

Farrell #1

AMERICAN ARBITRATION ASSOCIATION

Employee,

And

Employer,

Arbitrator: M. Catherine Farrell,

ARBITRATION AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated by the parties in accordance with a settlement agreement stemming from litigation, and having been duly sworn, and having duly heard the proofs and allegations of the parties, on two consecutive dates November 8 and 9, 2007 do hereby, FIND and AWARD, as follows.

Introduction

This is a statutory employment discrimination case involving allegation of gender and age discrimination. The Claimant, Employee alleges that her termination of employment with Respondent through an alleged Reduction In Force (RIF) was in violation of the Age Discrimination in Employment Act (ADEA) 29 USC 621 et seq , and the Michigan Elliot Larsen Act MCL 37 2101 et seq.

More specifically, Claimant alleges that the RIF disproportionately discharged employees who were members of a protected class based on age and gender. Claimant alleges that the discharge was not the result of a bona fide Reduction In Force and that there was a disparate impact on the basis of gender and age.

Respondent defends that it implemented a companywide Reduction In Force and there was neither disparate treatment nor disparate impact as a result of the Reduction in Force.

Exhibits

The following exhibits were offered and admitted at the evidentiary hearing

Jt 1 Respondent Employer's Revised Response to Claimant's Interrogatories Dated November 8, 2006.

Jt 2 Attachments to Affidavit of Person 1

Jt 3 Reduction in Staff Outline

Jt 4 Instructions for Completing Team Leader Evaluation Log

Jt 5 Team Leader Selected for Displacement at Store # 48

C 6 Plaintiff's personnel file

C 7 Report of Person 2 –Statistical /Revised

C 8 Report of Person 2- Economic

C 9 Dr Person 2's CV

C10 Respondent Employer's Responses and Objections to Claimant's Wrongful Discharge Interrogatories to Respondent

C 11 Affidavit of Person 1

C 12 Employer Statistical Information City A/ City B Retail Market ADEA Disclosure

R 13 Dr Person 3's CV

R14 Dr Person 3's report titled "A Statistical Analysis regarding the potential Gender and Age Discrimination Associated with the Reduction In Force at Employer's Retail Store 48 in January 2004"

R 15 Chart labeled "Team Leaders for Store 48

R 16 Person 4's CV

R 17 Report and letter from Person 4 to Person 5 including attachments at Exhibits I and II dated 9/27/07

R 18 Background for wage curve of RN salary based on 2006 DOL

R 19 Employee's College Transcripts

R 20 USDOL BLS Occupational Employment Statistics, Registered Nurses May 2006

R 23 Michigan Dept of Labor & Economic Growth LMIS 2006 Mi Job Vacancy Survey

R 25 People Soft Records

C 26 email Person 6 to Person 1

C 27 News article 3/23/07

C 28 News articles March 07

R 29 Transformation News Letter 01/16/04

Statement of Facts

The Claimant, Employee was hired by Respondent January 21, 1981. Over her 23 year career she worked in positions of increasing responsibility and at the time of her discharge she was a Team Leader working in the hardware department at Store 48-Road A, City C Michigan. She engaged in various educational programs through the Employer, received employee awards, and at the time of her discharge she was considered to be a fully satisfactory employee who met expectations.

Respondent, Employer is a privately owned food and general merchandise retailer with its headquarters in City D, Michigan. The company operates in five states and has 181 retail 'supercenters'. The Respondent alleges that in an effort to compete with other superstores such as Store One, Store Two and Store Three it engaged the services of a consulting firm, FIRM, as

early as 2003, to assist in developing a strategic plan to successfully compete with those other retail entities. The company wide effort was called Employer 'Transformation'. According to the testimony the Reduction In Force was part of that plan. There were two prior RIFs in 1991 and again in 2001 in the office and distribution centers which did not resolve the Respondent's economic problem.

According to the testimony on January 14, 2004 the store managers were summoned to a meeting, in the Detroit area, in which the Reduction In Force was rolled out. The key player, for the purpose of this case, was Person 1, store manager for store 48. Person 1, is a 23 year employee. He was the store manager of Store 48 for about 18 months before the RIF was announced. He testified that it was at the January meeting that he first learned of the RIF. The store managers in the area were presented with a book that detailed how the Reduction in Force was to be accomplished. According to credited testimony, The store managers were to rank their managers based solely on their own knowledge of their managers performance without input from or discussion with anyone else and without reviewing personnel files, past performance evaluations or other records. Person 1 was to reduce his management workforce by almost 40%. His management workforce consists of 5 Line Leaders and 37 Team Leaders. He was advised he would have to eliminate one Line Leader and 15 Team Leaders.

According to Person 1, he unilaterally changed the direction he was given during the January 14, 2007 meeting. He testified he was to evaluate each team leader on a scale of 1 to 5, five being the highest. He testified that all of his Line Leaders and Team Leaders performed satisfactorily and met expectations and so he decided to rate the Team Leaders against each other as opposed to rating them on the scale provided. (T 2- 123) As a result, he rated the Claimant with low marks, ones and twos because "if rated them all according to their performance he

would have "... end up with all 3's and 4's I took the definitions away and used the 1 through 5, just as a number system for my people . I felt that was the best way to do it for my staff and myself". (t 2 148, 149) When asked why not just use 3,s 4s, and 5s, Person 1 stated "everyone would be just one group...bunched up". (T 2- 149) Person 1 also testified he rated all his Line Leaders as above satisfactory (t 2-149).He testified that the one Line Leader who was at the bottom of the list of five, was offered a Team Leader position (t 2 149).

As a result of Person 1's change in the rating system, the Claimant who was a fully satisfactory employee who met expectations, was rated on the scale as unsatisfactory. She and 14 other Team Leaders who were discharged in the RIF. The Respondent offered all of the affected Team Leaders severance packages and the Claimant refused to accept the severance and filed an EEOC complaint, which eventually resulted in litigation.

After the RIF, Claimant filed for and received unemployment compensation in the amount of \$9,412 00 After her discharge and as a result of her unemployment she enrolled in the Delta College nursing program. She has performed very well in school and anticipates receiving a nursing degree in December 2008.

Each of the parties offered expert testimony regarding lost wages, damages and future earnings. Claimant offered the expert testimony of Person 2 Ph D. His testimony was that the Claimant would have earned \$1, 292,998 from the beginning of Claimant's employment to age 65. He testified that the difference between the wages from Employer's and the wages the Claimant would earn as a nurse was netted at \$364, 857.00 His statistical analysis was based on three (3) stores in the area, two in City C and one in City B. He opined in his written report and at the evidentiary hearing there was a statistically significant disparate treatment as a result of the RIF. His report states:

"This report presents an updated statistical analysis of the separation patterns at the date on or about 1/24/04. The data were obtained from a document entitled 'Respondent Employer's Revised Response to Claimant's Interrogatories Dated November 8, 2006'. This is in the context of the separation of Ms. Employee (DOB August 8, 1957) who was terminated in 2004 (January 23) at age 46.

For each individual, their age at separation date and gender were recorded. There were a total of 117 observations. Of these, 77 were retained and 40 separated. Of the 77 retained, the average age was 40.2 and of the 40 separated, the average age was 44.5. A t test of the hypothesis of no difference in age between the retained and separated is rejected at the 0.0046 level of significance. What this means is that the chance of observing such a difference in age across the groups when in fact there was none, has a probability of 0.045 percent.

By similar analysis, of the 77 retained, the percent female was 44% (male 56%), and of the 40 separated, the percent female was 62% (male 38%). A t test of the hypothesis of no difference in percent female between the retained and separated is rejected at the .030 level of significance. What this means is that the chance of observing such a difference in gender across the groups when in fact there was none, has a probability of 3.0 %.

From a supplementary multivariate analysis, the estimated effect of being female is to increase the chance of being terminated by 12 percent (significant at the 16 percent level). Each additional year of age increases the chance of being separated by about 2.0 percent (significant at the 0.2 percent level). The effect of age or gender is individually significant at the conventional 5% level. However, age and gender are competing factors in predicting separation, and in this situation age appears as the stronger of the two.'

The Respondent's expert, Dr. Person 3 offered his testimony that based upon his analysis of the single store # 48, there was insufficient evidence to conclude that a difference exists in the distribution of the ages between those who were terminated and those who were retained (t 2-19). He also found there was insufficient evidence to conclude that gender discrimination existed or a relationship exists between the gender of the employee and whether or not they were reduced or terminated (t 2-16).

The Respondent's final expert, Person 4 offered his opinion that the earning power of the Claimant as a nurse rather than an employer employee was substantially larger and that she suffered no economic damages that would not be mitigated as a result of her new career.

Discussion

There are two distinct theories to prove a case of discrimination, including age and gender, recognized by the courts: disparate treatment and disparate impact.

Disparate Treatment A claimant must prove by a preponderance of the evidence that the respondent intentionally discriminated against her. A claimant may prove disparate treatment by either producing direct evidence of discriminatory intent or producing indirect or circumstantial evidence of discrimination. *St. Mary's Honor Ctr v Hicks* 509 US 502 (1993) *Di Carlo v Potter* 358 F3d 408 (6th Cir 2004); *Matras v Amoco Oil Company* 424 Mich 675 (1986). Direct evidence is "evidence if believed, requires the conclusion that discrimination was at least a motivating factor in the employer's action *Stockman v Oakcrest Dental Ctr P.C.* 480 F3rd 791 (6th Cir 2007) Indirect evidence requires the burden shifting paradigm of *McDonnell Douglas Corp v Green* 411 US 792 (1973). Under the *McDonnell Douglas* burden shifting paradigm a claimant must first establish a prima facie case of discrimination, establishing that she was a (1) member of a protected class, (2) subjected to an adverse employment action, (3) qualified for the particular position and (4) treated differently than similarly situated, non protected employees *Corrigan v United States Steel Corp* 478 F3d 727 (6Th Cir 2007) In age discrimination cases the fourth prong of the prima facie case is modified to require "replacement not by a person outside the protected class, but merely replacement by a significantly younger person *Corrigan v United States Steel Corp* 478 F3d 718 (6m Cir 2007) The framework of a McDouglas paradigm is affected when the discharge/ termination is part of a reduction in force (RIF). The fourth element of the prima facie case requires additional direct, circumstantial or statistical evidence tending to indicate that the employer singled out the claimant for discharge for impermissible reasons.

Gofredson v Hess & Clark Inc 173 F3d 365 (6th Cir 1999), Ercegovich v Goodyear Tire & Rubber Co 154 F3d 344, 350 (6th Cir 1998).

Thereafter, the burden shifts to the employer to establish that there was a justifiable reason for its action. The burden then shifts back to the claimant to prove that the stated reason for the discharge was simply a pretext for the employer's action. The Claimant retains the burden of persuasion.

Disparate Impact A claimant must prove that the employer used a facially neutral practice that had a disproportionately adverse effect on a protected group. No intent is required. International Board of Teamsters v United States 431 US 324, 355 (1977).

In this case the procedure established by the Respondent as described *infra* was to rank their managers based solely on their own knowledge of their managers performance without input from or discussion with anyone else and without reviewing personnel files, past performance evaluations or other records. The question in this matter is whether the change Person 1 made in the use of the evaluation process, which deviated from the instructions he received is sufficient evidence to support the Claimant's allegation that the Respondent engaged in conduct which meets the standards for indirect proof of age and gender discrimination based on either disparate treatment or disparate impact theories.

Age Discrimination Claim

The Claimant testified as to her employment with Employer's; her experience when she learned of the termination; and her expectations for her next career as a nurse. In addition the Claimant offered the expert testimony of Dr. Person 2 to demonstrate that she suffered age and gender discrimination as a result of the RIF. Dr Person 2 was qualified as an expert and offered his expert report and testimony. As noted *infra*., Dr. Person 2 analyzed three (3) Employer stores

in the City C/ City B geographic area (Store 43 in City B, Store 48 in City C and Store 187 in City C) and determined that there was disparate impact based on age and gender as a result of the RIF. Dr. Person 2's results as presented at the evidentiary hearing were replete with inaccuracies including errors, omissions and duplications. He transcribed the birth date of one manager incorrectly, omitted data for 21 of the 117 managers and duplicated the data for 21 other managers. His explanation for the inaccuracies, included that he had a lot of paper was not persuasive. A corrected spreadsheet was not offered nor was the arbitrator shown a corrected electronic version of the spreadsheet.

The Respondent offered the testimony of its expert Dr Person 3. Dr. Person 3 based his analysis on the single store- store number 48. His statistical analysis indicated there was "insufficient evidence to conclude that a difference exists in the mean age between the terminated and retained employees (Jt14).

The question is raised which is the appropriate group to measure for purposes of demonstrating whether there is a statistical basis to find disparate treatment. In a recent Sixth Circuit decision *Bender and Rafferty v Hecht's Department Stores* 455 F3d 612 (2006) the question of what constitutes the relevant group for statistical analysis the court noted: " ... the relevant group must include: (1) the Plaintiff's positions; (2) all of the positions slated for elimination that were reviewed by the same decision maker(s); and (3) all equivalent, but only the equivalent positions of those held by the Plaintiffs... "

In the instant case the appropriate group was Store 48 as the Team Leaders were evaluated by the same individual Person 1. The Claimant was able to establish three of the four prongs of a prima facie case of age discrimination, i.e. she was a (1) member of a protected class, (2) subjected to an adverse employment action, and (3) qualified for the particular position.

However the effort to prove the fourth prong i.e. that through circumstantial or statistical evidence tending to indicate that she was singled out by the Respondent for impermissible reasons is deficient.

In this case all of the Team Leaders in Store 48 were treated the same. They were all rated comparatively to each other While Person 1 deviated from the procedure by ranking the Team Leaders as compared to each other, they were all ranked using the same methodology. There was no disparate treatment among the Team Leaders. Assuming arguendo, that Person 1 followed the standards and clustered all of the Team Leaders in threes, fours and fives, the lowest Le the threes would have been selected for termination as part of the Reduction In Force The Respondent determined that 15 of the 37 Team Leaders were going to be replaced. The finder of fact is not able to second guess the Respondent's business judgment *Naze v Ford Motor Co* 464 Mich 456 (2001). Claimant argued that she was replaced by a younger employee- Person 7. The evidence was that there was a consolidation of the hardware plumbing and electrical areas with four additional departments paint, automotive, sporting goods and toys. This 'consolidation' does not constitute replacement under either *Barnes v GenCorp Inc.*, 896 F2d 1457 (6th Cir 1990) or *Brocklehurst v PPG.*, 123 F3d 890 (6th Cir 1997).

Thus the Claimant is not able to establish a prima facie case of age discrimination. Having failed to produce the prima facie case, the burden shifting analysis of *McDonnell Douglas* does not proceed to the Respondent's reasons for its Reduction In Force. Further the finder of fact is not permitted to second guess the business judgment of the Respondent, *Hazie v Ford Motor Co supra*.

Thus the Claimant's argument for age discrimination fails.

Gender Discrimination Claim

The same burden shifting framework described above is applied in the gender discrimination claims. Claimant proposes that she was the subject of gender discrimination as a result of the Reduction In Force. Michigan Courts have adopted the McDonnell Douglas burden shifting analysis in gender discrimination cases under *Elliott Larsen Town v Michigan Bell Telephone Co* 455 Mich 688, 568 N\ /2d 64 (1997), *Lytle v Malady* 456 Mich 1 (1997). The Claimant's gender discrimination claim also fails for the same reasons- she cannot establish the fourth prong of her prima facie case. Claimant's gender discrimination case is based on indirect evidence, thus she must prove a prima facie case before the burden shifts to the Respondent to show that the Reduction in Force was not discriminatory. The Claimant established three of the four prongs of a prima facie case. She was a member of a protected class, she suffered an adverse employment action and she was qualified for the position. However she failed to prove by either additional direct, circumstantial or statistical evidence that the Company singled her out for termination because of her gender. The evidence adduced during the evidentiary hearing and introduced as Exhibit J-2 page 4 shows that 23 team leaders were retained. Of those retained, 14 were female and eight (8) were male. That same exhibit shows that seven (7) of the highest rated Team Leaders are females and eight (8) out of the ten highest rated Team Leaders are female. There is no basis for the Claimant's allegation of gender discrimination.

Arbitration Award

For the reasons stated above, the Claimant's Demand for damages for age and gender discrimination is denied. The arbitrator does not retain jurisdiction.

The Administrative fees of the Association totaling \$1,550.00 and the compensation of the arbitrator totaling \$8,250.00 shall be borne as incurred. This Award is in full settlement of all claims submitted to this Arbitration All claims not expressly granted are hereby, denied.

Date March 7 2008

M. Catherine Farrell

I, M. Catherine Farrell, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Award.

M Catherine Farrell

March 7, 2008