of leave).

[44] See *Hall v Consolidated Rail Corp*, 462 Mich 179, 187; 612 NW2d 112 (2000).

[45] See MCR 2.116(G)(4); *Etter*, *supra* at 555.

Reversed in part and affirmed in part.

/s/ William C. Whitbeck
/s/ Jeffrey G. Collins

Michael J. Kelly, J., did not participate.