

STATE OF MICHIGAN
COURT OF APPEALS

SHARON DONOHUE and KEVIN DONOHUE,

Plaintiffs-Appellants,

v

INTERMODAL TRANSPORTATION
SERVICES, INC.,

Defendant-Appellee.

UNPUBLISHED

January 11, 2005

No. 249700

Oakland Circuit Court

LC No. 2002-041818-NZ

Before: Zahra, P.J., and White and Talbot, JJ.

WHITE, J. (*concurring in part and dissenting in part*).

I agree with the majority that plaintiff's gender discrimination claims, and her age discrimination claims regarding remarketing accounts and intra-company transfer, were properly dismissed. I do not agree, however, that plaintiff's age discrimination claim as to her termination was properly dismissed, and would reverse that determination.

A

I agree with the majority that plaintiff established a prima facie case of age discrimination. That issue thus need not be addressed, but I note in that regard that defendant erroneously argues on appeal that plaintiff failed to establish a prima facie case because she did not establish that she was replaced by a younger person. Defendant's argument is legally flawed. As noted in *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 133-134, n 7; 666 NW2d 186 (2003), "the elements of the *McDonnell Douglas* prima facie case are adapted to" the factual situation at hand. Given that plaintiff's responsibilities were distributed to several employees on her termination, the last prong of plaintiff's prima facie case is not to show replacement with a younger person, but rather, that she establish that the adverse employment action(s) "occurred under circumstances giving rise to an inference of unlawful discrimination." 469 Mich at 134. I conclude that plaintiff did so. I also conclude that plaintiff presented ample evidence from which a reasonable fact-finder could infer that defendant's economic justification defense was pretextual.

"[A]lthough there may be justification for economic layoffs, an employer may not decide which employees to lay off on the basis of considerations that are prohibited by law, such as race, gender, or age." *Featherly v Teledyne Ind's, Inc*, 194 Mich App 352, 355; 486 NW2d 361 (1992). "[W]here an employer has a legitimate reason to terminate (e.g., economic necessity . . .

), it may not do so for illegal reasons such as unlawful discrimination. *Id.* at 355. I conclude that a reasonable fact-finder could infer from plaintiff's evidence, summarized below, that ***a determining factor*** in plaintiff's termination was age. *Featherly, supra* at 355. ("The primary issue in this case is whether, in choosing which employees to lay off, the defendants made their selection by using age as a determining factor.")

B

Plaintiff submitted below depositions, affidavits, organizational charts and employee lists, as well as statistical evidence of the age of account executives terminated and retained, and other management employees terminated and retained. Plaintiff's affidavit stated that at the time John McHale (defendant's then-president) terminated her, McHale told her the Marketing and Sales department was being eliminated and that she was being terminated because the DIT accounts (all of which she handled) did not fit into the future of the company. However, the affidavit of James Deal, one of defendant's area managers, stated that all DIT accounts were assigned to him when plaintiff was terminated. Moreover, plaintiff's affidavit stated that the DIT accounts are still being serviced, i.e., they were neither discontinued or terminated.

The affidavit of Robert White¹, senior vice president of marketing and sales, and plaintiff's immediate superior of 13 years, stated in pertinent part:

1. Mrs. Donohue was a direct report to me for 13 years. During those years she exemplified what an Account Executive should strive to be. The last two years, she scored a 4.5 out of a possible 5 points on her personnel achievement form. Out of nine (9) Account Executives, I had only one other that scored that high.
2. Mrs. Donohue was in charge of all Damaged In-Transit (D.I.T.) Vehicles for all OEM's in addition, she handled all Human Resources matters including hiring and firing clerical staff. Secondly, she handled the quality issues under ISO 9001 for Marketing & Sales.
3. During the last ten years, I.T.S. showed a continued growth in revenue from \$20 million in 1991 to \$83 million in 2000. The reason given for downsizing was that our profit margins were decreasing, but in fact, it was due to the IT Department (Information Technologies) expenditures. To the best of my knowledge, based upon accounting statements made available to me during my tenure with ITS, the company always made a profit.
4. Mrs. Donohue and her staff were able to maintain and grow the D.I.T. accounts in excess of quarter million dollars. Not once in those thirteen years did I ever hear a complaint from our customers over that way she handled the accounts.

¹ White submitted two affidavits, this one being dated February 28, 2003.

Deal's affidavit also stated:

6. The stated reasons for the terminations was that the marketing and sales department was being eliminated and the remaining account executive would be working under the regional managers. However, that department was recreated approximately eight months later.
7. After Sharon Donohue was terminated, I was assigned her DIT accounts. I delegated some of the clerical aspects of these accounts . . .
8. Sharon Donohue was an excellent employee. She kept the business that was assigned to her. Her customer complaint record was excellent.

Plaintiff's affidavit stated regarding her account executive position:

5. Account executives duties could be performed from any geographical location. For example Sharon Donohue handled accounts on the West Coast from Detroit, MI. The DIT accounts of Sharon Donohue were assigned to James Deal in Louisiana after her termination. After the termination of Sharon Donohue Bob Gapinski moved to Cincinnati, which was further from the location of most of his accounts. Contrary to the affidavit of John McHale, Bob Gapinski was working out of the Troy office at the time of my termination. The larger accounts of Keith Lee accounts [sic] were in Florida, Georgia and California. Bob Boehm was stationed in New Jersey, but a significant number of his accounts were located on the West Coast.
6. All account executives performed comparable duties. Our supervisor was Robert White. . . .

* * *

8. During February 2002 the employment of two of the nine account executives was terminated. In addition to Sharon Donohue, account executive Lew Schonberg was terminated. Mr. Schonberg was approximately 62 years old. Only retained male account executives Don Smith and Robert Boehm were over the age of 50. Don Smith had retired from General Motors and was in charge of the account that he retired from. Had he been terminated this account would have been in jeopardy. Robert Boehm handled marine accounts. No one else within the Company was qualified to do this job. The remaining executives were all young males within the age range of 25 to 35.
9. Sharon Donohue had more seniority than all of the retained young male account executives. For example, Sharon Donohue had 13 years of experience, while retained account executive Keith Lee had only three years of experience with the Company. Despite their salaries being comparable, Keith Lee was retained and Sharon Donohue was terminated.

10. Also terminated during February 2002 were: senior vice president Robert White (age), female P. Bitterle and female W. Forsythe. Thus, only members of protected groups were terminated. Additionally, three account executives older than 50 (Bob Mignosa-51, Don Sprow-57 and John Zarembski-51) were terminated approximately one year earlier.

* * *

13. At the time that my employment was terminated, John McHale told me that the marketing and sales department was being eliminated and I was being terminated because my DIT accounts did not fit into the future direction of the Company. I understand that my accounts are still being serviced by the defendant. According to the affidavit of James Deal that department was subsequently recreated and is currently a part of the defendant company. I was surprised to learn that most of the employees within the marketing and sales department were retained and not terminated.

* * *

19. The marketing and sales department continued to exist in Troy until August 2002 [plaintiff had been terminated in February 2002].

20. Although the operations group was consolidated into five regions (as explained in the John McHale affidavit), only two managers lost their jobs. I was told by Robert White and James Deal during the course of my employment, that these managers lost their jobs due to performance reasons.

Contrary to defendant's contention, the fact that two of the account executives defendant retained were over the age of 50 does not diminish or defeat plaintiff's claim that a determining factor in her termination was age. As plaintiff's affidavit stated and the record supports, these two older retained account executives, Don Smith and Robert Boehm, were not similarly situated to plaintiff. Don Smith had retired from General Motors and was in charge of the GM account for defendant, and Robert Boehm handled marine accounts--which no one else was qualified to do. The remaining account executives were all 25 to 35 years old.

C

As discussed above, plaintiff's superiors testified that plaintiff's qualifications, experience and work performance were top-notch. Deposition testimony of plaintiff's direct superior, Robert White, and plaintiff's deposition testimony and their affidavits stated that plaintiff had more experience and seniority than three of the younger account executives retained—Jason Reed, Keith Lee, and Brian Parton, and, importantly, that the younger account executives defendant retained were paid salaries comparable to hers. Plaintiff's direct superior, Robert White, testified that there was no reason to terminate plaintiff, in lieu of the younger, less experienced account executives defendant chose to retain.

Plaintiff also established that the Marketing and Sales department was resurrected several months after its elimination. Deal's affidavit stated that although defendant's stated reason for

terminating plaintiff was that the marketing and sales department was being eliminated, in fact, “that department was recreated approximately eight months later.” Contrary to the majority, I conclude that a permissible inference to draw from the resurrection of the department within months of plaintiff’s termination would be that elimination of the department was not the real reason for plaintiff’s termination, but rather, was a subterfuge for age discrimination.

In addition, Deal’s affidavit stated that in February 2002, he attended a secret meeting in New Jersey with defendant’s other area managers, other high-level managers, and CEO John McHale, at which meeting McHale announced that plaintiff (age 48), vice president Robert White (plaintiff’s boss, age 61), and account manager Lou Schonberg (age 62, approximately) would be terminated. Deal’s affidavit stated that at this secret meeting “there was very limited discussion of the reasons why the remaining account executives were being retained. . . it was discussed by a number of participants that the account executive terminations appeared to be discriminatory because the older employees seemed to be the only key employees being terminated.” On deposition, Deal testified that because several of the higher management personnel at the February 2002 meeting expressed concern that only older employees were being terminated, the director of Human Resources (Steve Bloom) was called to the meeting. Deal testified that Bloom “okayed” the terminations. As to this evidence, although not strongly supportive of plaintiff’s claim, the fact that the reaction of defendant’s high-ranking management was that it appeared that age was the determining factor in deciding who to terminate is some evidence that there was no other explanation given.

Deal’s affidavit, dated January 23, 2003, ends by stating that defendant recently terminated him, and that he “was replaced by a younger male, with no experience in my job area, who was approximately 41 years old. At the time of my termination I was 52 years old.”

I conclude that a reasonable jury could infer that defendant’s economic justification was a mere pretext for discharging plaintiff and other older employees. The documentary evidence plaintiff presented sufficed to raise a triable issue of fact on the question whether age was a motivating factor in defendant’s termination of plaintiff. I would reverse the dismissal of plaintiff’s age discrimination claim as to her termination alone.

/s/ Helene N. White