

STATE OF MICHIGAN
COURT OF APPEALS

PAUL DEBROW

UNPUBLISHED

Plaintiff-Appellant,

v

No. 161048

LC No. 91-420886

CENTURY 21 GREAT LAKES INC., a Michigan corporation, CENTURY FRANCHISE ASSOCIATION, a foreign corporation and KATHY MILLER,

Defendant-Appellees.

Before: Kelly, P.J., and Young and N.O. Holowka,* JJ.

YOUNG, J. (concurring in part, dissenting in part).

I concur with the majority's decision to affirm summary disposition as to plaintiff's non-age discrimination claims. However, I respectfully dissent from the majority's conclusion that plaintiff failed to state an age discrimination claim against defendant Century 21 Great Lakes, Inc. The record establishes that there was a genuine issue of material fact regarding plaintiff's claim of disparate treatment on the basis of age, and would reverse the granting of summary disposition as to this claim.

Intentional discrimination can be proven by direct and circumstantial evidence. *Lytle v Malady*, 209 Mich App 179, 185; 530 NW2d 135 (1995). Where direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas*¹ framework, and the case should proceed as an ordinary civil matter. *Trans World Airlines v Thurston*, 469 US 111, 121; 105 S Ct 613; 83 L Ed 2d 523 (1985); *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986); *Lytle, supra*, 209 Mich App 186 n 3. The shifting burden of proofs as contemplated in *McDonnell Douglas* and *Burdine*² only apply to discrimination claims based solely on indirect or circumstantial evidence of discrimination.³ *Thurston, supra*, 469 US 121; *Lytle, supra*, 209 Mich App 185.

Plaintiff testified in his deposition that when he was being removed as president, his superior, Century 21's Great Lakes Executive Vice President, Robert Hutchinson, told plaintiff "you're too old

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

for this shit.” This statement is direct evidence of age animus. Moreover, because it was allegedly made in the context of the discussion in which plaintiff was informed that he was being removed as president, it bears directly on the intent with which his employer acted in choosing to demote him.

The majority ignores this evidence as unworthy of credibility. Neither this court nor the trial court can make factual findings or weigh credibility in deciding a motion for summary disposition. *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). This evidence cannot be ignored in the context of a motion for summary disposition and precludes, in my judgment, dismissal of the plaintiff’s age claim. See *Lytle, supra*, 209 Mich App 187-188. Clearly, the statement by Vice President Hutchinson, if believed by the trier of fact, suggests that plaintiff’s age was *a factor* in the mind of his employer at the point plaintiff was removed from his position. See *Matras, supra*, 424 Mich 682.

I would reverse and remand for proceedings on plaintiff’s age discrimination claim against Century 21 Great Lakes, Inc., but affirm in all other respects.

/s/ Robert P. Young, Jr.

¹ *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

² *Texas Dep’t of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

³ As such, I disagree with the majority’s statement that plaintiff failed to set forth a prima facie case of age discrimination due to insufficient evidence that he was replaced by a younger person. As the United States Supreme Court recently stated, discrimination laws protect persons not classes. *O’Connor v Consolidated Coin Caterers Corp*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 64 USLW 4243, 4244 (April 1, 1996).