

STATE OF MICHIGAN
COURT OF APPEALS

LINDA DUFOUR,

Plaintiff-Appellant,

v

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
February 16, 2006

No. 255773
Oakland Circuit Court
LC No. 2003-047688-CL

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

In this age discrimination suit, plaintiff appeals as of right the grant of defendant's motion for summary disposition and the denial of plaintiff's motion to disqualify the trial court judge. Because plaintiff failed to provide either direct evidence of discrimination or indirect evidence of discrimination under the *McDonnell Douglas*¹ burden-shifting approach, the trial court appropriately granted defendant's motion for summary disposition. We further conclude that plaintiff did not demonstrate that the trial court was personally or extrajudicially biased against herself or her counsel. For those reasons, we affirm.

I

Plaintiff filed suit against defendant alleging an age discrimination violation of her rights under the Civil Rights Act, MCL 37.2101 *et seq.* Plaintiff testified and pled that she had worked for defendant since 1967, possessed all the qualifications and skills for her employment, was fifty-four at the time of her termination, and was replaced by a woman in her twenties. She further claimed she was subjected to age-related comments that constituted discriminatory animus, and that defendant's proffered reasons for her discharge were pretextual.

Plaintiff was a benefits assistant for defendant, handling clerical duties related to healthcare insurance for retirees and COBRA participants. As part of her duties, participants would mail in premium payments, and plaintiff was responsible for entering the payment information into the computer system. Although it was always part of plaintiff's responsibilities

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

to contact participants when she noticed incorrect payment amounts or late payments, plaintiff maintained that it was not her responsibility to verify all of the participant's accounts on a monthly basis until May 2002. She maintained that those monthly audits were the responsibility of another employee, Lisa Hawkins.

In April 2002, it came to defendant's attention that plaintiff was several months behind in entering payment data into the computer and plaintiff's supervisors worked for several days to assist her in entering the data for over a thousand unentered payment coupons. As a result, plaintiff received a correction action record (disciplinary action) noting poor job performance and defendant gave plaintiff a "Warning A" – the first of four disciplinary levels for poor job performance. Shortly thereafter defendant discovered hundreds of errors in the participant's accounts that needed to be corrected and defendant directed plaintiff to correct the errors. Before plaintiff went on vacation the last two weeks of June 2002, she reported to her supervisor, Sue Kant, that she was current in recording the payment coupons and had corrected the discovered errors. Kant covered plaintiff's job while she was on vacation and discovered dozens of errors plaintiff had never corrected and similar payment coupon deficiencies. Defendant terminated plaintiff for gross neglect of duty, an offense punishable by discharge on the first offense.

II

In order to survive a motion for summary disposition in an age discrimination action, a plaintiff must present sufficient admissible evidence to create a reasonable factual dispute that the employer's proffered reason for termination was a mere pretext, and that discrimination was the true motivation. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 157; 579 NW2d 906 (1998). The person's age need not have been the only reason or the main reason for the discharge, but must have been one of the reasons that made a difference in determining whether to discharge him. *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997). The issue is whether age was a determining factor in the discharge. *Id.* An age discrimination claim can be established by showing either (1) disparate treatment, which requires a showing of a pattern of intentional discrimination against either protected employees or the plaintiff; or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy discriminatorily impacted upon members of a protected class.² MCL 37.2101 *et seq.*; *Lytle, supra*, 177 n 26.

III

Plaintiff first contends she has presented sufficient direct evidence of discrimination to survive summary disposition. Plaintiff specifically asserts that she submitted sufficient evidence to create a genuine issue of material fact regarding whether defendant discriminated against her on the basis of age. She avers that the record contains both direct and indirect evidence of disparate treatment age discrimination. A plaintiff can establish a claim of disparate treatment with either direct or indirect evidence of intentional discrimination. *DeBrow v Century 21 Great*

² Plaintiff's claim on appeal is that she alone was discriminated against and discharged because of her age. Her claim is therefore one of disparate treatment.

Lakes, Inc (After Remand), 463 Mich 534, 539; 620 NW2d 836 (2001). Plaintiff has put forth arguments under both theories.

Direct evidence is evidence which, if believed, requires the conclusion, without presumption or inference, that unlawful discrimination was at least a motivating factor. *Graham v Ford*, 237 Mich App 670, 676-677; 604 NW2d 713 (1999); *Lytle v Malady*, 209 Mich App 179, 185; 530 NW2d 135 (1995), rev'd on other grounds 458 Mich 153 (1998). This direct evidence must constitute direct proof that the discriminatory animus was causally related to the adverse employment decision. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 133-135; 666 NW2d 186 (2003). Plaintiff failed to demonstrate the requisite causal connection because the evidence clearly establishes that it is more likely than not that defendant would have terminated her for gross neglect of duty regardless of her age.

Plaintiff points to the alleged remarks of three managers as constituting direct evidence of discriminatory animus. First, plaintiff's manager, Richard Cane, told plaintiff that he knew she was soon turning fifty-five and she should find another job because he did not feel that she could do the job. He also made other age-related comments. Second, during her meeting with Cane and Kant on her last day of employment, Kant asked her, "[d]o you feel like you're too – that you can't do this job anymore because you've gotten older?" Finally, plaintiff testified that she heard another manager in a higher position than Cane state, "[i]t's time that we get rid of the old employees and get the new employees" or "young employees." Defendant argues that even if these statements were made, they do not amount to direct evidence of discrimination because they are merely stray remarks.

Stray remarks are not relevant as direct evidence of discriminatory animus. *Sniecinski, supra*, 135-136. Our Supreme Court and this Court have used the following factors to determine if statements are "relevant" as direct evidence of discrimination or are merely stray remarks: (1) whether remarks were made by the decision maker or by an agent uninvolved in the challenged decision; (2) whether remarks were isolated or part of a pattern of biased comments; (3) whether the remarks were made close in time to the challenged decision; and (4) whether the remarks were ambiguous or clearly reflective of discriminatory bias. *Dept of Civil Rights ex rel Burnside v Fashion Bug of Detroit*, 473 Mich 863, 867; 702 NW2d 154 (2005). Applying that analysis, two of the three alleged remarks are relevant to a discriminatory animus.

Plaintiff claims that Cane made his remarks in 2000 and 2001. Based on the dates of some of the statements, they are remote in time to the discharge decision. However, because he was plaintiff's manager, Cane was a decision maker. Thus, Cane's comments were part of a pattern, and were not ambiguous, and were clearly reflective of a discriminatory bias. His comments are therefore not stray remarks but are relevant to a discriminatory animus. Kant's remark was not part of a pattern, but was an isolated comment. It was, however, close in time to the discharge decision, was not ambiguous, and Kant was a decision maker. Therefore, her comment is also not a stray remark but is relevant to a discriminatory animus. The third remark was merely overheard by plaintiff, not made directly to her, was not close in time to the discharge decision, and was vague and ambiguous. It is therefore a stray remark.

Although the remarks are relevant to defendant's discriminatory animus, plaintiff must still demonstrate that this animus was causally related to plaintiff's termination. *Sniecinski, supra*, 133-135. Defendant argues that it would have terminated plaintiff's employment

regardless of her age, which makes this a mixed motives case. *Id.*, 133. In a mixed motives case, a plaintiff must prove that “the defendant’s discriminatory animus was more likely than not a ‘substantial’ or ‘motivating’ factor in the decision.” *Id.* “Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision.” *Id.* Defendant argues that it would have terminated plaintiff regardless of her age because the evidence presented showed that plaintiff grossly neglected her job duties, was dishonest with her supervisors, and made hundreds of errors in her work that jeopardized health coverage for hundreds of employees and cost defendant over \$84,000 in uncollected premiums.

Plaintiff rebuts the charge of gross negligence by arguing that it was not her, but Lisa Hawkins who neglected her work duties, and by asserting that all her previous performance reviews were above standards. These arguments do not rebut the charge of gross neglect. Plaintiff’s gross neglect was not that she did not conduct the monthly audits plaintiff claims were Hawkins’ responsibility. The record reflects that the neglect occurred in June 2002 when plaintiff failed to enter payment coupons, made numerous errors, and lied to her supervisors about correcting errors. The neglect that occurred in June 2002 does not concern Lisa Hawkins or plaintiff’s prior positive performance reviews. Thus, plaintiff’s arguments are irrelevant, and she has failed to show that defendant would not have most likely terminated her regardless of any discriminatory animus.

Plaintiff also argues that she could have used the statistics she requested of the number of defendant’s employees over and under the age of 50 as direct evidence. However, direct evidence is evidence which, if believed, requires the conclusion, without presumption or inference, that unlawful discrimination was at least a motivating factor. *Graham, supra*, 676-677; *Lytle, supra*, 209 Mich App 185. Statistics here would not be direct proof of defendant’s discriminatory animus but would require a presumption or inference to reach that conclusion. Therefore, statistics could not have provided plaintiff with direct evidence of discrimination and her argument fails.

In the absence of direct evidence of discrimination, a plaintiff may establish a prima facie case of discrimination using indirect, or circumstantial evidence under the *McDonnell Douglas* burden-shifting test. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). A plaintiff in an age discrimination case must show that “(1) he was a member of the protected class; (2) he was discharged; (3) he was qualified for the position; and (4) he was replaced by a younger person.” *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). The only factor contested by the parties is whether plaintiff was qualified for her position.

Defendant argues that a qualified employee performs at a level that meets an employer’s legitimate expectations, and in order to show that she was qualified, plaintiff must rule out the possibility that she was terminated due to inadequate job performance. However, when considering this question, “[a] court must evaluate whether a plaintiff established his qualifications independent of the employer’s proffered nondiscriminatory reasons for discharge.” *Cicero v Borg-Warner Automotive, Inc*, 280 F3d 579, 585 (CA 6, 2002). Considering that plaintiff had a satisfactory review two months before she was terminated and had a thirty-plus year tenure with defendant, plaintiff has submitted sufficient evidence to show that she was qualified for her position. She has therefore established a prima facie case of indirect discrimination under the *McDonnell Douglas* burden-shifting method.

Once a plaintiff presents a prima facie case, a rebuttable presumption of discrimination arises and the burden of production shifts to the defendant to establish a legitimate reason for the discharge. *Venable v GMC*, 253 Mich App 473, 483-484; 656 NW2d 188 (2002). At this stage, defendant

need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. [*Lytle, supra*, 458 Mich 173-174.]

Defendant presented evidence showing that plaintiff was grossly negligent in the performance of her duties, was dishonest with her supervisors, and made hundreds of errors in her work. Therefore, defendant has met its burden of production and has rebutted plaintiff's prima facie showing of discrimination.

If the defendant produces a nondiscriminatory reason for the discharge, the burden then shifts back to the plaintiff to show by a preponderance of the evidence that a triable issue of fact exists whether the defendant's proffered reasons are merely a pretext for discrimination. A plaintiff can establish that a defendant's reasons for termination are pretexts "(1) by showing the reasons had no basis in fact, (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).

Plaintiff first contends defendant's reasons for discharge have no basis in fact because she received satisfactory performance appraisals from 1967 through 2002. The record reflects that defendant terminated plaintiff for gross neglect of duties, not poor job performance. That gross neglect occurred in June 2002 when she told her supervisors before leaving on vacation that she was up to date in coupon entry, a prior noted deficiency on plaintiff's part as ordered by the corrective action record, and had corrected the errors defendant directed her to correct. Therefore, plaintiff's previous satisfactory reviews prior to that time are not relevant to defendant's stated reason for discharge.

Next, plaintiff attempts to use James Peard's affidavit in support of her argument that defendant's stated reasons for her discharge are not based in fact. It is true that Peard's affidavit possibly demonstrates that defendant may not have followed Human Resources procedure. But it does not address plaintiff's gross neglect, lying, or errors. Therefore, it does not demonstrate that defendant's nondiscriminatory reasons for discharge have no basis in fact. Plaintiff also contends defendant's reasons for discharge are not based in fact because it was Lisa Hawkins' responsibility to conduct monthly audits, not plaintiff's responsibility. However, who had responsibility for the audits before May 2002 is irrelevant because plaintiff's discharge corrective action record clearly states that plaintiff never did an audit *after* May 2002, when both parties agree it *was* plaintiff's responsibility.

Plaintiff may still demonstrate pretext, however, by the second method of showing that even if the nondiscriminatory reasons for discharge are based in fact, that they were not the actual factors motivating the decision. *Dubey, supra*, 565-566. Plaintiff argues that the alleged discriminatory statements she presented demonstrate defendant's actual motivation for her discharge. Two of the statements are relevant to defendant's discriminatory animus, but, similar to the shortcomings of her direct evidence argument, plaintiff has not established a causal connection between the discriminatory animus of the comments and her discharge demonstrating that it was the actual factor motivating defendant's decision. Therefore, plaintiff's argument fails.

Plaintiff may show defendant's reasons for discharge were pretextual by the third method by showing that the nondiscriminatory reasons defendant provided were insufficient to justify her discharge. *Dubey, supra*, 565-566. She argues that defendant's nondiscriminatory reasons were insufficient to justify her discharge due to (1) her satisfactory performance reviews before she was terminated; (2) Peard's affidavit noting that the reasons given for her discharge "do not add up;" and (3) her claim that the audits were not her responsibility before May 2002. Plaintiff's arguments do not demonstrate that defendant's reasons for discharge were insufficient to justify the decision. The record reflects that plaintiff's gross neglect of duty caused defendant to pay the premiums for non-paying participants, resulting in a substantial underpayment. Her errors also caused a lack of coverage for "dozens" of participants who had actually paid for it. Plaintiff does not even address these errors or in any way demonstrate that they were an insufficient reason for discharge. Plaintiff has failed to show pretext under the third method.

Another method of showing pretext is to show that the defendant treated a similarly situated employee differently. *Lytle, supra*, 458 Mich 178. Plaintiff contends defendant treated her differently than Lisa Hawkins, a similarly situated employee. In order to show that two employees are similarly situated, a plaintiff "is required to show that 'all of the relevant aspects'" of the coworker's employment situation are "nearly identical" to those of plaintiff's situation. *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). Plaintiff has not established that the two employees were similarly situated when plaintiff and Hawkins worked in totally different jobs and their employment situations were not at all alike.

Plaintiff has failed to show either direct evidence of discrimination or indirect evidence of discrimination under the *McDonnell Douglas* burden-shifting approach. We affirm the trial court's grant of defendant's motion for summary disposition on that basis.

IV

Plaintiff's also argues that the trial court judge should have been disqualified. A party who seeks disqualification of a judge on the basis of bias bears the burden of proof and must overcome a heavy presumption of judicial impartiality. MCR 2.003(B); *Schellenberg v Rochester, Michigan Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998); *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 757; 442 NW2d 773 (1989). Absent a showing of actual personal bias or prejudice, a judge will not ordinarily be disqualified. *Schellenberg, supra*. Such a showing generally requires that the bias be personal and extrajudicial, having its origins in events or sources of information gleaned outside the judicial proceeding itself. *Cain v Dep't of Corrections*, 451 Mich 470, 495-

496; 548 NW2d 210 (1996). The opinions formed by a judge during the course of the proceedings based on events that occur or on the basis of facts introduced, do not constitute a basis for establishing bias “unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.” *Schellenberg, supra*. Similarly, critical, disapproving, or hostile judicial remarks made during a proceeding do not ordinarily establish disqualifying bias. *Id.*

Plaintiff avers that the trial court demonstrated bias in the following ways: through comments it made during an evidentiary motion, rulings that wrongfully excluded evidence, turning a deaf ear to plaintiff’s arguments, ruling for defendant when defendant “had not completely been honest with” the court, catering to defendant’s objections, entering an order contrary to what the court previously ruled, refusing to listen to plaintiff’s arguments, threatening plaintiff’s counsel with contempt, and accusing plaintiff’s counsel of changing and manipulating the court’s orders. None of plaintiff’s assignments of error display a personal, extrajudicial bias against plaintiff or her counsel. Rather, the trial court commented on plaintiff’s case, ruled contrary to plaintiff’s interests, and was short and impatient with plaintiff’s counsel during oral arguments. These acts do not demonstrate the required bias, and plaintiff has failed to show that the trial court harbored any personal or extrajudicial bias against herself or her attorney.

V

Plaintiff’s last issue that the trial court abused its discretion by ruling plaintiff was only entitled to statistics of defendant’s human resources department rather than the entire company is moot and we decline to address it. *Alliance for Mentally Ill v Dep’t of Comm Health*, 231 Mich App 647, 656; 588 NW2d 133 (1998).

VI

Plaintiff failed to provide either direct evidence of discrimination or indirect evidence of discrimination under the *McDonnell Douglas* burden-shifting approach, and therefore, the trial court appropriately granted defendant’s motion for summary disposition. Plaintiff did not demonstrate that the trial court was personally or extrajudicially biased against herself or her counsel because none of the acts she alleged sufficiently demonstrated bias.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly