STATE OF MICHIGAN

COURT OF APPEALS

CAROL A. AROLD,

Plaintiff-Appellant,

v

MICHIGAN BELL TELEPHONE CO.,

Defendant-Appellee.

UNPUBLISHED
February 6, 1998

No. 189945
Wayne Circuit Court
LC No. 93-334262-CZ

Before: Murphy, P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's MCR 2.116(C)(10) motion for summary disposition as to plaintiff's claims for sex discrimination, age discrimination, and unlawful retaliation brought pursuant to the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Plaintiff also appeals a preceding order of the trial court that granted defendant's MCR 2.116(C)(10) motion for summary disposition, which precluded plaintiff from recovering back pay, front pay, and benefits that accrued after July 12, 1994, the date she effectively rejected defendant's offer of reinstated employment. We affirm.

Plaintiff began working for defendant in April 1967. As of February 1993, she was employed as the manager of defendant's Outstate Installation and Maintenance Division. At that time, defendant began a corporate restructuring known as "Breakthrough," which involved reorganization of the five existing Ameritech/Michigan Bell companies into twelve Ameritech business units. As part of the restructuring, management employees were forced to seek positions within the newly organized business. Those who could not find positions were eventually terminated.

Plaintiff became involved in the Breakthrough interview process in March 1993, after being selected to interview for "Tier A" management positions. Tier A managers reported to and were hired by the individual business unit presidents. Positions within the new corporate structure extended down from Tier A through Tier D. Plaintiff alleged that from March 1993 until her termination in November 1993, she was discriminatorily denied, on the bases of gender and age, some eleven management positions of varying levels within the restructured corporation. Plaintiff failed to obtain a position in the

new corporation and, accordingly, lost her job on November 17, 1993, one of the 2,100 employees who were terminated as a result of Breakthrough.

I

Plaintiff first contends that the trial court erred in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to her claim of employment discrimination on the basis of gender. Although we cannot endorse the analytical approach by which the trial court reached its decision to grant defendant's motion for summary disposition, we find that the ultimate decision to grant defendant's motion for summary disposition was correct.[1]

A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Lytle v Malady*, 456 Mich 1, 12; 566 NW2d 582 (1997) (Riley, J.). "The affidavits, pleadings, depositions, admissions, and other material supporting and opposing the motion must be considered,[] so that it may be decided whether 'it is impossible for the claim or defense to be supported at trial because of some deficiency which cannot be overcome'" (footnote omitted). *Id.* (quoting *Rizzo v Kretschmer*, 389 Mich 363, 372; 207 NW2d 316 (1973)). Summary disposition is appropriate only if the court concludes that it is impossible to further develop the record. *Id.* We review de novo the trial court's decision to grant a motion for summary disposition. *Countrywalk Condominiums, Inc v Orchard Lake Village*, 221 Mich App 19, 21; 561 NW2d 405 (1997).

The Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, provides, in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . sex. [MCL 37.2202; MSA 3.548(202).]

Because the Elliott-Larsen Civil Rights Act and Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* are similar in function and scope, we may look to federal precedent for guidance in reviewing claims brought under the ELCRA. See *Lytle*, *supra* at 27; *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357-358; 486 NW2d 361 (1992).

In *Texas Dept of Community Affairs v Burdine*, 450 US 248, 252-253; 67 L Ed 2d 207, 215; 101 S Ct 1089 (1981), the Supreme Court succinctly articulated the burden of proof in employment discrimination cases brought pursuant to the Civil Rights Act of 1964:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. [*Id.* (citations omitted);

see also *McDonnell Douglas Corp v Green*, 411 US 792, 802-804; 36 L Ed 2d 668, 677-679; 93 S Ct 1817 (1973).]

Our courts have adopted this same standard in employment discrimination cases arising under the ELCRA. *Sisson v University of Michigan Board of Regents*, 174 Mich App 742, 746; 436 NW2d 747 (1989).

Having stated the method by which we allocate the burden of proof in an employment discrimination case, we now turn to the evidentiary requirements that plaintiff must meet. To establish a prima facie case of gender discrimination under the ELCRA, a plaintiff may resort to the use two theories, (1) disparate treatment and (2) disparate impact, *Donajkowski v Alpena Power Co*, 219 Mich App 441, 448; 556 NW2d 876 (1996), although, here, plaintiff's claim of gender discrimination generally implicates only the disparate treatment theory.[2] To establish a prima facie case of gender discrimination under the disparate treatment theory, plaintiff must submit admissible evidence to show that she was a member of a class protected under the ELCRA and that, for the same or similar conduct, she was treated differently than a man. *Shultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992). Stated differently, plaintiff may establish a prima facie case of gender discrimination by submitting evidence to establish "that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." *Burdine*, *supra* at 253. The crux of this theory is that there exist similarly situated males that defendant has treated differently because of their gender. *Schultes*, *supra* at 645. Alternatively, plaintiff may establish her prima facie case of gender discrimination with direct evidence of intentional discrimination. Under this approach, plaintiff is required to submit evidence to show (1) that she was a member of a protected class, (2) that she suffered an adverse employment decision, (3) that defendant was predisposed to discriminate against persons in plaintiff's class, and (4) that defendant actually acted on this predisposition when the adverse employment decision was made. See *id.* at 646.

Once the plaintiff submits evidence sufficient to establish a prima facie case of employment discrimination, the burden shifts to the employer to articulate a legitimate, nondiscriminatory basis for the adverse employment decision; if the employer is unable to meet this burden, it is assumed that the employer's decision was discriminatory. *Lytle*, *supra* at 29. Once the employer has articulated a legitimate, nondiscriminatory reason for the employment decision, the burden shifts back to the plaintiff, who is required to submit evidence to establish that the employer's articulated reason was merely a pretext to discrimination. *Id.* at 29-30. At this stage, the plaintiff's evidence must show that the employer's nondiscriminatory reason was not the true reason for the adverse employment decision and that illegal discrimination was a motivating factor in the employer's decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 696-697; 568 NW2d 64 (1997) (Brickley, J.). "The proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis." *Id.* at 697 (footnote omitted).

Turning now to our job-by-job evaluation of the evidence in relation to each new job that plaintiff was denied in the Breakthrough process, we must first state our disagreement with the position of the trial court and defendant that plaintiff's gender discrimination claim must be evaluated as stemming from an economically motivated reduction in force (RIF) and, thus, plaintiff is required to make a prima

facie showing of employment discrimination pursuant to the RIF prima facie case model.[3] The evidence shows that defendant terminated plaintiff along with thousands of other workers pursuant to a corporate reorganization. Plaintiff's claim that she was discriminated against on the basis of gender arises from defendant's allegedly discriminatory repeated refusal to hire her to new positions in the reformed corporate structure, not on the fact of her termination. This is not cognizable as a traditional RIF situation, but instead is analogous to a refusal to hire. Therefore, to establish a prima facie case of gender discrimination in this context, plaintiff is only required to establish her prima facie case of employment discrimination by showing that she was protected under the ELCRA, and was treated differently from a man in defendant's employment for the same of similar conduct. *Schultes*, *supra* at 645.

A

The first position plaintiff alleges that she was denied because of her gender is the position of General Manager – Michigan and Wisconsin – Small Business. Although it is not entirely clear exactly what skills were necessary to qualify for this position, we will accept, for the sake of argument, that plaintiff was at least nominally qualified for this position, in light of her previous experience in managing "small business call centers" and because defendant had found her a suitable candidate to interview for all Tier A management positions. Hence, plaintiff submitted evidence that she, as a female, was a member of a class protected under the ELCRA, that she applied for and interviewed for the Michigan/Wisconsin small business management position, and that she was qualified for this position. Defendant hired Robert Barczak, a male, for this position, instead of female. Because she has shown that she was qualified and denied this position, and defendant chose a male instead of her, plaintiff has established a prima facie case of gender discrimination.

Defendant, however, submits that it hired Barczak instead of plaintiff because he was *more* qualified for the position than she was. Plaintiff has failed to meet her burden of establishing that defendant's reason was a mere pretext for gender discrimination because she has submitted nothing to rebut defendant's proffered evidence Barczak had qualifications superior to hers. Indeed, plaintiff admitted at deposition that she was not aware of Barczak's qualifications. Plaintiff had not been involved in managing business call centers since 1982, while Barczak was currently managing defendant's Wisconsin small business centers at the time of his interview for this position and, according to defendant, had more extensive and relevant employment experience with defendant. There is no further indication that plaintiff was denied this position because of, *inter alia*, her gender. In fact, David Smith, the person who hired Barczak to this position, stated that, out of the five people he hired "as direct reports in the Breakthrough organization, 2 were female." Although plaintiff succeeded in establishing a prima facie case of gender discrimination as to defendant's refusal to hire her to the small business management position, she failed to present evidence that defendant's explanation for its action was not the true reason for its decision and that plaintiff's gender was a motivating factor in its decision. Accordingly, we affirm the trial court's decision to grant defendant's motion for summary disposition as to the denial of this position.

Although it is not entirely clear, plaintiff also appears to argue that she has submitted direct evidence to support the conclusion that David Smith had a predisposition to discriminate against women and, in refusing to hire plaintiff, acted in furtherance of this predisposition. See *Rasheed v Chrysler*

Corp, 445 Mich 109, 135; 517 NW2d 19 (1994); *Schultes*, *supra* at 646. First, plaintiff alleges that Dave Basset, one of defendant's executives, stated, "[F]ace it, Arold, you're not a man," when he discovered that plaintiff did not receive the Michigan/Wisconsin small business position. We agree with the trial court's evaluation that, because there is no evidence that Basset had any control over this particular hiring decision, his statement constitutes an expression of his own opinion that plaintiff did not receive this position because she was female. Generally, "it is not erroneous for a lay witness to express an opinion regarding discrimination in an employment setting so long as the opinion complies with the requirements of MRE 701," *Wilson v General Motors Corp*, 183 Mich App 21, 35; 445 NW2d 405 (1990); that is, the opinion must be "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue," MRE 701. We agree with the trial court's conclusion that Basset's alleged statement is not admissible to establish that Smith was predisposed to discriminate against females, and did so in refusing to hire plaintiff. Because there is simply no indication that Basset's opinion was rationally based on his knowledge or perception of Smith's motivation for making this hiring decision, it was inadmissible pursuant to MRE 701.

Second, plaintiff alleges that Wayne Wells, defendant's corporate counsel, told her that, in his opinion, Smith's refusal to hire her constituted gender discrimination. Again, opinion testimony is only admissible if it can be shown to be "rationally based on the perception of the witness." MRE 701(a). Plaintiff does not submit evidence to show that Wells had any knowledge of Smith's predisposition to discriminate or the basis upon which Smith made his decision to hire Barczak instead of plaintiff, and does not advance a rational basis for Wells' opinion other than plaintiff's assertion that Wells "understood" discrimination in the workplace. We agree with the trial court's determination that, from the record, "it appears that [Wells' opinion] would be based upon the [bare] fact that Plaintiff did not obtain the position (which begs the question)." Accordingly, we do not find Wells' statement of opinion to be of relevance in plaintiff's attempt to establish intentional employment discrimination.

Plaintiff further submits that Smith asked her a question during her interview that supports the inference that he was predisposed to discriminate against women, and did so in refusing to hire her. In plaintiff's interview, Smith asked plaintiff whether she believed there was sex discrimination at Michigan Bell. Plaintiff contends that this question demonstrates that her activities with the Women's Advisory Panel (WAP), an intra-company committee formed to address issues regarding women in the workplace, negatively impacted her chance of obtaining continuing employment during the Breakthrough process. However, neither Smith's question, nor anything else he said to plaintiff, implies that her membership in WAP adversely affected her chance of future employment. Plaintiff has merely speculated that Smith's question carried this meaning; speculation and conjecture are insufficient means by which a party may oppose a motion for summary disposition. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). In sum, we find that the trial court did not err in granting defendant's motion for summary disposition as it related to this position.

B

Next, plaintiff alleges that she was discriminatorily denied the position of General Manager – Michigan Outstate Installation and Maintenance and, thus, the trial court erred in granting defendant's motion for summary disposition insofar as her discrimination claim was based on the denial of this position. Although we agree that the trial court erred in concluding that plaintiff failed to establish a

prima facie case of sex discrimination with respect to the denial of this position, we disagree that the trial court erred in its ultimate determination to grant defendant's motion for summary disposition as to this plaintiff's employment discrimination claim for denial of this position.

We believe that plaintiff succeeded in establishing a prima facie case of employment discrimination based on defendant's refusal to hire her to the position of installation and maintenance general manager. Of course, there is no question that plaintiff, as a female, was entitled to protection under the ELCRA. Plaintiff's evidence showed that she was qualified for this position. Plaintiff's employment evaluations show that she was at least performing at acceptable levels, which is supported by the fact that defendant considered plaintiff an available candidate for all Tier A management positions in the Breakthrough process. Moreover, at the time of her interview, plaintiff had held this same position in the existing corporate structure. Regardless of her qualification, the evidence shows that defendant chose Mark Doman, in plaintiff's words a male "peer . . . from the small business department," to fill the installation and maintenance position. Because plaintiff has shown that she was qualified for this position and that defendant rejected her and instead hired a male for this position, she has presented adequate evidence to establish a prima facie case of employment discrimination on a disparate impact theory.

In contrast, defendant has submitted evidence that Doman was more qualified than plaintiff, because, although he was not the incumbent in the installation and management position at the time of his interview, he had gained years more experience with installation and maintenance as a general manager in another of defendant's employment divisions. Plaintiff herself testified that as late as 1993, she was relatively inexperienced in installation and maintenance. Moreover, the person who hired Doman, Mark Wallace, testified that he harbored grave concerns about plaintiff's failure to effectively address documented problems with customer service and accessibility that she had been charged with fixing in her former role as manager of defendant's Residence Markets division. Thus, defendant succeeded in articulating a legitimate, nondiscriminatory reason for choosing Doman for this position, i.e., based on the candidates' relative experience and past performance, Doman was more qualified for the position than plaintiff.

Plaintiff has attempted to demonstrate that defendant's proffered reasons for refusing to hire her were pretextual, claiming they were not worthy of credence. First, plaintiff attempts to argue that, while she and Doman may have been qualified for the installation and maintenance position, she was actually more qualified than Doman, because, as an incumbent, she should have been given priority over Doman in hiring for this position, according to defendant's own hiring policy. However, apart from plaintiff's assertion on this point, there is absolutely no evidentiary support for her contention that incumbents were to be given priority over non-incumbents for positions sought during the Breakthrough process. At most, the evidence suggests that incumbents were automatically considered only as *candidates* for management positions they occupied in the former corporate structure. No evidence suggests that incumbents were actually given priority over non-incumbents when defendant made hiring decisions. Second, plaintiff argues that defendant should have given more weight to some of Doman's performance problems, and this should have caused defendant to hire plaintiff instead of Doman. In essence, plaintiff argues that defendant made an unwise decision in choosing between two qualified candidates, each with performance problems, which is an invitation for this Court to second-guess defendant's business

judgment. "[T]he plaintiff cannot simply show that the employer's decision was wrong or mistaken [in an attempt to show pretext], since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Town*, *supra* at 704 (quoting *Fuentes v Perskie*, 32 F3d 759, 765 (CA 3, 1994)). Here, by simply challenging defendant's decision to hire Doman as misguided because Doman, as well as plaintiff, experienced performance problems, plaintiff has failed to raise a triable issue regarding whether defendant's proffered reason was pretextual. Therefore, we affirm the trial court's decision to grant defendant's motion for summary disposition as to the installation and maintenance position.

C

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition, because she succeeded in showing that defendant considered her gender in refusing to hire her for the position of General Manager – Michigan Residence Markets and instead hiring a male, Laird Spencer, for this position. We disagree.

As to this position, the trial court concluded that plaintiff had submitted sufficient evidence to establish a prima facie case of employment discrimination on the basis of gender. Therefore, we only find it necessary to address defendant's proffered legitimate, nondiscriminatory reasons for hiring Spencer instead of plaintiff for this position, and whether plaintiff has submitted evidence sufficient to show that defendant's proffered reasons were pretextual. We conclude that plaintiff failed to establish pretext, and, therefore, the trial court was correct in granting defendant's motion for summary disposition as to this management position.

Robert Ligett, the person who hired Laird Spencer instead of plaintiff, cited two primary reasons for not hiring plaintiff to the Michigan residence markets management position: (1) she had failed after four years to fix the accessibility problem the residence markets division had experienced under her tutelage, and (2) she had overstated her employment achievements both in during her interview and on her resume. There is evidence in the record to support these contentions.

To rebut defendant's proffered reasons, plaintiff once again submits evidence to challenge defendant's business decision as ill-advised, but submits nothing to show that defendant's reasons were not real, and that gender discrimination motivated the decision to hire Spencer. Basically, plaintiff argues that, all-in-all, Spencer also experienced problems with accessibility to which defendant should have accorded more weight in its hiring decision. Plaintiff also alleges that she did not create the accessibility problem, and, thus, defendant's reliance on her shortcomings in this area as a reason for its refusal to hire her was misplaced. It is evident that, once more, plaintiff has asked this Court to second-guess defendant's business judgment, something we will not do. This evidence merely suggests that, if plaintiff were the decisionmaker, she would have chosen herself over Spencer, which is hardly surprising.[4] It does not suggest that defendant's reasons were unworthy of credence, or otherwise pretextual, and does not lead us to the conclusion that discrimination on the basis of gender was defendant's true reason for the adverse employment decision. Because plaintiff failed to establish pretext, summary disposition was appropriate.

D

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition as to her claim that defendant discriminated against her by refusing to hire her for the General Manager – Michigan, Metro, Ohio CP & M position. We disagree.

Although, regarding this position, we find that plaintiff succeeded in establishing a prima facie case of gender discrimination by showing that she was within the protected class, she was at least nominally qualified for the position, and defendant hired a man instead of her, she has not submitted evidence sufficient to show that defendant's proffered reason for hiring Art Mucciante for this position, i.e. that he was vastly more qualified than plaintiff to perform installation and maintenance jobs, was a pretext for illegal gender discrimination. Plaintiff does not, and indeed cannot contest, that Mucciante had the advantage of decades-long experience in defendant's installation and management division, and received a far better performance rating in this position than had plaintiff. Plaintiff's further allegations that defendant had accorded Mucciante far more favorable treatment in the job application process than it accorded plaintiff is simply without support on the record. First, plaintiff contends that defendant did not require Mucciante to interview for the job, while she was made to interview for it. In the deposition testimony she cited in support of this allegation, both Mucciante and Wallace, the person who made the decision to hire Mucciante, actually stated that Mucciante had been required to interview. Moreover, Wallace stated that he gave consideration to all who applied for the position, thus denying that the position was in any way held open for Mucciante alone. Second, plaintiff stated that Wallace afforded Mucciante preferential treatment when Wallace "personally came to Michigan to meet with Mucciante so that they could get to know each other and excluded plaintiff." The deposition testimony that plaintiff cited in order to prove this allegation does not show that Wallace visited with Mucciante in relation to the Breakthrough process, but instead shows that Mucciante came to the Michigan offices to view an innovative process Mucciante had implemented prior to Breakthrough. Moreover, there is no evidence to show that Wallace affirmatively excluded plaintiff from this meeting. Indeed, the evidence shows that plaintiff was accorded a laudatory visit from upper management when she had implemented a beneficial program of her own. Because plaintiff failed to show that defendant's proffered reasons for hiring Mucciante instead of her were mere pretexts for gender discrimination, and otherwise failed to establish that her male competitor was accorded advantageous treatment during the interview process, we affirm the trial court's decision to grant summary disposition in defendant's favor as the order related to defendant's refusal to hire her for the CP & M general manager position.

E

Next, plaintiff argues that the trial court erred in granting defendant's motion for summary disposition as it related to her failure to obtain the position of vice president of human relations at defendant's Ameritech Mobile division in Illinois. We disagree.

Here, plaintiff has chosen to forego proving her case on a disparate treatment theory, and has instead submitted evidence she alleges directly supports the position that Bob Cooper, the male who obtained the vice presidential position, was accorded superior treatment during the interview process. Basically, plaintiff alleges that defendant "hand picked" Cooper for this position and did not apprise her of the opening. There is no evidentiary support for these allegations. Plaintiff does not allege that she

applied or interviewed for this position. It does not appear that defendant was in any way obligated to inform potentially qualified employees of this position, nor is there support for plaintiff's allegation that defendant "hand picked" Cooper and purposefully excluded her from consideration for this job. In sum, plaintiff has not even attempted to submit evidence relevant to this employment decision to raise a triable issue concerning whether defendant actually acted on a discriminatory predisposition when it chose Cooper instead of her for the job. Because there is no evidence of intentional discrimination regarding defendant's decision to hire Cooper instead of plaintiff, we affirm the trial court's grant of summary disposition as to the human relations managerial position.

F

Next, plaintiff alleges that she was discriminatorily denied district manager positions for defendant's construction divisions in Ann Arbor and Traverse City. The trial court found that plaintiff had not even applied for these jobs, and, accordingly, granted summary disposition in defendant's favor as to these position, because plaintiff had not shown that she was treated differently than a male in the selection process.

Briefly, we agree with the trial court's decision to grant summary disposition as to these positions. Plaintiff's failure to submit facts to show that she applied for these positions, and that she was qualified to perform them, is fatal to her attempt to establish a prima facie case of gender discrimination. *York v 50th Dist Ct*, 212 Mich App 345, 348; 536 NW2d 891 (1995). Although plaintiff generally asserts that neither of the males who obtained the construction positions applied or interviewed for the jobs, the record simply does not support this contention. There is no basis from which to infer that plaintiff was treated differently from males in defendant's decision to fill these positions. Accordingly, summary disposition was appropriate.

G

Next, plaintiff contends that the trial court erred in granting defendant's motion for summary disposition as to her claim that she was discriminatorily denied the job of Vice President – Public Relations, which defendant gave to a male, Steve Economy. We disagree. There is no indication that that plaintiff even applied for or interviewed for this position. Therefore, we find that plaintiff failed to establish a prima facie case of gender discrimination. *Id.* Even if she could, plaintiff did nothing to establish that defendant's reason for hiring Economy to this position, i.e., that he had more experience than plaintiff, was pretextual. Summary disposition, again, was appropriate.

H

Next, plaintiff argues that she was discriminated against because defendant had reserved the job of Director of Labor Relations for Ivan Johns, and asserts that the trial court erred in granting defendant's motion for summary disposition as it related to defendant's refusal to hire plaintiff for this position. We disagree.

Plaintiff does not contest the fact that all other employees who inquired about the availability of this job were similarly prevented from interviewing, because Fred Peters had pre-selected the person he

wished to place in the position. Thus, all male, as well as female candidates, had been excluded. Although her argument here, and in general, could be clearer, plaintiff appears to argue that she has proven a case of intentional discrimination by showing that (1) defendant violated its own rules by precluding others from interviewing for this job, when the Breakthrough policy dictated that all eligible employees would be considered for positions, and (2) Peters was the supervisor of an all-male division. There is simply no evidence that the Breakthrough process precluded the reservation of positions for highly qualified candidates and there is no additional evidence that illegal gender discrimination was a basis for Peters' selection of Johns. Additionally, there is no indication that Peters' division was male-dominated was a product of illegal discrimination. Without such evidence, it is just as likely that this was a product of chance. In any event, it certainly does not support the inference that Peters was predisposed to discriminate against females, and acted on this predisposition in reserving the position for Johns. Accordingly, because we find that plaintiff failed to establish a case of intentional gender discrimination as to the labor relations position, we affirm the trial court's grant of summary disposition.

I

Plaintiff has made sundry other allegations and presents further evidence she claims supports her claim of gender discrimination. First, plaintiff alleges that defendant "created new jobs for male displaced workers but not for plaintiff." Specifically, plaintiff points to a position which she claims was created for John Currie after his job was eliminated as part of Breakthrough. While plaintiff does not elaborate on the nature of this position, apparently Currie was "loaned" to the State of Michigan as part of its "Michigan First" project. Plaintiff argues that she was qualified for this position because she had worked as a community relations manager and had thus worked with governmental units. However, plaintiff does not dispute that, according to the evidence, state officials requested that Currie be assigned to it. There is no further indication that Currie's "loan" to the state was the product of discrimination.

Second, plaintiff has submitted evidence of numerous instances of harassment that had been aimed at women, evidence that she argues provides a relevant backdrop against which to assess her allegations of gender discrimination. The trial court ruled these instances inadmissible, and thus did not refer to them when analyzing plaintiff's claim. While plaintiff continues to assert the relevance and thus admissibility of this evidence, we agree with the trial court that this evidence is inadmissible because plaintiff has failed to demonstrate that any of the decision-makers at issue were responsible for this conduct. See *Rasheed v Chrysler Corp*, 445 Mich 109, 135-136; 517 NW2d 19 (1994). Moreover, this case does not present unique circumstances permitting discriminatory animus to be imputed to those individuals. *Id.* We further conclude that the trial court properly determined that plaintiff's evidence in the form of opinion statements by various employees concerning alleged discriminatory practices at Michigan Bell, most of which were related by plaintiff herself, is inadmissible because there is no indication that the statements were based on the witness' rational perception, or they are not helpful in determining a fact in issue. MRE 701.[5] Finally, with respect to plaintiff's evidence relating to the shredding of documents, we agree with the trial court that this evidence is not probative of discriminatory motives of any of the individual decision-makers, and therefore inadmissible.

Accordingly, we conclude that the trial court did not err in summarily disposing of plaintiff's gender discrimination claim.

III

Next, plaintiff argues that the trial court erred in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to her age discrimination claim. We disagree.

Like the test for disparate treatment in the sex discrimination context, in order to establish a prima facie case of age discrimination under the ELCRA, and thus avoid summary disposition, a plaintiff must present evidence that (1) she was a member of a protected class, (2) she was subjected to an adverse employment decision, (3) she was qualified for the position, (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town*, *supra* at 695. Again, our focus as to plaintiff's claim of age discrimination is not on defendant's ultimate decision to terminate her, but on defendant's refusal to hire plaintiff for the Breakthrough management positions to which she applied. This is because, as we previously stated, the Breakthrough process required all management employees to apply for and obtain positions in the new corporate structure if they were to keep their jobs. Thus, regarding each position for which defendant refused to hire her, plaintiff must submit evidence to establish a factual question whether illegal age discrimination was a basis for her failure to obtain a position in the Breakthrough process.

Initially, we must note that plaintiff does not dispute that there were only two Breakthrough positions which she was denied and for which defendant hired younger employees. As to the positions for which defendant actually hired people that were older than plaintiff, she has failed to state a prima facie case of age discrimination.

In an attempt to establish a prima facie case of age discrimination, plaintiff has generally avoided discussion of each of the jobs she was denied, and instead has submitted to this Court a statistical chart that she claims reflects the fact that more employees aged 40 and older, those in the protected class of employees, were terminated during the Breakthrough process than were those under the age of forty. Additionally, plaintiff has submitted an affidavit from Dr. Nitin Paranjpe, an economist and statistician, that, in her estimation, establishes "the termination rate for employees in the higher age groups was always greater than the rate in the lower age groups." Although we acknowledge that plaintiff may use statistics to establish that age was more likely than not a motivating factor in her failure to find a position in the newly formed corporate structure, see generally *Barnes v Gencorp Inc*, 896 F2d 1457 (CA 6, 1990), we find this evidence to be of no value in plaintiff's attempt to do so. Although plaintiff claims that the chart reflects the number and ages of defendant's employees that were terminated during Breakthrough, there is absolutely no support for this assertion. The chart does not purport to reflect the age demographics of the employees that were retained and terminated during Breakthrough. The chart itself is labeled, "Eligible/Ineligible Participants in the Transitional Staffing Separation Pay Plan of Michigan Bell Telephone Co[.]" Without the benefit of plaintiff's enlightenment, this has no significance to this Court. Likewise, no where in his affidavit does Dr. Paranjpe state that the chart categorizes the employee termination and retention rates of the Breakthrough process. Instead, Dr. Paranjpe states that the chart reflects the "eligibility rates for employees" in higher and lower age groups. Again, we are hard pressed to relate this concept of "eligibility" to defendant's decision to terminate employees. Finally, even if the chart actually reflected the actual termination decisions that defendant made during Breakthrough, we would be forced to find that it actually *belies* plaintiff's claim that age was a factor in defendant's termination decisions. Plaintiff ignores the fact that the Breakthrough process was unique in

the sense that it was actually a corporate restructuring, and not purely an economically-motivated reduction in force. Retained employees received positions in the newly formed Ameritech divisions. Therefore, the chart would demonstrate that employees aged forty and above were placed in new jobs at a much higher rate than younger employees. For example, according to the chart (and assuming it reflects termination rates), 13% of employees of pay grade three who were forty years of age and older received positions in the new corporate structures, while defendant retained only 4% of those under age forty. Of all employees in this pay grade who obtained jobs in Breakthrough, 89% were in the forty and over age group, while approximately 11% were aged below forty. For all employees in all pay grades, the results are similar. We therefore reject plaintiff's statistical evidence.

Plaintiff presents other evidence that she argues establishes a prima facie case of age discrimination. First, at a videotaped meeting, Jim Goetz, one of defendant's senior management executives, stated, "We want to get back and start bringing in some folks that are under 45 years old." Plaintiff argues that this statement reveals "the corporate intent with regard to the Breakthrough process," which plaintiff posits was to rid the company of many of its older workers. In plaintiff's words, Gotez's statement, "[w]hen combined with the huge statistical odds of the selection process being a random event" amounts to "substantial circumstantial evidence that one of the goals of Breakthrough was to create a younger workforce and that the Breakthrough staffing process was a sham."

We agree with the trial court that Goetz's statement, along with plaintiff's statistical evidence, was not effective in establishing a prima facie case of age discrimination. Again, the focus of our analysis must be on whether there is prima facie evidence of age discrimination in relation to each of the Breakthrough positions plaintiff applied for, and did not receive. There is no evidence that Goetz participated or in any way influenced the decisions of other management officers not to hire plaintiff for specific positions to which she applied. Instead, Goetz merely stated that he was present at meetings during which plaintiff's name was "mentioned," along with "hundreds" of other names. Standing alone, Goetz's comment does not indicate that any of the executives that rejected plaintiff harbored similar views about older employees in general. Moreover, we cannot accept plaintiff's position that Goetz's comment reflects a culture of age animus at defendant's higher executive levels, because the evidence simply does not support such an inference. See *Rasheed*, *supra* at 135-136. Goetz himself did not attribute the statement to a company wide policy, and specifically repudiated his statement at the same meeting during which he made it, averring that it was a mistake. Additionally, defendant issued a company-wide memorandum explicitly disavowing Goetz's comment, stating, "We *will not* discriminate on the basis of age, race, color, sex, religion, national origin, mental or physical handicap, or veteran status. Period." While we agree with plaintiff that statements of upper level employees may, in some instances, constitute evidence of employment discrimination as to staffing decisions, see *id.*, we do not agree that the statement in this case can be attributed to any of defendant's employees that actually decided not to hire plaintiff for a Breakthrough position.

Next, plaintiff submits evidence that defendant offered early retirement plans that attracted older employees and had the incidental, but intended effect, of reducing the number of older employees in defendant's workforce. Plaintiff argues that the existence of the early retirement scheme is circumstantial evidence of illegal age discrimination. We disagree. First, plaintiff does not allege that

employees were forced to take advantage of the early retirement plan. Indeed, no evidence suggests that the decision to choose early retirement was motivated by anything but the individual employee's desire to avail himself or herself of a neutral retirement plan. Evidence that older employees accepted the early retirement terms is hardly surprising, and, standing alone, not evidence of age discrimination. See *Zoppi v Chrysler Corp*, 206 Mich App 172, 176-177; 520 NW2d 378 (1994).

Because we conclude that plaintiff has failed to establish a prima facie case of age discrimination, we find it unnecessary to address her further arguments addressing the alleged pretextual nature of defendant's decision to terminate her.

IV

Next, plaintiff argues that the trial court erred in granting defendant's MCR 2.116(C)(10) motion for summary disposition as to her retaliation claim. Plaintiff argues that evidence shows defendant terminated her because she participated in the activities of the Women's Advisory Panel (WAP), an internal committee formed to address women's issues in the workplace. We disagree.

Article 7 of the Elliott-Larsen Civil Rights Act, MCL 37.2701; MSA 3.548(701), provides, in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of unlawful retaliation under the ELCRA, a plaintiff must show that (1) she engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436 (1997); 566 NW2d 661 (1997).

Accepting *arguendo* that plaintiff's participation in WAP activities was protected under the ELCRA, that plaintiff's participation was known to defendant, and that defendant took an employment action adverse to plaintiff by terminating her, we conclude that plaintiff has not submitted evidence to raise a triable issue of fact that her termination in 1993 was in any way causally related to her WAP membership, which, plaintiff admits, ended in 1987, some six years prior to the defendant's restructuring and her termination. Without further evidence of causation, we find that the period of time between plaintiff's termination and her WAP activities is too lengthy to give rise to an inference that her engagement in protected activity motivated her termination. Moreover, pursuant to the Breakthrough policy, all management employees, including plaintiff, were required to seek employment in the new corporate structure if they were to retain their jobs. Plaintiff's failure to obtain a job in the newly structured corporate entity was the reason for her termination. Further evidence shows that plaintiff sent a letter to defendant's vice president complaining that she had been discriminatorily denied a job

placement in the Breakthrough process and requesting his assistance "to try to find me a job . . . any job." However, it is not disputed that this letter was sent *after* she had been denied the positions for which she applied and at a time when her termination for failure to find a new position was a *fait accompli*. Moreover, we do not find that the vice president's refusal to aid plaintiff in her job hunt was an adverse employment action, because there is no indication that other employees received this type of assistance after they failed to obtain a new management job during Breakthrough. To counter the shortcomings of her attempt to establish a prima facie of retaliation, plaintiff has submitted the deposition testimony of one of defendant's female executives that she was "concerned" that plaintiff's failure to find placement could have been related to her WAP activities. However, this statement simply does not show a causal link between plaintiff's termination and her WAP activities. Likewise, the fact that plaintiff was asked during one of her interviews whether she believed that gender discrimination was a problem at the corporation does not support the inference urged upon us that plaintiff's WAP activities were causally related to her termination. Therefore, we conclude that the trial court did not err in granting defendant's motion for summary disposition as to plaintiff's retaliation claim.

Because we conclude that the trial court did not err in summarily disposition of plaintiff's claims for gender discrimination, age discrimination, and retaliatory discharge, we need not address plaintiff's remaining issues on appeal.

Affirmed.

/s/ Michael J. Kelly
/s/ Roman S. Gribbs

I concur in result only.

/s/ William B. Murphy

[1] Where the trial court has reached the right result, albeit for the wrong reason, reversal is not warranted. *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

[2] To establish a prima facie case of illegal employment discrimination with a disparate treatment theory, a plaintiff must submit evidence to establish a pattern of intentional discrimination directed at a protected class or against herself individually. *Donajkowski, supra* at 448-449. To establish a prima facie case by use of a disparate impact theory, the plaintiff must establish the discriminatory effect(s) of an otherwise neutral employment policy. *Id.* at 449. In the instant case, because plaintiff claims that defendant refused to select her for a new position during the BreakThrough process because she is female, her claim is one for intentional discrimination. Therefore, the disparate treatment theory is applicable to her claim of gender discrimination.

[3] In *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986), the Supreme Court stated, "To establish a prima facie case of age discrimination when an employer lays of employees for economic reasons, the courts have required the employee to present sufficient evidence on the ultimate question – whether age was a determining factor in the decision to discharge the older protected

employee. Accordingly, in the [RIF] case, the *McDonnell Douglas* prima facie case approach folds into the traditional directed verdict/judgment notwithstanding the verdict standard."

[4] We further note that plaintiff, in challenging Ligett's allegation that plaintiff untruthfully stated on her resume that "her Role Model project was implemented region wide" blatantly denied makin this claim, while her resume plainly reflects that she did make this statement.

[5] We also note that plaintiff has failed to challenge the trial court's rulings with respect to most of these statements. Thus, we would deem abandoned any issue relating to their admissibility. *Singerman v Municipal Service*, 211 Mich App 678, 684; 536 NW2d 547 (1995).