# STATE OF MICHIGAN

# COURT OF APPEALS

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DAVID MARTINEZ and CHRIS MARTINEZ,

Plaintiffs-Appellees,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant,

and

KEN MUELLER,

Defendant.

UNPUBLISHED
May 15, 2007

No. 266112
Oakland Circuit Court
LC No. 2003-054992-CD

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DAVID MARTINEZ and CHRIS MARTINEZ,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee,

and

KEN MUELLER,

Defendant.

No. 267218
Oakland Circuit Court
LC No. 2003-054992-CD

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Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

In Docket No. 266112, defendant General Motors (GM) appeals by leave granted the trial court order granting in part and denying in part GM's motion for summary disposition. In Docket No. 267218, plaintiffs Chris and David Martinez (plaintiff)[1] appeal by delayed leave granted the same trial court order. We affirm in part, reverse in part, and remand for further proceedings concerning plaintiff's age and national origin discrimination claims.

## I. Basic Facts

Plaintiff is a male of Hispanic or Mexican-American ancestry. At the time of his termination from employment on May 19, 2003, plaintiff worked as a salaried "7th Level Technician" in GM's small car group at the Milford Proving Grounds facility. He had worked continuously for GM for approximately 20 years, beginning in September 1983. Plaintiff alleged that during his 20 years of employment, his employment record was always satisfactory. GM's small car group supervisor confirmed that plaintiff was a good, honest, and loyal employee.

Plaintiff routinely accessed GM's e-mail system and internal computer network by way of an assigned computer terminal in the small car group work area. Like all employees, plaintiff had a personal computer password, which he used to access the terminal. The computer terminal was password-protected, and several different employees within the small car group used the same terminal on any given day. Included among the employees who used the computer terminal in question was plaintiff's coworker Ken Mueller. Mueller routinely alternated his computer use between at least three different terminals in the small car group work area.

Plaintiff typically logged onto the computer terminal with his personal password at the beginning of each day's shift. Then, once plaintiff finished his computer tasks, he generally remained logged onto the terminal instead of logging off, in effect leaving the computer terminal "open for others . . . to use." Ken Mueller frequently used the computer while plaintiff was still logged onto it. Often, plaintiff was not present in the immediate area while Mueller was using the computer under plaintiff's password. GM supervisors apparently condoned Mueller's use of other employees' passwords. Mueller, who was referred to as "the computer 'go-to' guy for the workers in the small car group," was in charge of assisting other workers with computer troubleshooting, and therefore had access to the other employees' passwords.

Plaintiff remembered having objected to at least two inappropriate e-mails sent to him by coworkers during the course of his employment at GM. Plaintiff testified that on both occasions he immediately replied to the specific coworker in question and asked him to stop sending the inappropriate e-mail. Plaintiff testified that he did not recall the specific content of any inappropriate e-mails that he had received from coworkers; however, he remembered that some of them had been objectionable.

In early 2003, a female GM employee informed her supervisor that she had received an inappropriate e-mail, sent to her internal GM e-mail address, from another GM employee named

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[1] Chris Martinez is David Martinez's wife. Because Chris Martinez's claims are wholly derivative of her husband's claims, the singular term "plaintiff" is used throughout this opinion.

Frank Ottavian. GM retained an outside investigation firm to look into possible inappropriate uses of the internal Lotus Notes e-mail system. An employee of the outside investigation firm "restore[d]" Ottavian's GM e-mail account, and verified that Ottavian had in fact sent the inappropriate e-mail. Other sexually inappropriate e-mails were found in Ottavian e-mail account as well. It was eventually discovered that several different GM employees had been involved in either sending or receiving sexually inappropriate e-mails within GM's internal Lotus Notes network. Included among the GM e-mail addresses to which inappropriate e-mails had been sent were the addresses of plaintiff and Mueller.

Sometime in April or May 2003, the outside investigation firm "obtained a restore of [plaintiff's] mailbox back at least until November 19, 2002," and located certain sexually inappropriate e-mails in plaintiff's mailbox. The restore of plaintiff's mailbox revealed at least one inappropriate e-mail message that had been forwarded to <ken@57-chevy.net>, Mueller's personal e-mail address.

GM approached plaintiff and questioned him regarding his use of GM computers and the internal Lotus Notes e-mail network. On about May 13, 2003, GM suspended plaintiff so that it could formally investigate his possible inappropriate use of company computers. Upon concluding that plaintiff had violated the company's acceptable computer use policy, GM fired plaintiff on May 19, 2003.

Plaintiff has at all times maintained that he did not send or receive the inappropriate e-mails at issue. Instead, plaintiff claims that Mueller surreptitiously accessed his GM e-mail account, opened and viewed the inappropriate e-mails, and then forwarded them to his own personal e-mail address. Plaintiff asserts that as soon as he realized that someone had sent e-mail from his account, he immediately confronted Mueller and other coworkers to determine the identity of the person who had accessed his account and sent the e-mails in question. Plaintiff's coworkers, including Mueller, initially denied any involvement in the matter.

However, according to plaintiff, sometime in May 2003, Mueller admitted to plaintiff that he had used plaintiff's password and e-mail address to send the inappropriate e-mails. Also according to plaintiff, Mueller admitted to coworkers Kevin Morrison and Raleigh Doust that he had sent the e-mails from plaintiff's account. Doust executed an affidavit in which he averred that he spoke with Mueller during the week of May 19, 2003, and that Mueller admitted that he had forwarded the e-mails to his own personal e-mail address using plaintiff's password and GM e-mail account.

When asked whether he had sent the e-mails that formed the basis for plaintiff's dismissal, even Mueller did not completely deny his involvement. Mueller testified at his deposition that he was "not sure" whether he or plaintiff had forwarded the inappropriate e-mails to his personal e-mail address, and that he simply could not recall whether he had confessed his involvement to Doust.

In May 2003, plaintiff met with GM management and human resources personnel to protest his termination, to assert his innocence, and to inform them of his belief that Mueller was responsible for sending the inappropriate e-mails in question. Mueller told GM human resources personnel that "quite a few guys share personal e-mails back and forth," but maintained that he had never used plaintiff's password or e-mail account to do so. GM determined that Mueller had

been somehow involved in the e-mail scandal. However, instead of firing Mueller, GM reduced the amount of a proposed pay raise that he was scheduled to receive.

## II. Procedural History

Plaintiff filed this action in December 2003, asserting claims of wrongful discharge (count I), breach of an implied covenant of good faith (count II), slander (count III), "malicious breaches of duty" (count IV), tortuous interference with existing and prospective contractual relations (count V), "mental distress" (count VI), and age and national origin discrimination in violation of the Michigan Civil Rights Act (count VII). On August 4, 2004, the trial court ordered GM to comply with plaintiff's discovery requests by answering certain interrogatories and by "produc[ing] copies of existing e-mails sent or received by Plaintiff Martinez and Ken Mueller from January 1, 2002 to January 18, 2003." The trial court further ordered that "if such e-mails do not exist, Defendant GM shall produce an affidavit from an . . . employee with appropriate knowledge, indicating that such e-mails do not exist."

Plaintiff then filed a motion seeking to compel GM to allow electronic discovery of its e-mail network and computer hardware by plaintiff's own computer expert. This motion was unsuccessful. However, plaintiff filed a second motion to compel electronic discovery, which was granted by the trial court on January 6, 2005. The trial court order authorized plaintiff's expert, Larry Dalman, to search GM's internal Lotus Notes e-mail server and three designated computer hard drives for the period May 19-26, 2003, using both plaintiff's and Mueller's passwords. The order specifically authorized Dalman to search for (1) e-mails that were received by plaintiff or Mueller at their GM e-mail addresses, and (2) e-mails that were sent from plaintiff's or Mueller's GM e-mail accounts, with particular emphasis on any such e-mails that were forwarded to Mueller's personal e-mail address.

In June 2005, plaintiff moved for sanctions against GM on the ground that it had caused the spoilation of digital evidence contained on "hard drive #1" before Dalman was able to conduct his search. According to plaintiff, GM knew that the contents of "hard drive #1" were relevant to the case, but nonetheless allowed the hard drive's contents to be erased. GM responded that it had not become aware of the need to preserve the contents of "hard drive #1" until the trial court issued its order of January 6, 2005. GM pointed out that the initial discovery order of August 2004 merely required GM to produce "copies of existing e-mails sent or received by Plaintiff . . . and Ken Mueller," and did not mention hard drives or any other type of computer evidence.

In July 2005, GM moved for summary disposition pursuant to MCR 2.116(C)(10). GM argued that it was justified in firing plaintiff because it had honestly believed that plaintiff was involved in sending and receiving inappropriate e-mails over the internal Lotus Notes e-mail server. Plaintiff responded that Ken Mueller was involved in the same or similar alleged conduct, but that Mueller, who was a younger Caucasian employee, was not fired. GM argued that Mueller's alleged confessions to plaintiff and Doust were inadmissible hearsay, and that there was thus no evidence to suggest that Mueller had engaged in the same or similar alleged misconduct.

The trial court granted summary disposition in favor of defendant with respect to plaintiff's claim of wrongful discharge (count I), ruling that plaintiff was an at-will employee.

The court also granted summary disposition for defendant with respect to plaintiff's counts II, III, IV, V, and VI. Finally, with respect to count VII, alleging intentional discrimination, the trial court granted summary disposition for defendant on the age discrimination claim, but denied summary disposition for defendant with respect to the national origin discrimination claim. The court ruled that plaintiff had not shown that he was replaced by a younger worker, but that plaintiff had created a genuine question of fact concerning whether he was treated differently than a similarly situated Caucasian employee. The trial court also denied plaintiff's motion for sanctions, finding that there was no showing that GM had intentionally destroyed relevant computer evidence.

## III. Standards of Review

We review de novo the trial court's grant or denial of summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. In presenting a motion for summary disposition under MCR 2.116(C)(10), the moving party has the initial burden of supporting its position with admissible evidence. *Id*.; *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). This evidence is viewed in the light most favorable to the party opposing the motion. *Maiden*, *supra* at 120. The burden then shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto*, *supra* at 362. The nonmoving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the proffered evidence fails to establish a genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law, the motion is properly granted. *Quinto*, *supra* at 363.

We review for an abuse of discretion the trial court's decision to sanction a party for the destruction or spoilation of evidence. *Bloemendaal v Town & Country Sports Ctr, Inc*, 255 Mich App 207, 211; 659 NW2d 684 (2002); *Brenner v Kolk*, 226 Mich App 149, 160-161; 573 NW2d 65 (1997).

## IV. Wrongful Discharge

Plaintiff first argues that because he had an implied contract or legitimate expectation of just-cause employment, the trial court erred in granting summary disposition in favor of GM with respect to his wrongful termination claim.

"Generally, and under Michigan law by presumption, employment relationships are terminable at the will of either party." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 163; 579 NW2d 906 (1998). However, the presumption of employment at will may be rebutted by (1) proof of a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause, (2) a clear and unequivocal express agreement, either written or oral, regarding job security, or (3) an implied contractual provision or "legitimate expectation" of job security resulting from the employer's policies and procedures. *Id.* at 164. In resolving the issue whether an employee has demonstrated a legitimate expectation of job security, an inquiry must be made into what, if anything, the employer promised and whether the promise is reasonably capable of instilling a legitimate expectation of just-cause employment in the employee. *Id.* at 164-165.

For example, in *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 598-599; 292 NW2d 880 (1980), our Supreme Court held that an employer's oral or written representation not to discharge an employee except for just cause may be legally enforceable, despite the general rule that employment contracts for indefinite terms are terminable at will. However, "[t]o establish a *Toussaint* claim, the employee must demonstrate both a subjective and objective expectancy that his employment is terminable for just cause only." *Singal v Gen Motors Corp*, 179 Mich App 497, 504; 447 NW2d 152 (1989).

In the present case, the GM employee handbook stated that regular employees were employed on a month-to-month basis and that, consistent with an at-will employment relationship, either the employee or the company could take the initiative to end the relationship. These written statements in the employee handbook created an at-will employment relationship, *Schultes v Naylor*, 195 Mich App 640, 643-644; 491 NW2d 240 (1992); *Singal*, *supra* at 504-505, and plaintiff has not produced any evidence corroborating his claim that GM made oral assurances or manifestations concerning a just-cause employment relationship, *Schultes*, *supra* at 644. Although plaintiff insists in his brief on appeal that certain GM officials at the Milford Proving Grounds facility—including director of operations Purvis Hunt—made such assurances concerning just-cause employment, plaintiff does not even identify the substance of these alleged statements.

Plaintiff has simply failed to submit any evidence of a written or oral agreement for just-cause employment, of a legitimate expectation of job security, or of a contract for a definite term of employment. *Lytle*, *supra* at 164-165. Because plaintiff was an at-will employee and failed to establish a genuine issue of material fact to the contrary, summary disposition of his wrongful termination claim was appropriate.

## V. Wrongful Use of Plaintiff's Password and Identification

Plaintiff also argues that GM wrongfully acquiesced in or consented to Mueller's unpermitted use of his computer password and e-mail account. Plaintiff has included this matter as a separate and distinct issue in his statement of the questions involved. See MCR 7.212(C)(5). However, plaintiff has not addressed or even mentioned this matter as a separate and distinct issue in the argument section of his brief on appeal. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). A cursory statement with little or no citation of supporting authority is insufficient to bring an issue before this Court. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). "If a party fails to adequately brief a position, or support a claim with authority, it is abandoned." *Moses, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006), citing *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). To the extent that plaintiff intended to include this matter as a separate and distinct issue in his brief on appeal, it has been abandoned.

## VI. Employee Handbook

Plaintiff next argues that even if he was an at-will employee, he was entitled to be treated "fairly" and "honestly" under the terms and conditions of GM's "open door policy" or employee

handbook. In effect, plaintiff argues that the GM employee handbook and company policies conferred on him a legitimate expectation that he would not be terminated without some degree of due-process-like protection, and that GM was required to comply with the procedural safeguards enumerated in its employee handbook before terminating his employment.

Relevant language in GM's U.S. Salaried Policy Handbook provides that "[t]he policies and procedures in this booklet do not constitute a legal contract and do not modify the month-to-month or day-to-day employment relationships . . . described in Section 2 of this booklet." Section 2 of the handbook, in turn, merely reiterates that regular, full-time employees are employed on "a calendar month-to-month basis." Such language "demonstrates that the [employer] did not intend to be bound to any provision contained in the handbook," and the procedural protections contained in the handbook are therefore unenforceable under principles of contract. *Heurtebise v Reliable Business Computers*, 452 Mich 405, 414; 550 NW2d 243 (1996). "[P]rovisions in a handbook will not create enforceable rights when the handbook expressly states that such provisions are not intended to create an employment contract." *Lytle*, *supra* at 169. Plaintiff may not seek judicial enforcement of the procedural protections contained in GM's non-contractual employee handbook.

## VII. Sanctions for Spoilation of Evidence

Plaintiff further argues that the trial court erred in failing to sanction GM for the destruction or spoilation of relevant electronic evidence contained on "hard drive #1."

"A trial court has the authority, derived from its inherent powers, to sanction a party for failing to preserve evidence that it knows or should know is relevant before litigation is commenced." *Bloemendaal*, *supra* at 211. As noted above, an exercise of this power may be disturbed only on a finding that there has been an abuse of discretion. *Brenner*, *supra* at 160-161. If material evidence has been spoiled or destroyed by one party, the trial court must carefully fashion a sanction that denies that party the fruits of its misconduct, but that does not interfere with the party's right to produce other relevant evidence. *Bloemendaal*, *supra* at 212. Possible sanctions include "the exclusion of evidence that unfairly prejudices the other party or an instruction that the jury may draw an inference adverse to the culpable party from the absence of the evidence." *Id.* "[S]poliation may occur by the failure to preserve crucial evidence, even though the evidence was not technically lost or destroyed." *Id.* "'Even when an action has not been commenced and there is only a potential for litigation, the litigant is under a duty to preserve evidence that it knows or reasonably should know is relevant to the action.'" *Id.*, quoting *Brenner*, *supra* at 162.

As an initial matter, it is uncontested that the contents of "hard drive #1," one of the three hard drives designated by plaintiff pursuant to the trial court's January 2005 digital discovery order, were erased before plaintiff's expert had an opportunity to search them. GM's computers at the Milford Proving Grounds facility were leased from a third party, and when the lease of those computers expired in late 2004, the computers' hard drives were erased and reformatted by the third-party leasing company in the normal course of its business. GM insists that it had no reason to believe prior to the trial court's January 2005 digital discovery order that plaintiff would seek discovery of any computer hard drive evidence in this case. Moreover, GM argues that the contents of "hard drive #1" were actually irrelevant, because internal GM e-mails are

retained only on the Lotus Notes e-mail server, and are not stored or retained on any individual computer hard drive.

We note that GM cites no admissible evidence in support of its contention that internal e-mails are not stored on computer hard drives. Further, plaintiff's computer expert Larry Dalman testified that he believed that any e-mail actually opened and viewed on a GM computer would have been stored as a temporary internet file on that computer's hard drive. However, notwithstanding the parties' seemingly genuine disagreement concerning whether internal e-mails are retained on computer hard drives, it is irrelevant whether the inappropriate e-mails at issue here were ever stored on "hard drive #1."

Even assuming arguendo that all internal e-mails sent from a particular computer are stored on that computer's hard drive, the most that plaintiff could have discovered by examining the contents of "hard drive #1" is whether the inappropriate e-mails at issue in this case were ever sent from plaintiff's e-mail account on a specific computer terminal. However, even plaintiff admits that the e-mails were sent and received using plaintiff's account and password, and this fact is confirmed by the e-mails' presence on GM's Lotus Notes e-mail server. Indeed, the critical question is not whether the e-mails were ever sent and received in the first instance, but is rather whether the e-mails were sent and received by plaintiff or by someone else who was using plaintiff's password and account. It is undisputed that even if a search of "hard drive #1" in its pre-reformatted condition could have shown the presence of the inappropriate e-mails, such a search could not have shown whether those e-mails were actually sent by plaintiff, by Mueller, or by a third party using plaintiff's account and password. Similarly, it is undisputed that even if a search of "hard drive #1" in its pre-reformatted condition could have shown the absence of the inappropriate e-mails, such a search could not have conclusively established that plaintiff was not involved.

Discovery of the digital contents of "hard drive #1," as those contents existed before the drive was erased, could not in any way have increased or decreased the probability that plaintiff was involved in sending the inappropriate e-mails at issue in this case. In short, the contents of "hard drive #1" were irrelevant. MRE 401. Although a party is prejudiced by the destruction or spoliation of material and relevant evidence, *Brenner*, *supra* at 160-161, it is axiomatic that a party cannot be prejudiced by the destruction or spoliation of irrelevant evidence. Moreover, to the extent that the contents of "hard drive #1" could have shown the existence of any e-mails sent from plaintiff's GM e-mail account, such contents would have been superfluous because the e-mails at issue had already been discovered through a search of the GM Lotus Notes server. The trial court did not abuse its discretion by declining to sanction GM for the destruction of this superfluous and irrelevant computer evidence. *Bloemendaal*, *supra* at 211.

## VIII. Age Discrimination

Plaintiff next argues that the trial court erred in finding that he failed to establish a prima facie case of age discrimination, and in granting summary disposition for defendant with respect to his age discrimination claim.

Among other things, the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, prohibits employment discrimination based on age. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). A discrimination claim under the CRA can be

based on one of two theories: (1) disparate treatment, which requires a showing of either a pattern or practice of intentional discrimination against protected employees, or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Lytle*, *supra* at 177 n 26; *Wilcoxon*, *supra* at 358. In this case, plaintiff's age discrimination claim is based on alleged disparate treatment.

"Disparate treatment" is another name for a claim of intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Disparate treatment discrimination may be proved by direct or by circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003); *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). When direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas*[2] framework. *DeBrow*, *supra* at 537-538. However, where there is no direct evidence of discrimination, and the plaintiff bases his discrimination case on circumstantial evidence, the *McDonnell Douglas* framework applies. *Bachman v Swan Harbour Assoc*, 252 Mich App 400, 432-433; 653 NW2d 415 (2002).

A. Prima Facie Case

Under the *McDonnell Douglas* framework, a plaintiff must first make a prima facie showing of discrimination by establishing that (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for his position, and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001); *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). In the context of age discrimination, Michigan courts have sometimes stated the fourth prong of this *McDonnell Douglas* framework differently, often purporting to require evidence that the plaintiff "was replaced by a younger person."[3] *Lytle*, *supra* at 177; see also *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); and see *Kerns v Dura Mechanical Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000). However, although evidence of replacement by a younger worker is perhaps the simplest and most common way of establishing the fourth prong of the *McDonnell Douglas* framework in age discrimination cases, it is not the only way. A plaintiff

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[2] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[3] In the present case, both the trial court and defendant fell prey to this oft-cited misstatement of the *McDonnell Douglas* framework's fourth prong. Defendant argues, and the trial court agreed, that plaintiff did not establish a prima facie case of age discrimination because he did not sufficiently show that his position at GM was given to a younger worker. However, as noted above, there are other ways to establish the final prong of a prima facie showing of age discrimination. Although evidence of replacement by a younger worker is perhaps the most common method of establishing the fourth prong of the *McDonnell Douglas* framework in age discrimination cases, it is not an essential showing. See, e.g., *Leffel v Valley Financial Services*, 113 F3d 787, 793 (CA 7, 1997). It is sufficient for a plaintiff to present proof that the defendant treated him differently than persons of a different age class who engaged in the same or similar conduct. *Town*, *supra* at 695; *Meagher*, *supra* at 716.

has also made a sufficient showing on the fourth prong when he has established that the defendant treated the plaintiff differently than persons of a different age class who engaged in the same or similar conduct. *Town*, *supra* at 695; *Meagher*, *supra* at 716.

The parties apparently do not dispute that plaintiff was a member of a protected class and that he was qualified for his position. Nor do the parties dispute that plaintiff suffered an adverse employment action—i.e., his termination. Instead, the question in this case is whether the employment action taken by defendant occurred under circumstances sufficient to give rise to an inference of unlawful discrimination.

The plaintiff has the burden of producing sufficient evidence to establish a prima facie case of discrimination. *Sniecinski*, *supra* at 134.

Plaintiff argues on appeal, as he did below, that he was replaced by Mueller, who was approximately 15 years his junior. However, there is no other evidence in this case that plaintiff was actually replaced by Mueller upon his termination, and plaintiff's entire argument in this regard is encapsulated in one sentence, wherein plaintiff states that after he was terminated, "Mr. Mueller . . . took on [plaintiff's] responsibilities to replace him." Nor did plaintiff present any further evidence before the trial court to establish that he was *actually replaced* by a younger worker. Opinions, conclusory denials, unsworn statements, and other inadmissible materials are not sufficient to create a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 321; 575 NW2d 324 (1998); *SSC Assoc Ltd Partnership v Gen Retirement Sys of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991). The unsworn claim that plaintiff was replaced by Mueller was unsupported by specific, admissible evidence. The trial court correctly found that there was insufficient evidence that plaintiff was actually replaced by a younger worker.

But that is not to say that plaintiff cannot establish the fourth prong of the *McDonnell Douglas* framework through proof that GM treated him differently than younger persons who engaged in the same or similar alleged conduct. *Town*, *supra* at 695; *Meagher*, *supra* at 716. There was evidence presented below from which reasonable minds could conclude that Mueller—who was not terminated—engaged in the same or similar alleged e-mail misconduct as plaintiff. Mueller's deposition testimony suggests that he may well have been involved in inappropriate use of the GM internal e-mail network. Of particular note, Mueller testified that he could not recall which e-mails he had sent and received, and he at no time denied being involved in sending and receiving the inappropriate e-mails for which plaintiff was fired. For example, when Mueller was asked during his deposition whether he or plaintiff had sent the e-mails that formed the basis of plaintiff's dismissal, Mueller did not deny sending the e-mails, and replied that he did not recall whether he or plaintiff had sent those e-mails. Moreover, GM employee Raleigh Doust averred in a sworn affidavit that Mueller personally admitted sending the e-mails using plaintiff's password and e-mail account. Similarly, plaintiff testified that Mueller confessed to him that he had sent the inappropriate e-mail messages using plaintiff's e-mail account and password.[4] It is undisputed that Mueller was not terminated from employment, and

[4] GM argues that the admissions allegedly made by Mueller, which are contained in Doust's (continued…)

that GM punished him only by reducing the amount of a proposed pay raise that he was scheduled to receive. It is further undisputed that Mueller is younger than plaintiff.

We conclude that plaintiff submitted sufficient admissible evidence to show that GM treated plaintiff differently than it treated a younger employee, namely Mueller, even though GM had reason to believe that both plaintiff and Mueller engaged in the same or similar alleged misconduct. Accordingly, plaintiff established a prima facie case of age discrimination in this case. *Town*, *supra* at 695; *Meagher*, *supra* at 716.

B. Proof of Pretext

The fact that a plaintiff has established a prima facie case of age discrimination does not automatically preclude summary disposition in the defendant's favor. *Hazle*, *supra* at 463-464. The establishment of a prima facie case merely creates a presumption of discrimination. However, that presumption may be rebutted. *Id*. After the plaintiff makes a prima facie showing of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. *Lytle*, *supra* at 173. Once the defendant produces such evidence, the presumption drops away, and the burden of proof shifts back to the plaintiff. The plaintiff must then demonstrate, by a preponderance of the evidence, that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. *Id.* at 174.

But in the present case, because the trial court granted summary disposition for GM on the ground that plaintiff had not established a prima facie case, it never considered whether GM articulated a legitimate, nondiscriminatory reason for plaintiff's termination. We typically do not decide issues on appeal that were not actually decided in the court below. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996). "Appellate review is generally limited to issues decided by the trial court." *Candelaria v BC Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

Because plaintiff established a prima facie case of age discrimination, we reverse the trial court's grant of summary disposition for GM on the age discrimination claim. However, the trial court will be required to consider on remand whether GM had a legitimate, nondiscriminatory

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(…continued)

sworn affidavit and plaintiff's deposition testimony, constitute inadmissible hearsay because Mueller is "a non-party to this case." However, Mueller was an employee of GM who allegedly made these admissions during the course of his employment relationship. See MRE 801(d)(2)(D); *Bachman*, *supra* at 439-440. Additionally, there was sufficient evidence to suggest that Mueller actually made the admissions at issue. See *Merrow v Bofferding*, 458 Mich 617, 633; 581 NW2d 696 (1998); see also *Bourjaily v United States*, 483 US 171, 181; 107 S Ct 2775; 97 L Ed 2d 144 (1987) (the statements sought to be admitted may themselves be considered as substantive evidence that the declarant actually made the statements at issue). Of note, the testimony of Doust and plaintiff would have been sufficient to lay a proper foundation concerning the authenticity of Mueller's admissions. *Merrow*, *supra* at 633 n 14; *Bradbury v Ford Motor Co*, 123 Mich App 179, 188; 333 NW2d 214 (1983), mod on other grounds 419 Mich 550 (1984). Mueller's statements, contained in Doust's affidavit and in plaintiff's deposition testimony, were admissible as non-hearsay party admissions. MRE 801(d)(2)(D).

reason for terminating plaintiff.[5] In order to withstand summary disposition at that time, plaintiff will be required to present sufficient evidence to allow a rational trier of fact to conclude that GM's proffered nondiscriminatory reason for the adverse employment action was mere pretext for unlawful discrimination. *Lytle*, *supra* at 175; *Town*, *supra* at 698. We note that the same evidence used to establish plaintiff's prima facie case may also be used to rebut the employer's proffered nondiscriminatory reason for the adverse employment action. *Id*. at 697.

## IX. National Origin Discrimination

Finally, GM argues that the trial court erred in finding that plaintiff established a prima facie case of national origin discrimination, and in denying summary disposition for defendant with respect to plaintiff's national origin discrimination claim.

In addition to age and other categories, the CRA also prohibits employment discrimination based on national origin. MCL 37.2202(1)(a); *Wilcoxon*, *supra* at 358. Like plaintiff's age discrimination claim, plaintiff's national origin discrimination claim is based on alleged disparate treatment. Also like plaintiff's age discrimination claim, plaintiff's national origin discrimination claim is premised on circumstantial evidence, and the *McDonnell Douglas* framework therefore applies. *Bachman*, *supra* at 432-433.

### A. Prima Facie Case

Under the *McDonnell Douglas* framework, a plaintiff must make a prima facie showing of discrimination by establishing that (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for his position, and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle*, *supra* at 463. To establish the fourth prong of this framework, it is sufficient for a plaintiff to show that the employer treated him differently than a similarly situated person outside the protected class. *Town*, *supra* at 695; *Meagher*, *supra* at 716.

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[5] While plaintiff has shown that he was treated differently that one similarly situated employee outside the protected class, namely Mueller, the testimony of human resources manager Elizabeth Azoni indicated that there may have been other GM employees outside the protected class—including Frank Ottavian and Jerry Knapp—who were discharged for engaging in activities similar to those allegedly engaged in by plaintiff. GM contends that this evidence of similarly situated employees outside the protected class who were treated in the same manner as plaintiff precludes plaintiff's ability to establish the fourth prong of the *McDonnell Douglas* framework by showing differential treatment. In other words, GM argues that it is irrelevant that plaintiff was treated differently than Mueller because he was treated the same as other employees. While the evidence of comparably treated employees outside the protected class will surely go to the weight and sufficiency of plaintiff's "pretext" argument on remand, we simply do not read Michigan law as requiring a plaintiff to prove that he was treated differently than *all* similarly situated persons outside the protected class. But see *EEOC v Our Lady of Resurrection Med Ctr*, 77 F3d 145, 151 (CA 7, 1996) (emphasis added) (holding that "'comparative' evidence is dispositive for summary judgment purposes only if it shows '*systematically* more favorable treatment toward similarly situated employees not sharing the protected characteristic'").

It is undisputed that plaintiff was a member of a protected class as a Hispanic or Mexican-American, and that he was qualified for his position. Nor do the parties dispute that plaintiff suffered an adverse employment action. Rather, as in the case of plaintiff's age discrimination claim, the question is whether the employment action taken by defendant occurred under circumstances sufficient to give rise to an inference of unlawful discrimination. *Hazle, supra* at 463. In other words, the question is whether plaintiff was treated differently than similarly situated non-Hispanic or non-Mexican-American employees who engaged in the same or similar alleged conduct. *Town, supra* at 695; *Meagher, supra* at 716.

The plaintiff has the burden of producing sufficient evidence to establish a prima facie case of discrimination. *Sniecinski, supra* at 134.

Plaintiff argues that he was treated differently than Mueller, a Caucasian, even though GM had reason to believe that both he and Mueller had engaged in the same or similar type of computer misuse. As noted earlier, although plaintiff was terminated, Mueller received only a reduction in the amount of a proposed pay raise. Plaintiff claims that this differential treatment of two similarly situated employees was sufficient to establish the fourth prong of the *McDonnell Douglas* prima facie case.

As with plaintiff's age discrimination claim, there was evidence presented in this case from which reasonable minds could conclude that Mueller engaged in the same or similar alleged activities as plaintiff but was not terminated. Mueller's deposition testimony suggests that he may well have been involved in inappropriate use of the GM internal e-mail network. Mueller never denied having sent the inappropriate e-mails that are at issue in this case, and of particular note, Mueller testified that he could not recall whether he or plaintiff had sent those e-mails. Moreover, Doust averred that Mueller personally admitted to sending the e-mails using plaintiff's password and e-mail account, and plaintiff testified that Mueller confessed to him that he had sent the e-mail messages using plaintiff's e-mail account and password. As noted above, Mueller's admissions, contained in Doust's affidavit and in plaintiff's deposition testimony, were admissible as non-hearsay party admissions. MRE 801(d)(2)(D).

We conclude that plaintiff submitted sufficient admissible evidence that GM treated plaintiff differently than it treated Mueller, a Caucasian employee, even though GM had reason to believe that both plaintiff and Mueller engaged in the same or similar misconduct. Accordingly, plaintiff established a prima facie case of national origin discrimination. *Town, supra* at 695; *Meagher, supra* at 716.

B. Proof of Pretext

Once a plaintiff has sufficiently established a prima facie case of discrimination, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. *Lytle, supra* at 173. Once the defendant produces such evidence, the presumption drops away, and the burden of proof shifts back to the plaintiff. The plaintiff must then demonstrate, by a preponderance of the evidence, that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. *Id.* at 174.

Although the trial court found that plaintiff had established a prima facie case of national origin discrimination within the *McDonnell Douglas* framework, it again appears that the court did not consider whether GM proffered a legitimate, nondiscriminatory reason for plaintiff's termination. We generally will not decide issues that were not actually decided in the court below. *Candelaria, supra* at 83; *Bowers, supra* at 495. Therefore, although we affirm the trial court's finding that plaintiff established a prima facie case of national origin discrimination, we remand for further proceedings concerning GM's articulated nondiscriminatory reason for terminating plaintiff. In order to withstand summary disposition on remand, plaintiff will be required to present sufficient evidence to allow a rational trier of fact to conclude that GM's proffered nondiscriminatory reason for the adverse employment action was mere pretext for unlawful discrimination. *Lytle, supra* at 175; *Town, supra* at 698. As above, the same evidence used to establish plaintiff's prima facie case may also be used to rebut GM's proffered nondiscriminatory reason for the adverse employment action.[6] *Id.* at 697.

## X. Conclusion

We affirm the trial court's grant of summary disposition for defendant on plaintiff's wrongful discharge claim, and we affirm the trial court's denial of plaintiff's motion for sanctions against GM.[7]

We affirm the trial court's denial of summary disposition for defendant on plaintiff's national origin discrimination claim, we reverse the trial court's grant of summary disposition for defendant on plaintiff's age discrimination claim, and we remand for further proceedings concerning plaintiff's age and national origin discrimination claims.

Affirmed in part, reversed in part, and remanded for further proceedings concerning plaintiff's age and national origin discrimination claims. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

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[6] While plaintiff has shown that he was treated differently that one similarly situated employee outside the protected class, we acknowledge that there were other similarly situated employees outside the protected class who may have been treated in the same manner as plaintiff. Although evidence of comparably treated Caucasian employees will surely go to the weight and sufficiency of plaintiff's "pretext" argument on remand, we do not read Michigan law as requiring plaintiff to prove that he was treated differently than *all* similarly situated persons outside the protected class. See footnote 5, *supra*.

[7] We do not consider plaintiff's counts II, III, IV, V, and VI, which are not at issue in this appeal. See MCR 7.212(C)(7); *Ass'n Research & Dev Corp v CNA Financial Corp,* 123 Mich App 162, 170 n 1; 333 NW2d 206 (1983).