

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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KATHLEEN L. RUSHMORE,

Plaintiff-Appellee,

v

MICHIGAN BELL TELEPHONE, d/b/a  
AMERITECH MICHIGAN, d/b/a AMERITECH  
CORPORATION,

Defendant-Appellant.

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UNPUBLISHED

September 25, 1998

No. 195754

Wayne Circuit Court

LC No. 94-417187 NZ

Before: Cavanagh, P.J., and White and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from a jury verdict in favor of plaintiff in this age discrimination case brought pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We reverse.

In 1993, defendant undertook a major restructuring known as Breakthrough. Breakthrough resulted in the creation of several business units, one of which was Network Services. Network Services was divided into several separate service areas, each of which was headed by a vice president who reported to the president of Network Services. These vice presidents were "Tier A" managers. Under the restructuring, Tier A managers were to appoint Tier B managers and Tier B managers were to appoint Tier C managers. The Tier C managers were to appoint Tier D managers. Because of the reorganization, plaintiff's position became a Tier D position, and she was required to submit her resume to compete for that job and any other available positions in the new organization. Although she interviewed with several managers, she was not selected for a position, and her employment was subsequently terminated. At the time that plaintiff's employment was terminated, she was forty-nine years old. Plaintiff then brought this age discrimination suit. A jury awarded damages of \$445,058.

I

Defendant first contends that the trial court erred in allowing the admission of plaintiff's statistical evidence into evidence. A trial court's decision whether to admit evidence is reviewed

for an abuse of discretion. *Poirier v Grand Blanc Township (After Remand)*, 192 Mich App 539, 546; 481 NW2d 762 (1992). All relevant evidence is generally admissible. MRE 402; *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401; *Szymanski, supra*. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. The risk of unfair prejudice embodies two concepts: (1) there is a danger that marginally probative evidence will be given undue weight by a jury, and (2) it would be inequitable to allow the proponent to use the evidence. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 201; 555 NW2d 733 (1996).

Plaintiff's statistics suggested that the company tended to fire older workers during the restructuring. We believe that the trial court did not abuse its discretion in allowing the admission of the statistical evidence. While we conclude that the statistical evidence provided only weak circumstantial evidence of age discrimination, it was nonetheless relevant. See *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361 (1992); *Dixon v WW Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1987). Defendant was free to challenge the methodology and the weight accorded the evidence, as it did.

## II

Defendant also contends that the trial court erred in admitting a videotaped conference where James Goetz, a vice president, indicated that his division was going to start hiring for entry level analyst jobs where "we want to get back and start bringing in some folks that are under forty-five years old." We conclude that the trial court abused its discretion in admitting the videotape of Goetz' statement. Goetz and plaintiff worked in different divisions, Goetz in information technology and plaintiff in operator services. Goetz' comment was not related to the decision-making process that resulted in plaintiff's termination. There is no indication that the comment was a statement of company policy or reflected a pattern of discrimination. In fact, later in the conference, Goetz himself explained that he had meant only that the company would resume hiring from colleges, but that the company was open to hiring people of any age.

Under these circumstances, the comment was of no probative value.<sup>1</sup> See *Cooley v Carmike Cinemas, Inc*, 25 F3d 1325, 1330 (CA 6, 1994); *Fortino v Quasar Co*, 950 F2d 389, 395 (CA 7, 1991). Furthermore, as the statement was undoubtedly prejudicial, it was inadmissible. Because, as discussed below, plaintiff did not produce sufficient evidence to support her claim of age discrimination, it is likely that the jury gave disproportionate weight to this evidence.<sup>2</sup> See *Zeeland Farm Services, supra*.

## III

Finally, defendant asserts that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict. In reviewing a trial court's failure to grant a defendant's motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may be drawn in the light most favorable to the plaintiff. If reasonable jurors

could honestly have reached different conclusions, the motion should have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).

The prima facie test articulated by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), may be used as a framework for evaluating age discrimination claims. This approach requires an employee to show that (1) the employee was a member of a protected class, (2) the employee was subject to an adverse employment action, (3) the employee was qualified for the position, and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in defendant's adverse conduct toward the plaintiff. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997); *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997). After the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision. If the employer is unable to satisfy its burden of production, it is presumed that the basis of the employer's decision was discriminatory. If the defendant rebuts the presumption, then the burden of production shifts back to the plaintiff who must establish that the employer's articulation was merely a pretext to discrimination. *Id.*

As plaintiff notes, a claim of age discrimination may also be shown under ordinary principles of proof by the use of direct or indirect evidence relevant to and sufficiently probative of the issue, without resort to any special judicially created presumptions or inferences related to the evidence. *Town, supra; Matras, supra* at 682-683. Such unaided proof may consist of direct evidence that the employer announced, or admitted, or otherwise unmistakably indicated that age was a determining factor in the challenged employment decision or circumstantial evidence, including but not limited to proof of the claimant's general qualifications, from which the inference of age discrimination may rationally be drawn independently of any presumption. *Cline v Roadway Express, Inc*, 689 F2d 481, 485 (CA 4, 1982). When this kind of direct or circumstantial proof is adduced, there is no need to employ the *McDonnell Douglas* presumption-based scheme. *Id.*; *Matras, supra* at 683-684.

Here, even viewing the evidence in a light most favorable to plaintiff, we conclude that the evidence could not permit a reasonable jury to conclude that age discrimination took place. There was no direct evidence of age discrimination, and the circumstantial evidence was insufficient to satisfy plaintiff's burden of proof, whether one analyzes under the *McDonnell Douglas* test or considers ordinary principles of proof.

None of the circumstantial evidence relied on by plaintiff, other than the statistical proofs, suggests that age discrimination occurred. However,

statistical evidence in a disparate treatment case, in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision to dismiss an individual employee. This is because a company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual. Without an indication of a connection between the statistics, the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision to discharge the employee

was impermissibly based on age. [*LeBlanc v Great American Ins Co*, 6 F3d 836, 848 (CA 1, 1993), cert den 511 US 1018; 114 S Ct 1398; 128 L Ed 2d 72 (1994) (citations omitted).]

While appropriate statistical data showing an employer's pattern of conduct toward a protected class as a group can create an inference that a defendant discriminated against individual members of the class, the data must be un rebutted and the statistics must show a significant disparity and eliminate the most common nondiscriminatory explanations for the disparity. *Barnes v GenCorp, Inc*, 896 F2d 1457, 1466 (CA 6, 1990). Here, plaintiff's statistical evidence was rebutted by the statistical evidence defendant presented. Moreover, plaintiff's limited statistical evidence failed to eliminate nondiscriminatory explanations for the disparities noted.

Even assuming that plaintiff's statistics were sufficient to establish a prima facie case of discrimination, defendant should have prevailed because it showed that bias did not play a role in the particular decision to discharge plaintiff. See *id.* at 1469. Rather, the evidence established that plaintiff was terminated because of her failure to secure a job during the interview process. Plaintiff interviewed with three Tier C managers, Carole Dennard, James Bussell, and Patricia King, and did not receive offers from any of them. Plaintiff's employment was then terminated because she had not found a position in the restructured company.

Dennard, Bussell, and King all denied considering the ages of the candidates for the Tier D positions. Moreover, Dennard, Bussell, and King all selected at least one person who was older than plaintiff.<sup>3</sup>

In addition, the managers articulated legitimate, nondiscriminatory reasons for not selecting plaintiff. Dennard testified that plaintiff was unenthusiastic, did not appear confident about what she was communicating, and was not positive during the interview.<sup>4</sup> Bussell testified that plaintiff gave the impression that she was not interested in increasing her responsibilities, and he gave her low scores in growth potential and leadership skills. Furthermore, plaintiff had never been part of a quality team, a specific attribute he was seeking. Bussell stated that, while it was not a bad interview, plaintiff simply did not impress him enough to select her for one of the five jobs, where he was considering almost thirty candidates. After interviewing plaintiff, King concluded that she lacked leadership ability. King perceived plaintiff as being "sort of lackadaisical" and not very serious about being selected, unlike the successful candidates. Thus, defendant presented legitimate, nondiscriminatory reasons for its failure to hire plaintiff for a Tier D position.

Plaintiff maintains that the selection process was "unfair and inconsistent." Plaintiff argues that the testimony of the Tier C employees would permit a reasonable person to conclude that the process was arbitrary, except that older workers tended to fare worse than younger employees.<sup>5</sup> We disagree.

Reading Dennard's testimony in context, any inconsistencies were minor and certainly do not suggest that Dennard chose not to select plaintiff based on her age. This is particularly true when it is considered that Dennard selected persons older than plaintiff and around her same age.<sup>6</sup>

Plaintiff claims that King gave her lower scores for the same answers that garnered higher scores for younger applicants and suggests that King put together a fraudulent rating sheet for plaintiff with low ratings only for litigation purposes. However, King denied even knowing about this lawsuit at the time she filled out the ratings sheet, and she explained that even if some of the answers reflected in the rating sheet appeared similar, it did not fully articulate what was said by the candidates. Under these circumstances, there is no basis to conclude that King engaged in age discrimination, especially considering that she selected two people older than plaintiff, two people aged forty-six, and one person aged forty-four.

As for Bussell, plaintiff asserts that his ratings were inconsistent in that, for people age forty-nine and over, he translated their 1992 performance ratings more unfavorably than for people younger. Our examination of all the ratings and ages demonstrates that Bussell did not use any hard-and-fast rules when assessing the candidates; some of his ratings were consistent with the method he claimed he used and some were not. Nevertheless, Bussell selected one person older than plaintiff and three others near her age. He rejected many candidates in their thirties in favor of these older candidates. Under these circumstances, there is no inference of age discrimination to be drawn.<sup>7</sup>

Plaintiff contends that pretext was established because there was evidence, in the form of written performance reviews and testimony from her former boss, that she performed her previous job well. However, simply because plaintiff performed well as a manager and was not selected to a Tier D position does not permit a conclusion that defendant's explanations were pretextual. The testimony established that, while the basic job description remained the same, the new Tier D managers were to have significantly more responsibility for decision making than plaintiff had in her former position. Accordingly, the fact that plaintiff performed her old job well does not demonstrate that she would perform the new Tier D job satisfactorily.

In sum, by presenting evidence that plaintiff was less qualified than those chosen, defendant undercut the importance of plaintiff's statistical proof. See *Barnes, supra* at 1466. Plaintiff could not rebut defendant's evidence by reference to the statistics she presented because the statistics did not tend to establish that age played a factor in the *particular* decision to discharge her. Plaintiff would have had to show that defendant's explanations are inherently suspect or present other direct or circumstantial evidence suggesting that defendant's reasons are pretextual. See *id.* Neither the circumstantial evidence plaintiff relies on nor evidence that she performed her old job well suggests that the reasons given for not selecting plaintiff were untrue or inherently suspect. The soundness of defendant's management decisions is not a matter for court review in the absence of any illegal discrimination. See *Meagher, supra* at 715. Accordingly, the trial court erred in denying defendant's motions for directed verdict and JNOV.

Reversed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh

/s/ Robert P. Young, Jr.

<sup>1</sup> We note that another panel of this Court found Goetz' statement to be inadmissible in *Arold v Michigan Bell Telephone Co*, unpublished opinion per curiam of the Court of Appeals, issued February 6, 1998 (Docket No. 189945), slip op p 12. The basis for excluding the statement is even stronger in the instant case, as Goetz was present at meetings at which the name of the *Arold* plaintiff, a candidate for Tier A positions, was mentioned. Plaintiff has offered no evidence that Goetz ever heard her name mentioned, much less provided any input on the decision to terminate her employment.

<sup>2</sup> Plaintiff highlighted the remark in her opening statement and the videotape was played to the jury at trial and again in summation.

<sup>3</sup> Dennard selected a candidate who was 51, Bussell selected a candidate who was 52, and King selected two candidates who were 52 and 51, respectively. In addition, all three managers selected two candidates who were 46.

<sup>4</sup> Plaintiff admitted during cross-examination that the interview with Dennard did not go well.

<sup>5</sup> Our dissenting colleague also contends that the evaluation and scoring procedures used in considering plaintiff for a Tier D position appear to be "inconsistent, arbitrary, and overly subjective." However, as long as unlawful discrimination does not occur, it is not this Court's job to oversee the criteria used in hiring decisions. See *Meagher, supra* at 715.

<sup>6</sup> Plaintiff contends that defendant retained younger and less qualified employees, pointing to twenty-four-year-old Marla Kurz and thirty-six-year-old Velma Dixon, both of whom Dennard picked as Tier D subordinates. However, Dennard also chose a woman older than plaintiff, two other women age forty-six, and another woman age forty-two. She rejected many applicants younger than these three women, including four in their thirties or younger. Therefore, the fact that she also picked those younger than plaintiff cannot support an inference that Dennard acted with discriminatory animus.

Plaintiff also points out that two other younger men secured positions in other parts of the organization, despite having received lower scores than plaintiff from the managers who interviewed plaintiff. Even if both men did find other positions within the organization, this fact alone does not suggest that age was a determinative factor in the decision to terminate plaintiff, especially since both Bussell and King, who interviewed and rejected plaintiff, rejected these younger men for positions as well.

<sup>7</sup> Plaintiff also points to the fact that Bussell changed two of plaintiff's ratings from "medium" to "low." However, he explained that these changes were made when he completed the sheets and denied counsel's suggestion that the changes were made because of this lawsuit. Plaintiff has offered no contrary evidence.