IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

RONALD D. McKINNA,	)	
	)	Shelby Chancery
Plaintiff/Appellant	)	Case No. 104080-3R.D.
v.	)	
	)	
LASCO, INC.,	)	Appeal No. 02A01-9604-CH-00083
	)	
Defendant/Appellee	)	

FILED

March 20, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF SHELBY COUNTY
AT MEMPHIS, TENNESSEE
THE HONORABLE D. J. ALISSANDRATOS, CHANCELLOR

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REVERSED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY K. LILLARD, JUDGE

O P I N I O N

This action for damages for age discrimination in violation of T.C.A. § 4-21-401(a)(1) and (2) was dismissed on motion for summary judgment, the propriety of which is presented for our review. Appellate review is *de novo* with no presumption of correctness. *Presley v. Bennett*, 860 S.W.2d 857 (Tenn. 1993).

I

The plaintiff is 58-years-old. He is a pipefitter by trade and was employed by the defendant in 1984. He was laid off on December 3, 1993, ostensibly for lack of work, which he claims was pretextual because the business of his employer was burgeoning and, on various occasions, a corporate official had made disparaging remarks about his age. There is evidence in the record that at the time the plaintiff was laid off for lack of work, December 1993, his employer had negotiated various contracts to install fire prevention systems during the fourth quarter of 1993, but the contracts negotiated for completion in 1994 were still in the executory stages in December 1993.

With respect to the specific evidence of age discrimination, there is evidence that a Vice-President of the employer, about a month before the plaintiff was laid off said to him, "Well man, you're getting old, aren't you? Roger can run more heads than you." And in August 1993, the plaintiff testified that the same official referred to him as an "old man," who was getting "old and fat and can't keep up."

II

T.C.A. § 4-21-401(a) provides:

> It is a discriminatory practice for an employer to:
>
> (1) fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex age or national origin; or
>
> (2) limit, segregate or classify an employee or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee,

> because of race, creed, color, religion, sex, age or national origin.

The preamble to the Tennessee Human Rights Act specifically provides that, "[i]t is the purpose and intent of the General Assembly by this enactment to provide for execution within Tennessee of the policies embodied in the Federal Civil Rights Acts of 1964, 1968 and 1972 and the Age Discrimination in Employment Act of 1967, as amended . . . . " T.C.A. § 4-21-101.

In an age discrimination case, the burden is a shifting process. *Bruce v. Western Auto Supply Co.*, 669 S.W.2d 95, 97 (Tenn. Ct. App. 1984). *See also Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1329 (6th Cir. 1994); *Brenner v. Textron Aerostructures, Inc.*, 874 S.W.2d 579, 583 (Tenn. Ct. App. 1993). The employee must first prove a *prima facie* case of age discrimination. *Bruce*, 669 S.W.2d at 97, following which, the burden shifts to the employer who must simply produce evidence of a legitimate, non-discriminatory reason for the employee's discharge. *Id.* If the employer meets this burden, the plaintiff must then prove by a preponderance of the evidence that the reason proffered by the employer was not its true reason but merely a pretext for intentional age discrimination. *Id; Board of Trustees v. Sweeney*, 439 U.S. 24, 99 S. Ct. 2931, 58 L. Ed. 2d 216 (1978).

While the burden shifts throughout the age discrimination analysis, "the burden of persuasion remains at all times with [plaintiff]." *Bruce*, 669 S.W.2d at 97. *See also Phelps v. Yale Sec., Inc.*, 986 F.2d 1020, 1024 (6th Cir. 1993) (*citing Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1179 (6th Cir. 1983)). Plaintiff's final burden of showing that defendant's articulated legitimate non-discriminatory reasons for the lay-off are pretextual "merges with . . . Plaintiff's ultimate burden of persuading the Court that [he] has been the victim of intentional discrimination." *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994) (*citing Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)).

In order to establish a *prima facie* case of age discrimination, plaintiff must show that (1) he was a member of the protected class (over age 40), (2) he was

subjected to an adverse employment action, (3) he was qualified for the position and (4) he was replaced by a younger person. *Loeffler v. Kiellgren*, 884 S.W.2d 463, 469 (Tenn. Ct. App. 1994) (*citing McDonnell Douglas v. Green*, 441 U.S. 792 (1973)). But a plaintiff may show by direct or circumstantial evidence that his age was a determining factor in the employer's decision to terminate his employment. *Bruce,* 669 S.W.2d at 97; *Blackwell*, 696 F.2d 1176 (6th Cir. 1983).

The prohibition imposed by statute relating to age discrimination in employment is limited to persons who fall into the 40 to 70 year age group. T.C.A. § 4-21-126(a). Since the plaintiff was 58 when he was laid off, and eventually terminated, he is protected by the Human Rights Act, if he establishes the remaining criteria or if he shows that age was a determining factor in his discharge.

It is not disputed that the plaintiff was "subjected to adverse employment action," nor is it contended that he was unqualified for the position. The case, then, turns upon the issues of whether he was replaced by a younger person and a closely allied consideration of whether the employer's evidence of a non-discriminatory reason for the plaintiff's discharge was merely pretextual to shield the real reason, that being the plaintiff's age.

In *Byrd v. Hall*, 847 S.W.2d 208 (Tenn. 1993), the Supreme Court directed the standard to be used in this state when determining summary judgment motions. The Court reaffirmed the summary judgment principles announced in previous Tennessee cases and also adopted the summary judgment standards explained by the U.S. Supreme Court in an earlier trilogy of cases. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); and *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The *Byrd* court held that Rule 56 was designed to enable the courts to pierce the pleadings and determine whether a case justifies the time and expense of a trial. *Byrd*, 847 S.W.2d at 214. The non-moving party bears the burden of establishing the essential elements of his case which must be proved at trial. *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 312 (6th Cir. 1989) (*citing Celotex*, 477

U.S. at 322-23). Failure to do so will result in summary judgment for the moving party because, "in such a situation, there can be ‹no genuine issue as to any material facts,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Byrd*, 847 S.W.2d at 214. Consequently, where there is no genuine issue of any material fact, summary judgment is appropriate. *Id.* at 212.

On appeal, the appellant has the burden of showing that the evidence preponderates against the findings of the trial court and that the evidence reveals a genuine issue of material fact. *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990). In ruling on a motion for summary judgment, the trial court and this Court must consider the evidence in the same manner as they would a motion for directed verdict made at the close of the plaintiff's proof. *White v. Methodist Hosp. S.*, 844 S.W.2d 642, 645 (Tenn. Ct. App. 1992). If there is no disputed issue of material fact, the granting of summary judgment should be sustained, since "the issues that lie at the heart of evaluating a summary judgment motion are: (1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed material fact creates a genuine issue for trial. *Byrd*, 847 S.W.2d at 214.

Our mandate is to scrutinize the evidence to determine whether there is a factual dispute. *Brenner*, 874 S.W.2d at 583. If there is no dispute over the evidence establishing the facts that control the application of a rule of law, summary judgment is appropriate. *Id.* If this Court finds that a factual dispute does exist, then we must determine whether the disputed fact is material. *Id*. A disputed fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. *Id*. Finally, if this Court finds a disputed, material fact, then we must determine whether it creates a genuine issue for trial. *Id.* This involves whether a reasonable finder of fact could legitimately resolve the fact in favor of one side or the other. *Id.* If a fact finder could not do so, summary judgment is proper for obvious reasons.

III

The fourth criteria laid down in *McDonnell Douglas* does not find support in this record. Criteria (4) is the obstacle in the way of the plaintiff, whose interpretation of the evidence in support of his insistence that he was replaced by a younger person goes beyond strong advocacy. The evidence establishes that none of the employees whom plaintiff alleges replaced him, actually did so. These employees were current employees at the time plaintiff was laid off or were hired months after plaintiff's lay-off.

Plaintiff says that he was replaced by Vincent Campbell, although the evidence is clear that Campbell was employed by Lasco before the plaintiff was laid off. Campbell left Lasco and was re-hired more than one year later. He obviously cannot be considered a replacement for the plaintiff.

The plaintiff next says that he was replaced by Robert Kelly, who, similarly to Campbell, was employed by Lasco at the time of, and before, the lay-off of the plaintiff. He obviously cannot be considered a replacement for the plaintiff.

The plaintiff next says that he was replaced by Wayne Ware, who was hired to work on jobs in Memphis and Tuscaloosa. Aside from the fact that the only evidence offered by the plaintiff about Ware's employment is his affidavit based on hearsay, and therefore inadmissible, the unrebutted testimony of Limberg, one of the defendant's officers, is that Ware was employed in early 1994 for work on a job in Tuscaloosa.

The plaintiff next argues that he was replaced when the defendant hired four other pipefitters in Tuscaloosa, but he conceded in his deposition that he had no knowledge of this allegation.

Arrayed against the recited evidence is the evidence offered by the defendant that the plaintiff was laid off to reduce the labor force owing to economic conditions. The termination of an employee at a time when cutbacks are necessary because of economic conditions is not sufficient to establish a *prima facie* case of age discrimination. *Brenner*, 874 S.W.2d at 584. The evidence established that at the

time the plaintiff was laid off, Lasco employed seven pipefitters. After the lay-off, the defendant never employed more than six pipefitters, except for Ware who worked exclusively in Tuscaloosa, Alabama--months after the plaintiff's lay-off--under restrictive financial arrangements and for a limited time.

We agree with the conclusion of the trial judge that there is no evidence the plaintiff was replaced by a younger person and, thus the criteria of *McDonnell Douglas* are not satisfied, especially when superimposed upon the principle that an age-discrimination plaintiff who is terminated during a reduction in force is held to a higher burden than other plaintiffs who claim age discrimination. *Id.* at 584. But inquiry does not end there

IV

If a plaintiff can show that age was a determining factor in his termination, he may be entitled to recover under the Act, but he must produce direct or circumstantial evidence that his age was a determining factor in his termination. *Brenner*, 874 S.W.2d at 585. "The mere termination of a competent employee when an employer is making cutbacks due to economic necessity is insufficient to establish a prima facie case of age discrimination." *Id.* at 584 (*quoting McMahon v. Libbey-Owens-Ford Co.*, 870 F.2d 1073 (6th Cir. 1989)). Further, mere conclusory allegations do not suffice to prove intentional discrimination based on age. *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 941 (6th Cir. 1987).

Plaintiff argues that comments allegedly made by Karl Limberg about plaintiff's age are sufficient evidence of intentional age discrimination.[1] The trial court found that this evidence was not sufficient to establish age discrimination because the comments were too remote and isolated, as in *Waggoner v. City of Garland*, 987 F.2d 1160 (5th Cir. 1993).

The supervisor, Limberg, made three age-related comments to the plaintiff in the months before he was laid off. As heretofore stated, these remarks were "Well

[1]Although Limberg denies making any age-related comments, this Court must, for the purpose of appellate review, accept the facts in the light most favorable to the plaintiff.

man, you're getting old, aren't you? Roger can run more heads than you." and "Old man, you're either going to shape up or ship out," and "[You're] getting old and fat and can't keep up."

Courts have recognized that certain statements unconnected to the employment decision-making process are simply stray remarks that do not demonstrate discriminatory intent. *See Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (6th Cir. 1990); *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989). "Case precedent clearly reflects that isolated and ambiguous statements . . . ‹are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination'." *Brenner*, 874 S.W.2d at 585-86 (*citing Gagne*, 881 F.2d at 314).

In contrast, in *Flynn v. Shoney's Inc.*, 850 S.W.2d 458 (Tenn. Ct. App. 1992), at the time of plaintiff's termination, he was told by his supervisor that, for the same money the plaintiff was paid, the company could hire a lot of "eager young bucks right out of college" and that it was "a young man's business.." *Id.* at 459. These remarks were deemed sufficient to send the case to the jury. *Id.* at 460. In *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*, 865 F.2d 1461 (5th Cir. 1989), the plaintiff alleged age discrimination in his discharge. As evidence of age discrimination, the plaintiff testified that prior to his termination, he had told an employee-relations trainee, "I have done heavy lifting all my life. I am not quite as young as I used to be,." and the trainee replied, "Yes, it's kind of risky at your age." *Id.* at 1465. The plaintiff also submitted opinion testimony of another employee, unconnected with the plaintiff's termination, that the termination was part of the company's "youth movement." *Id.* In addition, the termination took place seven months before the plaintiff's pension benefits vested. *Id.* at 1466. Taken together, this evidence was deemed sufficient to support a finding of age discrimination. *Id.*

The remarks alleged by McKinna in this case are not strong evidence of age discrimination. However, one of the remarks allegedly was made "a month or two" prior to the layoff. There is a series of alleged remarks, rather than a single one. All

of the alleged derogatory remarks were directed at McKinna, not generalized, and can be seen as linking McKinna's age with his job performance. The comments were made by someone clearly involved in the decision-making process and who, at age thirty-four, was considerably younger than McKinna. Under all of these circumstances, like the remarks in *Flynn* and *Hansard*, the comments alleged by McKinna were not "stray remarks" and are sufficient to withstand summary judgment.

The judgment is reversed and the case is remanded for trial. Costs are assessed to the appellee.

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William H. Inman, Senior Judge

CONCUR:

_____
Alan E. Highers, Judge

_____
Holly K. Lillard, Judge