STATE OF MICHIGAN

COURT OF APPEALS

MANUEL A. CEDRO,

Plaintiff-Appellee,

v

VOLKSWAGEN OF AMERICA, INC.,

Defendant-Appellant.

UNPUBLISHED
October 15, 1996

No. 177473
LC No. 92-442297-CK

Before: Neff, P.J., and Jansen and G. C. Steeh, III,* JJ.

PER CURIAM.

Defendant appeals as of right from the jury verdict of $200,000 in favor of plaintiff in this age discrimination action. We affirm the trial court's denial of defendant's motion for judgment notwithstanding the verdict and affirm the jury's award.

Defendant argues that the evidence was insufficient to support a prima facie case of age discrimination, and thus the trial court erred in failing to grant its motion for judgment notwithstanding the verdict. We disagree.

I

Defendant preserved this issue below by requesting both a directed verdict and judgment notwithstanding the verdict. In evaluating a trial court's determination on a directed verdict or judgment notwithstanding the verdict, this Court considers the evidence in a light most favorable to the nonmoving party to determine whether reasonable minds could differ. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 579; 507 NW2d 751, 755 (1993). If reasonable minds could differ, then the motions are properly denied.

II

In order to determine whether sufficient evidence existed to support the jury's verdict, we must consider whether plaintiff established a prima facie case of age discrimination. See *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). To do so, plaintiff must show that (1) he was a

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

member of a protected class, (2) he was discharged, (3) he was qualified for the position, and (4) he was replaced by a younger person. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 358; 486 NW2d 361, 364 (1992). In cases such as this, where economic reasons are given to justify the firing,[1] there is a fifth requirement: Plaintiff must also demonstrate that age was a determining factor in the firing decision. *Matras, supra*, at 684. This does not mean that plaintiff must prove that age was the sole or overriding reason, but only that it played a part in the determination to dismiss him. *Id.* at 682.

III

Here, the parties do not dispute that plaintiff, fifty-three years old when fired, was a member of the protected class. Also, there is no dispute that plaintiff was replaced by a younger worker. The parties do, however, dispute the remaining factors.

A

Defendant argues that plaintiff, who accepted an early retirement offer, was not discharged. However, Gerhard Albers, plaintiff's supervisor, testified that if plaintiff had not accepted the early retirement offer, he would have been fired. Further, there was no evidence that plaintiff was offered any other position within defendant's organization. When viewed in a light most favorable to plaintiff, we conclude that the evidence was sufficient to support a finding that plaintiff was discharged.

B

Next, defendant argues that plaintiff failed to provide sufficient evidence that he was qualified for the job in question. Defendant argues that plaintiff's job was consolidated with others, and that plaintiff was not qualified to handle the new aspects of the job. Plaintiff, however, presented evidence that he trained the person hired to take over his position, Robert McCrea. McCrea told plaintiff that he did not feel qualified for the position, and was uncertain as to why he had been promoted. Further, plaintiff testified that he had worked at his position for approximately fifteen years. Plaintiff also demonstrated that his worst review rating was "good." When viewed in a light most favorable to plaintiff, we deem this evidence sufficient to support a finding that plaintiff was qualified to perform the job in question.

C

The real issue in this case is whether plaintiff demonstrated that age was a determining factor in his discharge.

1

Plaintiff testified that the general belief at Volkswagen was that employees over a certain age had a high probability of being dismissed. Three of plaintiff's coworkers, Donald F. Parks, Edward Connelly and Walter Guenther, agreed that this general consensus existed. Further, Guenther testified that he believed those over fifty were targeted by defendant because, in his department, those over fifty-

three years old were offered early retirement and were identified by name by Guenther's supervisor, Dieter Ksoll.

Because this testimony amounted to nothing more than mere personal beliefs and conjecture that age was a determining factor, we find this testimony alone is insufficient to sustain the jury's verdict. See *Wilson v Firestone Tire & Rubber Co*, 932 F2d 510, 515 (CA 6, 1991). The only potentially substantial testimony in support of plaintiff's claim was Guenther's statement that those workers in the finance department, not the department in which plaintiff worked, over fifty-three years old were identified by name. This evidence, however, is consistent with the Guenther's testimony that those employees were targeted to be offered early retirement. As plaintiff acknowledges, merely offering early retirement cannot stand as proof of age discrimination.

2

Plaintiff also submitted as evidence to support his claim a memo that provided "the number of management levels should be reduced and the average age of management reduced." Defendant argues that the probative value of the memo was substantially outweighed by its prejudicial effect because it was written for defendant's parent company in Germany and, by its terms, only applies to management employees, a class to which plaintiff did not belong. MRE 403. We disagree with defendant's arguments.

The memo, originally written in German, was alleged to be intended only for Volkswagen, AG, defendant's German parent company. However, it was translated into English and given to Volkswagen of America's vice president of finance who convened a meeting at his home to discuss with his managers, including plaintiff's manager, the contents of the memo. In addition, although the memo was alleged to apply only to managers, and although not officially distributed, it was seen by plaintiff and his three witnesses.

Donald Parks, plaintiff's witness, testified how he obtained the memo from the list of managers present at the vice president's home meeting.

"Q. What I'm trying to find out is how did you get these two documents?"

"A. Well, what happened is some of the departments the people had a meeting of their people and it was somewhat disseminated and then copies were made and it circulated around the company. No one on that list gave me this directly if that's what…"

"Q. But, you did get it?"

"A. I did see it, yes."

"Q You were a member of management at the time?"

"A. No, I wasn't. I was a supervisor."

"Q. That's not the same level then?"

"A. That's correct." []

"Q. Mr. Park[s], did you discuss this with anybody?"

"A. Co-workers, sure." []

"Q. And you say you discussed these with other—your co-workers?"

"A. Well, yeah, you know, you see something like this you naturally would."

"Q. Why?" []

"A. Well, because it's obviously that they want to reduce—they are saying age of management and the question is what you say management is, and just—that would naturally, quite frankly, as you get older you start thinking it's going to affect you."

3

The lower court correctly denied defendant's motion for summary disposition and judgment notwithstanding the verdict. The memo, when coupled with the testimony, presented a genuine issue of fact to be left to the jury to decide. *Wilson, supra*. Plaintiff presented evidence showing that defendant's possible motive was to lower the age of its workforce, although specifically referring only to management. To succeed in this matter, plaintiff "must present direct, circumstantial, or statistical evidence that age was a determining factor in his job displacement." *Id.* at 517; *Ridenour v Lawson Co.*, 791 F2d 52, 57 (CA 6, 1986). Plaintiff need not prove that age was the sole or overriding reason, but only that it played a part in the determination to dismiss him. *Matras, supra,* at 682. With the evidence presented by plaintiff, it can be inferred that age was *a* factor in plaintiff's termination, although not *the* factor.

Viewing the testimony and memo in a light most favorable to plaintiff, reasonable minds could not differ about whether age was *the* determining factor, but could differ about whether age was *a* determining factor. Sufficient evidence existed supporting a prima facie case of age discrimination. Accordingly, the trial court's ruling denying defendant's motion for judgment notwithstanding the verdict is affirmed. Our resolution of this claim obviates the need to address defendant's remaining appellate issues.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh, III

[1] Although plaintiff claims on appeal that defendant presented no evidence of an economic necessity to justify his firing, plaintiff testified that he was told his firing was as a result of "downsizing," and that he, as an accountant for defendant, understood that such downsizing was necessary.