

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

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JOHN CAMPBELL,

Plaintiff-Appellant,

v

CHEMISTRI, INC., WILL PERRY, THOMAS  
DAVIDSON and MAGDA MARUDAS,

Defendants-Appellees.

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UNPUBLISHED

August 3, 2006

No. 267837

Oakland Circuit Court

LC No. 2003-053374-CD

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

Plaintiff, John Campbell, appeals the trial court's order that granted summary disposition to defendants. We affirm.

Chemistri is an advertising agency that hired Campbell as a copywriter in 1975. When Chemistri terminated Campbell on August 8, 2003, he was a senior copywriter and was 56 years old. Defendant, Will Perry, was Campbell's supervisor at the time of his termination and, according to Campbell, defendant Thomas Davidson was Perry's second-in-command. Defendant Magda Marudas was a vice president of Chemistri's human resources department.

According to Chemistri, it terminated Campbell after the company discovered that he was using the Chemistri computer and other equipment for his work as editor of a non-work related publication called the *Single Shot Rifle Journal*.<sup>1</sup> Campbell began his duties as editor of the journal sometime shortly after March 2001. On March 19, 2001, Campbell sent a letter to Gary Staup, Secretary-Treasurer of the American Single Shot Rifle Association (ASSRA). Campbell wrote:

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<sup>1</sup> Campbell testified that the journal is published approximately six times per year for the American Single Shot Rifle Association. The journal contains articles about firearms used during the Civil War through World War I and, according to Campbell, the journal is intended to educate readers about firearms and American history.

As far as new equipment goes for the creation of such a new SSRJ, I offer the ASSRA this perk: I have free use of the computer system equipment in my office. It is very current and unexcelled in quality and capability. It's benefits are yours for nada. But if I ever leave the agency, that "freebie" disappears. I've been at this firm for 26 years, so the potential I suggest is low, but still there. Therefore, I recommend this:

Let me get the new SSRJ going with office equipment. At the same time, ASSRA can lease a properly equipped back-up Macintosh for my home office (alternate: I lease and bill ASSRA). That way, if my professional career suddenly changes, or I have to work late on the next issue, etc., SSRJ can roll on without a hitch.

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I shouldn't say this in print, but ASSRA will also have the benefit of my office telephone system/access, FAX and e-mail capabilities. This should save the organization some dough on that count.

Campbell admits that he worked on the journal at the Chemistri offices and with Chemistri equipment. Campbell also concedes that he printed his work telephone number and email address on the journal as his contact information. Campbell testified that, at work, he received about six phone calls per month and approximately a dozen emails related to his work on the journal. He also testified that, in addition to his editing duties, he wrote articles for "virtually" every issue of the publication. Campbell estimated that it would take him 20 hours to write an article and, altogether, he spent approximately 20 hours per week on the journal. He conceded that he completed approximately 60 percent of his work on the journal while at work.

During his termination meeting, Marudas gave Campbell a copy of a Chemistri Progress Report. The report states that Campbell was being fired for using Chemistri property and services for his personal benefit and without permission. The report also states that Campbell's productivity was "clearly below others" in his department and that it appeared that his work on the *Single Shot Rifle Journal* was interfering with his professional responsibilities. The report further provides that Campbell was "rarely willing and available to collaborate on his assigned projects within the group," he failed to attend some meetings and, during a meeting with representatives from Pontiac GTO, he argued with the client and strained Pontiac's relationship with Chemistri.

Campbell testified that no one at Chemistri said he was being terminated because of his age or that he was too old for the job. However, Campbell maintained that other Chemistri employees worked on personal projects using Chemistri equipment and were not terminated from the company. Chemistri employees testified that they learned about Campbell's work on the journal at different times. Trevor Wilson worked in Chemistri's IT department and testified that he knew about Campbell's outside work for some time. Indeed, Wilson testified that, when Campbell would call him for help with his computer, Wilson was surprised when Campbell needed assistance with something that was actually related to Campbell's Chemistri work. Human resources manager Gregg Warner testified that someone sent him a copy of the *Single Shot Rifle Journal* through interoffice mail, but he did not know who sent it. When he looked

through the publication, Warner noticed that Campbell listed his work telephone number and email address as his contact information and this made Warner suspect that Campbell was using Chemistri equipment for the journal.

Warner told Marudas about the journal and Marudas testified that she first saw the publication in July 2003. According to Marudas, she asked the IT department to look at Campbell's computer usage to determine how much Campbell was working on the journal at work. Marudas testified that, according to the list generated by the IT department, most of Campbell's files were devoted to the *Single Shot Rifle Journal* and not his copywriting work. Marudas testified that she, along with Creative Services Director Tony Booth, decided to terminate Campbell because the computer inventory showed that he was using Chemistri equipment primarily for non-work related purposes. This statement is inconsistent with IT employee Trevor Wilson's recollection that Marudas and Warner asked him to generate the computer inventory list *after* Campbell's termination. According to Marudas, Booth also informed her that Campbell had problems interacting with clients and that he was "oftentimes uncooperative, sarcastic, uncollaborative, very difficult to work with," and unavailable.

Campbell testified that he believes he was terminated because of his age. Specifically, he stated that he believes Marudas wanted to terminate him because he thinks "the HR department has a mandate from upper management to reconfigure the agency's personnel toward a younger skew." When asked why he believes his manager, Will Perry, wanted to fire him because of his age, Campbell testified that he just has "a feeling" it had to do with his age and he concedes that he is speculating about his motives. Campbell further testified that, in the past 5 to 10 years, he thinks several older employees were "eliminated" by Chemistri. He believes that Chemistri has expressed its attitude about older employees by terminating them, disregarding their experience and viewpoints, and by diminishing their responsibilities. According to Campbell, Chemistri disregarded his experience and viewpoints and, at his deposition, Campbell recalled the names of several other older employees who, he testified, told him that their viewpoints and experience were also disregarded.

However, Campbell also acknowledged that at the end of 2002 or beginning of 2003, something changed so that, unlike before, his supervisors, Perry and Davidson, did not simply accept his work "as is." Campbell also stated that part of the reason he was terminated may have been because of his "creative stalwartness." Campbell explained that, "[a]s we age we become more perceptive and less able to be dissuaded from creative ideas that we know are good, i.e., older people know what's good and they will not easily relent to having these things watered down." He further observed that, in older employees, there is "a reluctance to accept wholesale and even moderate modifications to top-flight creative work to make it less effective and less professional."

On August 8, 2003, Campbell signed a separation agreement that outlined his severance package and released all potential claims against Chemistri with regard to Campbell's employment and termination. However, Campbell revoked the release less than a week later and, as required by the separation agreement, he forfeited his severance package. Campbell filed a complaint in this case on October 13, 2003, and alleged that Chemistri, Perry, Davidson and Marudas discriminated against him in violation of the Elliot-Larsen Civil Rights Act, MCL 37.2101, *et seq.*

Chemistri filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and argued that Campbell cannot establish an issue of material fact that he was terminated because of his age. Chemistri further asserted that, during discovery in February 2004, it learned that Campbell was paid for his work on the journal and that this would have constituted a valid reason to terminate him. Therefore, Chemistri argued that it is entitled to the benefit of the after-acquired evidence rule so that Campbell may not collect damages for alleged injuries that occurred after February 2004.

In an opinion and order entered on August 24, 2005, the trial court granted Chemistri's motion. The trial court reasoned that, though Campbell established a prima facie case of age discrimination, he failed to overcome Chemistri's legitimate business reason for his termination. Specifically, the trial court found that, by his own admission, Campbell was terminated because of problems related to his work. The trial judge explained:

Plaintiff himself testified he felt he was terminated based upon his reluctance to take criticism and direction from his supervisors and/or Defendant's clients. There cannot be a reason more legitimate than an employee's refusal to take direction from his or her supervisors, and the Court refuses to second guess the decision when Plaintiff himself admits to the legitimacy of the decision to terminate him. Therefore, summary disposition is granted pursuant to MCR 2.116(C)(10).

## II. Analysis

Campbell argues that the trial court erred when it granted summary disposition to Chemistri and that he was discharged in violation of the Civil Rights Act, MCL 37.2202(1)(a), which provides, in relevant part:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The trial court ruled that Campbell established a prima facie case of age discrimination. Though the trial court granted Chemistri's motion for summary disposition on other grounds, because our review is de novo, we must analyze whether the trial court correctly ruled that Campbell satisfied the elements of a prima facie case.<sup>2</sup>

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<sup>2</sup> As our Supreme Court explained in *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001):

(continued...)

Campbell alleged that he was treated differently than other employees who also used Chemistri computers for outside projects and both parties agree that this case falls within the burden-shifting framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 93 S Ct 1817, 36 L Ed 2d 668 (1973) As our Court explained in *Wilcoxon v Minnesota Min & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999):

A plaintiff may establish a pretextual *McDonnell Douglas* type prima facie case of prohibited discrimination by demonstrating that “(1) she was a member of the protected class; (2) she suffered an adverse employment action . . .; (3) she was qualified for the position; but (4) she [suffered the adverse employment action] under circumstances that give rise to an inference of unlawful discrimination.” *Lytle [v Malady (On Rehearing)]*, 458 Mich 153, 172-173; 579 NW2d 906 (1998)] (Weaver, J.). Circumstances give rise to an inference of discrimination when the plaintiff “was treated differently than persons of a different class for the same or similar conduct.” *Reisman [v Wayne State Univ Regents]*, 188 Mich App 526, 538; 470 NW2d 678 (1991)].

The parties agree that Campbell established that he is a member of a protected class and that he suffered an adverse employment action. The trial court ruled that Campbell also established that he was qualified for his position as senior copywriter. Specifically, the trial court ruled:

First, [Chemistri] claims [Campbell] failed to meet the performance expectations. This, however, relates back to [Campbell’s] use of the computer system and other resources for the ASSRA and the [*Single Shot Rifle Journal*]. In response, [Campbell] asserts other employees at Chemistri also perform services for groups other than [Chemistri]. [Campbell] also presents the testimony of Rex Roy, who was [Campbell’s] supervisor for three years. Roy testified [Campbell] never allowed his extracurricular activities to interfere with his employment obligations. Further, Roy testified the suggestion that [Campbell] would be terminated for his outside work is “bogus.” Based upon the testimony presented, this portion of the motion must be denied. A reasonable juror could return a verdict in favor of [Campbell], thus making summary disposition inappropriate.

We hold that the trial erred in its analysis. “An employee is qualified if he was performing his job at a level that met the employer’s legitimate expectations.” *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699; 568 NW2d 64 (1997) (Brickley, J.). In other words, “[t]o establish that

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(...continued)

We review de novo a trial court’s decision on a motion for summary disposition. A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 453; 597 NW2d 28 (1999).

he was ‘qualified’ a complainant must show ‘that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.’ ” *Id.* at 699 n 22, quoting *Menard v First Security Services Corp*, 848 F2d 281, 285 (CA 1, 1988).

While it is undisputed that Campbell was an experienced and talented copywriter, Chemistri presented ample evidence that, at the time of his discharge, Campbell was not “performing his job at a level that met the employer’s legitimate expectations.” *Id.*; see also *Cole v West Side Auto Employees Federal Credit Union*, 229 Mich App 639, 649; 583 NW2d 226 (1998). Campbell did not present sufficient evidence to create a rebuttal presumption of age discrimination. See *Meagher v Wayne State University*, 222 Mich App 700, 711; 565 NW2d 401 (1997).

As Chemistri argues in its appeal brief, while Campbell presented evidence that his former supervisor, Rex Roy, was happy with his work, Roy did not supervise Campbell for the eight months prior to his termination. Accordingly, the trial court erroneously relied on his positive testimony about Campbell in finding that Campbell was adequately performing his job at the time of his termination. Campbell conceded in his deposition that his supervisors for the eight months prior to his discharge, Perry and Davidson, no longer thought his work was top notch and they did not simply accept Campbell’s work without revision. Further, though the trial court found it persuasive that Campbell said other employees used their computers for outside projects, this does not establish whether Campbell was performing his own job adequately. To the contrary, when he was terminated, Campbell concedes that he would complete approximately 60 percent of the *Single Shot Rifle Journal* at the office and that he spent 20 hours per week on the publication. Accordingly, by his own admission, Campbell was spending approximately twelve hours a week on the journal while at work. Chemistri’s IT employee, Trevor Wilson, also confirmed that, when Campbell would ask for computer assistance, it was almost always for his work on the journal. Wilson further noted that Campbell had an inordinate number of *Single Shot Rifle Journal* files on his computer and that there were so many files that, after Campbell left the company, Wilson had to copy the files onto four or five compact disks.

Marudas also testified that Creative Services Director Tony Booth informed her that Campbell had problems interacting with clients, that he was “uncooperative, sarcastic, uncollaborative, very difficult to work with,” and often unavailable. Campbell’s termination “Progress Report” also noted that Campbell “is rarely willing and available to collaborate on his assigned projects within the group” and refused to work on a project for GM Accessories because, according to Campbell, “he doesn’t work on Accessories.” The report also stated that, when workloads and deadlines required him to stay at the office, he nonetheless would leave at 3:00 or 3:30 p.m. and would be unavailable “to meet with the account groups when they have feedback from client meetings.” The report further noted:

John’s attitude and creative deliverable is such whereby when there is a project that needs to get done, the preference is that he not work on it. This places a burden on the already taxed resources within the group and negatively impacts the collaboration and team spirit that needs to prevail in a highly productive, high turnaround and stressful work unit.

Further, Chemistri's Pontiac account director, Don Peasley, sent an email to Gregg Warner the day before Campbell's termination and stated:

John's ongoing behavior [is] plainly obstinate and downright insubordinate. He has lost the trust of clients, account people, the people who work with him and the people who manage him to the point where he is ineffective.

Campbell did not present evidence to rebut these proofs. While he submitted Rex Roy's deposition testimony and copies of prior evaluations that indicated his job performance was satisfactory, they give no indication of how Campbell was performing his job in 2003 or how much of his work time was taken up by the journal by the time he was terminated. In other words, Campbell failed to show " 'that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance . . . .' " *Town, supra* at 699 n 22, quoting *Menard, supra* at 285. Accordingly, the trial court erred when it ruled that Campbell established a prima facie case of age discrimination and it should have granted summary disposition to Chemistri without further analysis. However, it is well settled that this Court will affirm a lower court's ruling when it reaches the right result, albeit for the wrong reason. *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

Were we to conclude that Campbell submitted sufficient evidence to establish that he was qualified for his position, we agree with Chemistri that Campbell also failed to meet the fourth element of his prima facie case because he did not show that he was replaced by a younger employee or that he was terminated "under circumstances that give rise to an inference of unlawful discrimination." *Wilcox v Minnesota Min & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999), quoting *Lytle, supra* at 172-173 (Weaver, J.).

It is undisputed that Campbell was not replaced by a younger employee.<sup>3</sup> The trial court ruled that Chemistri admitted that other employees used computer equipment for outside projects and that, while Chemistri tried to show that the employees had permission or did not devote as much company time to the projects, the trial court ruled that a jury should decide whether other, younger employees were treated more favorably for the same conduct as Campbell.

Once again, we hold that the trial court erred in its analysis. Campbell did not present evidence that younger employees used their computers for outside, paid work. He testified that

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<sup>3</sup> Campbell submitted a copy of an August 20, 2003 job posting from Monster.com in which Chemistri sought candidates for a senior copywriter position. According to Campbell, the posting shows that Chemistri wanted to hire a younger employee for his job because it called for candidates with only five to seven years of experience. We note that the posting actually states that Chemistri was seeking candidates with "5 to 7+" years of experience, which clearly indicates that Chemistri would consider candidates with more than seven years of experience. In any case, Campbell did not present evidence that the posting was for his position, in his department at Chemistri, and he concedes that Chemistri never actually hired a younger employee for his job.

he believes other, younger employees did volunteer projects for charitable or non-profit organizations. However, he did not specifically name those employees or present evidence to establish that they were outside his protected class. He also failed to present evidence to show whether their projects were approved, how much time the other employees allegedly spent on them, and whether they received payment for them. Therefore, Campbell's assertions in his deposition were merely speculative.

Moreover, in *Wilcoxon, supra* at 369-370, our Court stated that, to establish the fourth element of discrimination, a plaintiff must show that other, similarly situated employees outside of the plaintiff's protected class were not terminated. Campbell did not present any evidence to show that any *similarly situated* younger employees used Chemistri computers for outside projects and were not terminated. To establish this element, Campbell was required to present evidence that " 'all of the relevant aspects' . . . were 'nearly identical' to those of [a differently treated person.]" *Id.* at 370, quoting *Town, supra* at 699-700 (Brickley, J.) (citation omitted). Again, Campbell did not name younger employees who were retained despite their unauthorized computer use or otherwise establish that they had a nearly identical employment situation. Accordingly, Campbell did not produce " 'enough evidence to create a rebuttable presumption of . . . discrimination.' " *Wilcoxon, supra* at 361 n 7, quoting *Meagher, supra* at 710-711.<sup>4</sup>

Because Campbell failed to establish a prima facie case of age discrimination, we need not analyze whether he presented sufficient evidence to show that Chemistri's articulated reason for his termination—his work on the *Single Shot Rifle Journal*—was pretext for age discrimination. However, we observe that Campbell failed to raise "a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lyle, supra* at 175.

To establish that age was a motivating factor in his termination, Campbell offered his own testimony in which he stated that he thinks "the HR department has a mandate from upper management to reconfigure the agency's personnel toward a younger skew." He further asserted that, in his opinion, this explains why Marudas wanted to terminate him. Campbell also testified that he just had "a feeling" that Will Perry wanted to terminate him because of his age, but he admitted that this was his own speculation about Perry's motives. Speculation or conjecture is insufficient to raise an issue of material fact and it is insufficient to establish causation.

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<sup>4</sup> To the extent Campbell's brief can be read to suggest that he believes another employee, Ron Peasley, was treated differently because he also allegedly performed badly on a Pontiac GTO project and was not terminated, we note that Campbell failed to present evidence that Peasley was a similarly situated, younger employee. Further, that the GM executives did not remember Campbell's conduct at one particular meeting does not mean that Campbell acted appropriately in the eyes of his employer. Moreover, the misconduct described in Campbell's Progress Report is not similar to the alleged "leadership" problems that concerned GM representative Robert Kraut about Peasley.



*Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 140; 666 NW2d 186 (2003); *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977).<sup>5</sup>

Because Campbell presented insufficient evidence to establish a genuine issue of material fact with regard to whether Chemistri's purported reason for terminating him was a pretext for age discrimination, the trial court correctly granted summary disposition to Chemistri.<sup>6</sup>

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Henry William Saad

/s/ Jessica R. Cooper

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<sup>5</sup> During his testimony, Campbell also referred to two hearsay documents, an "eligibility list" and a document entitled "Most Repeated Themes." The eligibility list is undated and contains no explanatory information, but lists the ages of certain employees who, presumably, might be eligible for a layoff in January 2004, six months *after* Campbell was discharged. In some categories, older employees are listed under the "eligible" column, though some of the "eligible" employees are also younger or are in the middle of the age range in each department. The document does not indicate that any older employees *were* actually laid off pursuant to the list.

The "Most Repeated Themes" document is equally unavailing. The document is undated and does not identify when the survey took place or who participated. Further, the survey plainly indicates that the comments are those of the employees themselves, not of the company or its management. Without some evidence to establish that the company itself had a pattern of terminating or otherwise discriminating against "long-termers," the evidence is insufficient to establish that age may have been a motivating factor in Campbell's termination. Moreover, in the paragraph that actually contains the word "old," the text is clearly a summary of employee feedback about the company's "culture," not its workers. In sum, neither document suggests that age may have motivated Chemistri to terminate Campbell.

<sup>6</sup> Campbell also argues that the trial court erred when it ruled that his damages are limited by the after-acquired evidence rule. In light of our conclusions above, we need not address this issue.