

STATE OF MICHIGAN
COURT OF APPEALS

FORD MOTOR COMPANY,

Plaintiff/Counterdefendant-
Appellant,

v

HELEN C. HARVEY,

Defendant/Counterplaintiff-
Appellee.

and

O'DEAIL HARVEY,

Defendant.

UNPUBLISHED

June 19, 2003

No. 238483

Wayne Circuit Court

LC No. 01-127746-CZ

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiff Ford Motor Company appeals as of right the trial court's order confirming the arbitration award. We affirm.

Defendant Helen Harvey (Harvey) began working for Ford in 1969. In 1996, she was offered early retirement by Ford, but declined the offer. In August 1997, Ford instituted an investigation of Harvey based on information that Harvey had been stealing resources and money from the company to support her doctoral dissertation. Following the investigation, Ford terminated Harvey's employment.

In May 2001, the parties entered into an arbitration agreement under which Harvey agreed to submit her employment discrimination claims to arbitration under the Arbitration Act. The arbitrator ruled in favor of Harvey.¹ Ford sought to have the arbitration award vacated,

¹ Helen Harvey's husband O'Deail Harvey also brought a claim for loss of consortium, but the arbitrator found that he failed to prove damages. This part of the arbitrator's decision was not
(continued...)

arguing that the arbitrator had disregarded controlling principles of Michigan law by making explicit findings that negated the existence of age discrimination under Michigan law, but nevertheless, entering an award in favor of Harvey on her age discrimination claim. Ford also argued that the arbitrator committed clear procedural error by granting almost \$200,000 in attorney fees based on an ex parte submission by Harvey's attorney without an evidentiary hearing. The trial court denied Ford's motion and granted Harvey's motion to confirm the award.

The parties agree that the arbitration agreement provided for binding statutory arbitration. See *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 495; 475 NW2d 704 (1991). Under MCR 3.602, a court may vacate an arbitration award in only limited circumstances, such as where an arbitrator evidences partiality, refuses to hear material evidence, or exceeds his powers. *Collins v Blue Cross Blue Shield of Michigan*, 228 Mich App 560, 567; 579 NW2d 435 (1998), citing *Gordon Sel-Way, supra* at 495-496. "Arbitrators exceed the scope of their authority 'whenever they act beyond the material terms of the contract from which they primarily draw their authority, or in contravention of controlling principles of law.'" *Collins, supra* at 567, quoting *DAIIE v Gavin*, 416 Mich 407, 434; 331 NW2d 418 (1982). "A reviewing court may vacate an arbitration award where it finds an error of law that is apparent on its face and so substantial that, but for the error, the award would have been substantially different." *Collins, supra* at 567.

"An allegation that the arbitrators have exceeded their powers must be carefully evaluated in order to assure that this claim is not used as a ruse to induce the court to review the merits of the arbitrator's decision. Stated otherwise, courts may not substitute their judgment for that of the arbitrators and hence are reluctant to vacate or modify an award when the arbitration agreement does not expressly limit the arbitrator's power in some way." [*Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 177; 550 NW2d 608 (1996), quoting *Gordon Sel-Way, supra* at 497.]

"Therefore, a general principle of arbitration precludes courts from upsetting an award for reasons that concern the merits of the claim." *Id.*

Ford argues that the arbitrator's factual findings with respect to Harvey's termination and the voluntary resignation program compelled a conclusion in its favor. Ford claims that the arbitrator found that Harvey's termination was not based on her age but instead was based on a variety of performance, behavioral, and attitudinal problems with coworkers. According to Ford, the mere fact that Harvey was offered and refused an early retirement "buyout offer" a year before she was terminated for unrelated non-age reasons, cannot support a conclusion of age discrimination. Harvey responds that Ford handpicked the arbitrator and drafted the arbitration form in this case and is now only seeking to relitigate the merits of the claim. Harvey maintains that the arbitration award does not contain any legal errors on its face and, thus, the trial court correctly confirmed the award.

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challenged.

The arbitration award form submitted to the arbitrator by the parties required the arbitrator to specifically find whether Ford discriminated against Harvey on the basis of age when it terminated her and then specify what facts he relied on to reach his conclusion. After making its findings of fact, the arbitrator stated:

The facts regarding the supervisory relationship between Plaintiff and Lauri Alvarez lead me to believe that there was an irreconcilable conflict between the two company employees. Plaintiff had been in treatment for depression for approximately two years when Ms. Alvarez became her supervisor. Ms. Alvarez's management style and her level of job experience were unacceptable to Plaintiff. I believe that the unit's management team was aware of this conflict, and was aware of Plaintiff's emotional condition. So when the invitation for the buyout came about, there was a collective sigh of relief in the unit based on their believing that Plaintiff would understand that this was a good opportunity to depart from the organization, with an incentive for doing so.

From November 1996, when Plaintiff refused the buyout invitation, until her termination in September 1997, there was heightened managerial, supervisory and co-worker interest in her job area. Plaintiff had been offered *the carrot* (buyout offer) to leave the organization and she had refused it, now it was time for *the stick* to ensure her departure.

I have doubts regarding Plaintiff's job performance following the death of her father in 1994. If the testimony of her psychiatrist, who has been treating her for depression and possibly a bi-polar condition, was true, and if the testimony of her spouse, that there were significant behavioral changes in her at home, was true, then there should have been a correspondingly negative change in her performance at work. However, the record indicates that no one in her work unit observed that anything out of order until the investigators entered her office and found that much was amiss. In fact, I believe that Plaintiff exhibited problematic behavior in the workplace for quite some time, and that as her depressed state continued, unit managers, supervisors and co-workers became less and less sympathetic.

Conclusion:

The facts of the case raised sufficient doubt regarding the voluntary nature of the buyout offer that caused me to be persuaded that the invitation was, in Plaintiff's case, an offer that she was not supposed to refuse.

In Michigan, a claim of age discrimination can be shown in two ways: (1) under ordinary principles of proof by the use of direct or indirect evidence, or (2) by making a prima facie showing. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). The prima facie approach requires an employee to show that the employee was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Id.*, citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S

Ct 1817; 36 L Ed 2d 668 (1973). After the employer produces evidence of a nondiscriminatory reason for the discharge, the presumption of discrimination is eliminated, and the employee has the ultimate burden of proving discrimination. *Id.* at 695-696. To prevail, the employee must prove that the employer's nondiscriminatory reason was not the true reason for the discharge and that the employee's age was a motivating factor in the employer's decision. *Id.* at 697.

Ford's "buyout" program can be analogized with an offer of early retirement. It has been held that the mere offer of early retirement is not evidence of discrimination. See *Zoppi v Chrysler Corp*, 206 Mich App 172, 177; 520 NW2d 378 (1994), overruled on other grounds *Zanni v Medaphis Physician Servs Corp*, 240 Mich App 472; 612 NW2d 845 (2000).

The arbitrator heavily relied on Ford's "buyout" offer in finding that Ford discriminated against Harvey based on her age. The arbitrator's decision was a bit ambiguous. A review of the decision shows that the arbitrator did in fact find that Harvey was having problems unrelated to her age at work. The arbitrator found that Harvey had a tenuous relationship with another employee. The arbitrator also found that Harvey had exhibited problematic behavior at work and was in a depressed mental state. The arbitrator further found that Harvey admitted her misconduct involving theft of company materials. However, the arbitrator found that Ford did nothing about these problems until after Harvey declined the early "buyout" offer.

It appears that Ford did not terminate any of the other employees who declined their "buyout" offers. This fact weighs against Harvey's discrimination claim. It is also clear from the arbitrator's findings that Harvey was exhibiting problems at work unrelated to the theft issue. This also weighs against the discrimination claim. However, the arbitrator clearly found that no action was taken regarding these problems until after Harvey declined the "buyout" offer. Moreover, with specific regard to the theft issue, the arbitrator found that the record demonstrated that "Defendant [Ford] did, in the cases of certain other company employees, handle incidents of theft without employee termination."

Courts can vacate an arbitrator's decision only in very limited circumstances. Ford contends this is one of those circumstances, arguing that the arbitrator misapplied the law. We disagree. Although the arbitrator's decision is admittedly ambiguous and appears contradictory at times, the arbitrator clearly found that age was a determining factor in Harvey's termination. The arbitrator did not base his decision solely on evidence of the existence of the "buyout" offer, the arbitrator analyzed other evidence in relation to the "buyout" offer to find that age was a determining factor in Harvey's termination. Most notably, with regard to Ford's contention that it fired Harvey because of her theft from the company, the arbitrator found that Ford did not terminate other employees involved in other incidents of theft. We cannot overturn an arbitrator's decision simply because we do not agree with the result. Under the circumstances, regardless whether we agree with the award, we are constrained to find the arbitrator did not base his decision on an error of law.

Ford also argues that the arbitrator erred by failing to hold an evidentiary hearing regarding the issue of attorney fees. Neither party disputes that the arbitrator had the authority to

award reasonable attorney fees to Harvey.² Ford contends that its attorneys were unaware that Harvey's attorney had given a statement of fees to the arbitrator and that the arbitrator was required to hold an evidentiary hearing.

A trial court is required to hold a hearing regarding the reasonableness of attorney fees on request by the party challenging the fees. *B & B Investment Group v Gitler*, 229 Mich App 1, 15; 581 NW2d 17 (1998).

Where the opposing party challenges the reasonableness of the fee requested, the trial court should inquire into the services actually rendered prior to approving the bills of costs. . . . Although a full-blown trial is not necessary, an evidentiary hearing regarding the reasonableness of the fee request is. [*Id.*, quoting *Wilson v General Motors Corp*, 183 Mich App 21, 42-43; 454 NW2d 405 (1990).]

The parties dispute whether Harvey's attorney gave a copy of his statement of attorney fees to Ford's counsel on the last day of the arbitration hearing. Although Harvey's attorney claimed that he gave Ford's attorneys a copy of the statement, Ford presented affidavits from its attorneys in which they allege that they knew nothing of the fees until they received the arbitrator's award. A review of the transcript of the last day of the arbitration hearing shows that Harvey's counsel made his attorney fee request during his closing statement. Specifically, counsel stated:

And finally, with respect to reasonable attorney fees, I do have a billing statement that lists all of my work on this case. I have been working since 1997. We have been to three appeals, as well as two – excuse me, one Supreme Court case, all requiring an arduous amount of work, as well as consistently counseling, and I'm asking for actual cost. I have a contract with them that was signed on the date of the 10th or thereabouts, somewhat just a little bit less than \$200,000 in attorney fees. And with that, I close.

Harvey's counsel made this statement at the hearing, presumably before the arbitrator as well as Ford's counsel. Ford's counsel did not challenge the attorney fee request at the time it was made. It appears Ford's counsel took no action with regard to the attorney fee issue until after they received the arbitrator's award. Although it is disputed whether Harvey's counsel gave Ford's counsel a copy of his fee statement at the time of the hearing, it is clear from the hearing transcript that Ford should have known about the fee request and should have at least inquired into the request at that time. Again, Ford took no action until after the arbitrator rendered the award. Under the circumstances, because Ford took no action and failed to challenge the fees or request an evidentiary hearing, the arbitrator was not required to hold a

² The arbitration agreement states, “[I]n the event the arbitrator decides in Plaintiff’s [Harvey’s] favor on any or all of the claims, the Arbitrator shall have the authority to fashion a remedy under the principles of Michigan.”

earing. Although Ford now argues that the award was unreasonable, we find no error of law that would merit vacating the arbitrator's award.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen