

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARGUERITE DEBORAH PEES JONES

UNPUBLISHED

Plaintiff-Appellant,

v

No. 164658

LC No. 92-436436 CZ

MICHIGAN BELL COMMUNICATIONS, INC.,

Defendant-Appellee.

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Before: Marilyn Kelly, P.J., and Taylor and M.R. Knoblock,\* JJ.

MARILYN KELLY, P.J. (concurring in part and dissenting in part).

I agree with the majority that plaintiff failed to present sufficient evidence with respect to her age discrimination claim to survive defendant's motion for summary disposition. However, I disagree with regard to her weight discrimination claim. Plaintiff presented sufficient evidence from which a reasonable jury could find that defendant's proffered reasons for not promoting her were a pretext for discrimination.

Defendant's motion was brought pursuant to MCR 2.116(C)(10). Therefore, we must consider the evidence, and all inferences therefrom, in a light most favorable to plaintiff. Plaintiff need only submit factual evidence from which a reasonable jury could conclude that defendant's proffered reasons are a pretext for discrimination. *Lytle v Malady*, 209 Mich App 179, 187-188; 530 NW2d 135 (1995).

As stated by the majority, a plaintiff can establish that a defendant's stated, legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons have no basis in fact, or (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

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

Here, Jeanne Belcher, the sole decisionmaker with respect to the promotions, stated that the reason for bypassing plaintiff was that her annual performance rating was lower than Miller's or Glenn's. However, that reason is unavailing where Belcher's subjective analysis of the applicants' qualifications played a large role in the decision. *Paulitch v Detroit Edison Co*, 208 Mich App 656, 659; 528 NW2d 200 (1995).

The evidence establishes that plaintiff had received numerous positive employment evaluations and had more experience than Miller or Glenn. According to plaintiff's deposition testimony, Belcher commented that plaintiff should lose some weight and should try a liquid diet program. The fact that the comments did not take place at the same time plaintiff was considered for promotion is irrelevant. Belcher's comments, coupled with plaintiff's superior experience and the subjective performance rating, provide sufficient evidence for a reasonable jury to conclude that defendant's proffered reasons were a pretext for discrimination. *Lytle, supra*.

/s/ Marilyn Kelly