# STATE OF MICHIGAN

# COURT OF APPEALS

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RONALD J. RICHARDS and MARLENE M. RICHARDS,

Plaintiffs-Appellants,

v

KLOCHKO CORPORATION,

Defendant-Appellee.

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UNPUBLISHED
May 17, 1996

No. 176181
LC No. 92-217186-NO

Before: Griffin, P.J., and Smolenski and L. P. Borrello,* JJ.

PER CURIAM.

In this case of alleged unlawful age and handicap employment discrimination, plaintiffs appeal as of right an order of the circuit court granting summary judgment in defendant's favor. We affirm.

I

In 1984, defendant, Klochko Corporation, hired plaintiff Ronald J. Richards to be a field supervisor for its construction division. Plaintiff was fifty-five years old when he was hired. Plaintiff's employment responsibilities included supervising construction projects and performing office duties related to estimating the cost of construction projects.

In March, 1990, defendant hired Mark LeClair as another field supervisor. LeClair was twenty-seven years old when he was hired. Plaintiff's job title and compensation remained the same after LeClair was hired. However, plaintiff claims LeClair was assigned to supervise a project that would normally have been assigned to plaintiff and that plaintiff was forced to spend more time in the office.

In late 1990 and early 1991, defendant laid off twenty-one employees because of an alleged downturn in its business. In March, 1991, plaintiff was laid off, LeClair was not.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff filed suit against defendant in June, 1992, alleging unlawful age and handicap discrimination and intentional infliction of emotional distress.[1] Subsequently, in a letter dated September 22, 1992, defendant informed plaintiff that it had contracted for a new construction project and offered to reinstate plaintiff's employment. Plaintiff declined the offer because he had obtained other employment.

In October, 1993, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted summary disposition in defendant's favor on each count. Plaintiffs appeal as of right, and we affirm.

II

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Porter v Royal Oak,* 214 Mich App 478, 484; 542 NW2d 905 (1995); *Panich v Iron Wood Products Corp,* 179 Mich App 136, 139; 445 NW2d 795 (1989). In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, MCR 2.115(G)(5), and must give the nonmoving party the benefit of every reasonable doubt. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993); *Porter*, *supra* at 484. Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *McCart v J Walter Thompson USA, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991); *Mascarenas v Union Carbide Corp,* 196 Mich App 240, 243; 492 NW2d 512 (1992).

III

Plaintiff argues that the circuit court erred in finding no genuine issue of material fact with respect to his age discrimination claim. We disagree. In *Barnell v Taubman Co,* 203 Mich App 110, 120; 512 NW2d 13 (1993), this Court summarized the burden of proof in a discrimination case as follows:

> (1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action; and (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext.

See also *Lytle v Malady*, 209 Mich App 179, 186-189; 530 NW2d 135 (1995). In *Lytle*, *supra* at 185-186, this Court held that, where plaintiff is discharged as a result of an economically motivated reduction in force (RIF), a prima facie case of intentional employment age discrimination is established when:

> (1) the plaintiff was within [a] protected class and was discharged or demoted, (2) the plaintiff was qualified to assume another position at the time of discharge or

> demotion, and (3) age was a "determining factor" in the employer's decision to discharge or demote the plaintiff. *Matras, supra; McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

Evidence that a competent older employee was laid off and a younger employee was not, standing alone, is insufficient to establish a prima facie case of age discrimination when the adverse employment action was pursuant to an economically-motivated RIF. *Matras, supra* at 684; *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 359; 486 NW2d 361 (1992); see also *Haas v Montgomery Ward & Co*, 812 F2d 1015 (CA 6, 1987). In such cases, the plaintiff must provide direct, circumstantial, or statistical evidence from which a reasonable trier of fact could conclude that age was a determining factor in the adverse employment action. *Lytle, supra* at 185-186; see also *Barnes v GenCorp, Inc*, 896 F2d 1457 (CA 6, 1990). If a discharge or demotion is not caused by an economically-motivated RIF, plaintiff can establish a prima facie case of intentional discrimination by showing that (1) plaintiff was a member of a protected class, (2) plaintiff was qualified for the position, and (3) plaintiff was replaced by a substantially younger person. *Lytle, supra* at 186, n 2.

Plaintiff failed to present documentary evidence to establish a material fact on the issue whether his age was a determining factor in defendant's decision to lay him off. Plaintiff's documentary evidence purported to show that he was laid off in lieu of a younger person and that defendant's allegedly nondiscriminatory reasons for this decision were pretextual. However, as emphasized in *Lytle, supra* at 186-187, such evidence does not satisfy plaintiff's prima facie burden when plaintiff was laid off during a RIF. Therefore, if plaintiff was laid off during a RIF, he has failed to offer sufficient evidence to establish a prima facie case of intentional age discrimination.

We are not persuaded by plaintiff's attempt to ease his burden of proof by shifting the date of the allegedly adverse employment action to a time when defendant was not suffering economic difficulty. Contrary to plaintiff's claim that he was "replaced" by LeClair in 1990, plaintiff's salary, benefits, job title, and general duties did not change until he was laid off in 1991. Thus, even if plaintiff spent less time in the field after LeClair was hired (the seemingly natural consequence of defendant's decision to retain an additional field supervisor), plaintiff suffered no tangible harm to his employment status until he was laid off. Further, we agree with the trial court's conclusion that plaintiff failed to present sufficient evidence to establish a material dispute on the issue whether defendant laid plaintiff off during a RIF. Although plaintiff argued that defendant had a large number of ongoing construction projects in 1990 and 1991, such evidence fails to consider the size, nature, or profitability of such projects and does not rebut defendant's documentary evidence that it suffered significant operating losses and was forced to lay off over twenty employees in late 1990 and early 1991. Accordingly, because plaintiff failed to establish a prima facie case of age discrimination, we find no error in the trial court's decision to grant summary disposition in defendant's favor.

IV

Next, plaintiff contends that the trial court erred in summarily dismissing his handicap discrimination claim. Again, we disagree. In order to establish a prima facie case under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.;* MSA 3.550(101) *et seq.*, plaintiff must show that (1) he is "handicapped" as defined in the act, (2) the handicap is unrelated to his ability to perform his job duties, and (3) he was discriminated against in one of the ways set forth in § 202 of the HCRA. MCL 37.1202; MSA 3.550(202); *Hall v Hackley Hosp,* 210 Mich App 48, 53-54; 532 NW2d 893 (1995); *Crittenden v Chrysler Corp,* 178 Mich App 324, 330; 443 NW2d 412 (1989). In this case, the relevant section is § 202(1)(b), which prohibits the discharge of an employee because of a handicap.

In the present case, even assuming arguendo that plaintiff's speculative, inferential evidence could establish a material fact on the issue whether Robert Klochko (the person who decided to lay plaintiff off) was aware of plaintiff's alleged back problem, plaintiff offers no evidence to document that Robert Klochko either considered plaintiff to be handicapped or laid plaintiff off because of a perceived handicap. Therefore, we hold that the trial court correctly ruled that plaintiff failed to establish a material fact on the issue whether he was laid off because of a handicap. See *Murphy v Bradford-White Corp,* 166 Mich App 195, 201-202; 420 NW2d 101 (1987).

V

Finally, plaintiff contends that the trial court erred in dismissing plaintiff's claim of intentional infliction of emotional distress. We disagree. In *Linebaugh v Sheraton Mich Corp,* 198 Mich App 335, 342; 497 NW2d 585 (1993), this Court set forth the factors involved in proving a case of intentional infliction of emotional distress as follows:

> The elements of the tort of intentional infliction of emotional distress are: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Auto-Owners Ins Co,* 422 Mich 594, 602; 374 NW2d 905 (1985); *Runions v Auto-Owners Ins Co,* 197 Mich App 105; 495 NW2d 166 (1992). Liability for the intentional infliction of emotional distress has been found only where the conduct complained of has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. *Roberts,* [*supra* at] 603; *Meek v Michigan Bell Telephone Co,* 193 Mich App 340, 346; 483 NW2d 407 (1992). However, liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. *Roberts,* [*supra* at] 603.

See also *Doe v Mills,* 212 Mich App 73, 91; 536 NW2d 824 (1995); *Duran v The Detroit News,* 200 Mich App 622, 629-630; 504 NW2d 715 (1993). The trial court must determine as a matter of

law whether defendant's conduct was so extreme and outrageous to withstand a motion for summary disposition. *Doe, supra* at 92; *Duran, supra* at 630.

In the present case, defendant did no more than exercise its legal right to terminate an at-will employee. Accordingly, the trial court correctly decided as a matter of law that defendant's conduct did not constitute intentional infliction of emotional distress. See *Ledl v Quik Pik Stores*, 133 Mich App 583, 591; 349 NW2d 529 (1984).

Affirmed.

/s/ Richard Allen Griffin
/s/ Michael R. Smolenski
/s/ Leopold P. Borrello

[1] In addition, plaintiff's wife, Marlene M. Richards, filed a derivative claim for loss of consortium.