STATE OF MICHIGAN

COURT OF APPEALS

ROMAN KUZIO, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296259 Wayne Circuit Court
AT&T MICHIGAN EAST, INC., and LARRY SPISAK, Defendants-Appellants.	LC No. 08-101356-NZ

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendants AT&T Michigan East, Inc. (AT&T), and Larry Spisak appeal by leave granted the trial court's order denying defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiff Roman Kuzio's age discrimination claim brought pursuant to § 202(1)(a) of the Civil Rights Act (CRA), MCL 37.2101 *et seq.* We reverse and remand for entry of an order granting summary disposition in favor of defendants.

I. BACKGROUND

Plaintiff worked for AT&T as a clerical employee for nearly 30 years before being "surplussed" in a May 2007 reduction in force (RIF), due to a merger between AT&T and Bell South. "Surplus" is a term of art used by AT&T to describe being "laid off" as part of a "force adjustment." Deposition testimony alternatively indicated that plaintiff's job was eliminated and that plaintiff was effectively discharged.[1] For purposes of this opinion, we refer to plaintiff as being "surplussed," given the parties' use of that terminology. Plaintiff predicated his lawsuit on claims of age discrimination, retaliatory discharge, and breach of employment contract, all

[1] On being surplussed, plaintiff signed an Employment Opportunity Agreement. The agreement entitled him to receive 85% of his "regular base wage" paid out of his termination or severance pay. Plaintiff continued to accrue work credits and benefits, received priority consideration for lateral and demotional moves, and could be placed in traditional or non-traditional work. Two months after being surplussed, plaintiff formally retired with 30 years of recognized service.

relative to AT&T's decision to surplus plaintiff. The retaliation and contract claims are not at issue in this appeal. In an extensive written opinion, the trial court found that a genuine issue of material fact existed with respect to plaintiff's age discrimination claim, and subsequently denied defendants' motion for reconsideration. Defendants filed an application for leave to appeal, which this Court granted. *Kuzio v AT&T Michigan East, Inc*, unpublished order of the Court of Appeals, entered July 13, 2010 (Docket No. 296259).

Plaintiff, who was born in 1952, testified that when he was surplussed, he held a Staff Associate II (S2)[2] position in AT&T's Publishing Department, which produced the Detroit area Yellow Pages. Arthur (Terry) Humphrey, who was born in 1956, worked with plaintiff as an S2 in the Publishing Department, and was surplussed at the same time as plaintiff. As the Director of Directory Listing Services for 13 states, defendant Spisak bore responsibility supervising 11 senior managers, 35 managers, multiple departments, including the Publishing and Advertising Department (P&A Dep't) in the Detroit-Toledo area, and about 400 associates, including plaintiff and Humphrey. Spisak alone made the decision to eliminate plaintiff and Humphrey's S2 positions as part of the RIF.

Plaintiff and Humphrey were the only S2s employed in the Publishing Department, and they were the only S2s in the Detroit-Toledo area surplussed in May of 2007. Many other S2s worked for AT&T in the Detroit-Toledo area; most were younger and enjoyed less seniority than plaintiff and Humphrey. Because an important issue raised in this appeal concerns whether plaintiff and the other S2s were similarly situated, we now consider the record evidence identifying the departmental and work units containing S2 employees.

Plaintiff and Humphrey were both union members covered by a collective bargaining agreement (CBA). Under the title "Departmental Units," the CBA provided:

> **WORK UNITS:**
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> - Premises Sales
> - Telephone Sales
> - Art
> - Service/Claims Bureau
> - Publishing Production, Administrative Services, Sales Support, Market Control, Market Support, NYPS

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[2] Among other positions at the company, AT&T employed individuals as Staff Associates I, II, III, and IV (hereafter S1-4), reflecting clerical classifications in which the higher the number, the greater the necessary skill set.

- Corporate Graphics Center

- Outbound Calling Team

LOCATIONS:

Akron-Summit County/Cleveland – Cuyahoga County

Columbus-Franklin County

Dayton

Detroit-Metro Area/Toledo – Lucas County

. . .

The CBA defined a "departmental unit" as "the work units, locations and/or job classifications shown" in the above-quoted list. The CBA further provided that if AT&T deems it necessary to make force adjustments through layoffs, "seniority shall be applied . . . to displace the least senior employees *in the applicable departmental unit(s)*." (Emphasis added). The CBA permitted necessary layoffs of "regular employees performing essentially the same type of work, *by location within a departmental unit* of the bargaining unit." (Emphasis added). Accordingly, an AT&T employee's "departmental unit" determined the employee's ability to invoke seniority rights during an RIF.

Plaintiff testified that pursuant to the CBA, his work unit was the Publishing Department. Defendants asserts that plaintiff's testimony refers to "Publishing Production," a work area falling within the CBA's bulleted grouping of "Publishing Production, Administrative Services, Sales Support, Market Control, Market Support, NYPS." Plaintiff counters that he worked within the entire bulleted grouping of "Publishing Production, Administrative Services, Sales Support, Market Control, Market Support, NYPS," collectively known as the Publishing Department. The documentary evidence fails to clarify whether the Publishing Department also went by the moniker "Publishing Production" or encompassed the entire bulleted grouping. Plaintiff did testify that he worked in different "work *groups*" in the Publishing Department, including "data entry," "mail," and the "administrative team." These work groups are not delineated in the CBA, although the bulleted grouping does include an area identified as "Administrative Services."

Despite the parties' disagreement regarding whether the Publishing Department constituted a separate work group or fell within the rubric of "Publishing Production Administrative Services, Sales Support, Market Control, Market Support, NYPS," we confidently conclude from the record that neither the Publishing Department nor the P&A Department encompassed the Corporate Graphics Center. It is undisputed that most S2s in the Detroit-Toledo area worked in the Corporate Graphics Center. Two S2s were employed at AT&T's Troy corporate headquarters. Although the documentary evidence fails to specify their particular work or departmental units, the record evidence clearly places them outside the Publishing or P&A Department. Consequently, no evidence refutes Spisak's testimony that plaintiff and Humphrey were the only S2s under his control.

II. ANALYSIS

A. APPELLATE STANDARD OF REVIEW

We review de novo a circuit court's summary disposition ruling. *Robertson v Blue Water Oil Co*, 268 Mich App 588, 592; 708 NW2d 749 (2005). A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. We likewise review de novo issues concerning the interpretation of the CRA. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005).

B. GENERAL CRA PRINCIPLES

The CRA's purpose is to prevent discrimination that is directed against a person based on that person's membership in a certain class and to eliminate the effects of demeaning or offensive stereotypes, prejudices, and biases. *Noecker v Dep't of Corrections*, 203 Mich App 43, 46; 512 NW2d 44 (1993). The CRA is remedial, and it must be liberally construed to effectuate its ends. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993).

C. DISCUSSION

Defendants contend that the trial court erred by denying summary disposition of plaintiff's age discrimination claim. Defendants maintain that the trial court erroneously concluded that the RIF was a pretext for age discrimination. Defendants further argue that the trial court improperly substituted its own judgment for defendants' business choices by questioning the necessity of surplussing plaintiff. Finally, defendants assert that the trial court erroneously concluded that plaintiff had presented evidence that similarly-situated, younger employees received more favorable treatment.

Plaintiff's appellate argument focuses on his establishment of a prima facie case of age discrimination, asserting in summary:

> In conclusion, the initially stated law accurately reflects what is prohibited – an alleged reduction in force (even if there was one here) does not allow the employer a complete defense, but instead forbids the employer from hand picking out of the jelly bean jar only the red (here, aged employees) jelly beans. As the

> Court indicated . . ., when the plaintiff produces evidence from which a jury could find that defendants unlawfully [implemented] this reduction in force – that is, direct, circumstantial, or statistical evidence tending to indicate that the employer singled out plaintiff for discharge for impermissible reasons.[3] The evidence here is statistically overwhelming and, in addition, the seniority mandates of the [CBA] were ignored and not used, although wholly applicable. [The cases] all support the *prima facie* case here and the statistical evidence supporting same.

However, as discussed in greater detail, *infra*, the establishment of a prima facie case merely begins the analysis under the CRA.

> MCL 37.2202 provides in pertinent part:
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> > (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. [Emphasis added].

In some discrimination cases, direct evidence supports a claim of bias relative to the protected characteristic, and in those cases the "plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Direct evidence consists of evidence that, if believed, requires a conclusion that unlawful discrimination was at least in part a motivating factor for the adverse employment action. *Id.*

If no direct evidence of impermissible bias exists, a plaintiff must "proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]" *Hazle v Ford Motor Co*, 464 Mich at 462. "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id*. at 464. If the defendant produces a legitimate, nondiscriminatory reason for its action, "the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is 'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.'" *Id*. at 465, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). Here, plaintiff fails to cite any direct evidence in support of his age discrimination claim. Indeed, plaintiff testified that no one at AT&T had ever said

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[3] The statistics to which plaintiff refers pertain to the numerous younger S2s who were not surplussed in the first stage of the RIF.

anything about his age, nor had anyone commented that plaintiff needed to retire. Accordingly, we utilize the *McDonnell Douglas* test.

We conclude that plaintiff's discharge occurred under circumstances giving rise to at least an inference of age discrimination. Defendants' appellate arguments appear to accept that plaintiff established the elements of a prima facie case. Having established a rebuttable presumption of discrimination, we now consider whether defendants successfully articulated a legitimate, nondiscriminatory reason for their employment decision. As explained by our Supreme Court in *Hazle*,

> The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. "Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away.
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> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination."
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> The inquiry at this final stage of the *McDonnell Douglas* framework is exactly the same as the ultimate factual inquiry made by the jury: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision. The only difference is that, for purposes of a motion for summary disposition . . ., a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision.
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> [T]he *McDonnell Douglas* burden-shifting framework is merely intended "to progressively sharpen the inquiry into the elusive factual question of intentional discrimination." It is important to keep in mind, therefore, that for purposes of claims brought under the [CRA], the *McDonnell Douglas* approach merely provides a mechanism for assessing motions for summary disposition . . . in cases involving circumstantial evidence of discrimination. It is useful only for purposes of assisting trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination. [*Hazle*, 464 Mich at 464-466 (citations omitted).]

We find that defendants articulated legitimate, nondiscriminatory reasons in support of the decision to surplus plaintiff. While plaintiff's position was not eliminated because it was duplicative of Bell South's operations, the merger clearly motivated AT&T to examine and

reduce costs through the RIF, which entailed contemplation of whether certain positions could be eliminated. Spisak concluded that the duties associated with plaintiff and Humphrey's S2 positions had dwindled to the point that their work could effectively be absorbed by other employees.[4] That some duties still remained does not conflict with a finding that the work expected of plaintiff and Humphrey had diminished to a point that it was not economically sound to maintain their S2 positions. Contrary to the trial court's analysis, defendants' decision to surplus plaintiff in 2007 instead of letting him go earlier does not render pretextual defendants' articulated legitimate, nondiscriminatory reasons for surplussing plaintiff. Furthermore, the trial court misplaced its focus on the alleged lack of documentation concerning AT&T's "merger synergy" and the RIF. Defendants adamantly argue that documents describing both were

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[4] In a January 2007 email, Spisak indicated that plaintiff and Humphrey's positions could be declared surplus where "their responsibilities ha[d] decreased and many ha[d] been eliminated." The email explained that Spisak's organization had become less manual over the last 20 years and it further elaborated:

> Roman and Terry used to stamp as received graphics copy, DCR's, service orders and Yellow Pages contracts, and would route them to more skilled associates in the organization who processed that work into the appropriate system. Sales now processes advertising contracts electronically to the appropriate Yellow Pages system, bypassing the listing organization. Graphics copy flows to Design Centers. DCR's and manual CLEC orders flow through Filenet, a fax system that automatically routes work to associates and tracks it. AT&T service orders processed manually are worked in Ohio. As White Pages converts to CSS, that activity will flow electronically. In short, Roman's and Terry's key responsibilities gradually have been eliminated. Another of their responsibilities was to maintain a mail and supply room. As the organization became more automated, that responsibility decreased. When the organization moved to downtown Detroit, staff there operated the mail room. Supplies are much smaller and don't require dedicated staff. We have found it hard to occupy them with meaningful work. They maintain our DCR directory library and answer phones. But there is little else for them to do.

Penny Mitchell, who managed the P & A Department in the Detroit-Toledo area, made comparable observations in an email, noting that "Terry and Roman's current responsibilities consist[] primarily of answering the office main line and maintaining the directory libraries." That Spisak may have made his surplussing decision based on information obtained from others regarding plaintiff's duties and responsibilities and absent firsthand knowledge does not preclude a finding that defendants articulated legitimate, nondiscriminatory reasons for surplussing plaintiff. Considering that he worked out of St. Louis and oversaw 13 states and 400 employees, it would be expected that Spisak would rely on managers like Mitchell to gather information relative to the RIF.

submitted to the court as attachments to a summary disposition reply brief.[5] Regardless, Spisak's testimony provided evidence of the AT&T-Bell South merger, the RIF, the merger synergy, and the reasons for surplussing plaintiff. Plaintiff did not present *any* documentary or deposition evidence suggesting that there was no merger, no RIF, or no merger synergy. Consequently, the trial court improperly rejected Spisak's testimony.

In examining whether the employer articulated a legitimate, nondiscriminatory reason for its employment decision, courts must avoid analyzing the soundness of the employment decision, or whether the decision was wise, prudent, competent, or shrewd. *Hazle*, 464 Mich at 464 n 7. Rather, the attention must be focused on the lawfulness of the employment decision, i.e., whether it was not motivated by discriminatory animus. *Id.* Here, regardless whether the surplus decision reflected sound or wise business judgments, defendants' articulated bases for surplussing plaintiff qualify as lawful.

Defendants' advancement of legitimate, nondiscriminatory reasons for terminating plaintiff's employment shifted to him the burden to articulate evidence that, when viewed in the light most favorable to him, would permit a reasonable fact finder to conclude that defendants' proffered reasons for their decision constituted pretexts for age discrimination. Consequently, this case turns on whether plaintiff has produced evidence that the articulated, nondiscriminatory reasons for eliminating plaintiff's job were actually pretexts for age discrimination. "When it is asserted that the plaintiff was discharged because of age, the individual's age need not be the only reason or main reason for discharge but must be one of the reasons that made a difference in determining whether to discharge the person[;] . . . [t]he question is whether age was a determining factor in the discharge." *Lytle*, 458 Mich at 710; see also *Barnell v Taubman Co, Inc*, 203 Mich App 110, 121; 512 NW2d 13 (1993).

A plaintiff can establish pretext by substantiating that the proffered reasons for the adverse employment action (1) had no basis in fact, (2) were not the actual factors motivating the decision, or (3) were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Defendants' reasons for eliminating plaintiff's position, i.e., the merger, the RIF, and the desire to reduce costs and eliminate unnecessary positions, had a basis in fact as borne out by the documentary evidence. Plaintiff did not provide any evidence showing that others in his department were incapable of absorbing the work duties previously performed by plaintiff and Humphrey, nor did any evidence contradict that technological changes and advances had reduced the necessity of keeping the two S2 positions, and that the two S2 positions were never refilled. Plaintiff himself admitted that some of his duties had been transferred to others. Further, Spisak's reliance on Mitchell and other sources to gather information concerning the extent of plaintiff and Humphrey's duties and workloads

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[5] Given the horrendous condition of the lower court record submitted to this Court, which failed to include any documents associated with summary disposition and the motion for reconsideration, as well as the court's written opinions, there may be some validity to defendants' assertions.

does not support an inference that the articulated reasons given for surplussing plaintiff lacked a factual basis. Our review of the record leads us to conclude that plaintiff has presented no evidence from which a fact finder could reasonably conclude that defendants' articulated reasons for his termination constituted pretexts.

Plaintiff argues that the RIF was a smokescreen, because only plaintiff and Humphrey were surplussed. Contrary to plaintiff's argument and as reflected in the documentary evidence, positions were eliminated in Texas, Ohio, Illinois, and Wisconsin, with Spisak testifying that about 100 positions were eliminated. Plaintiff presented no evidence to the contrary. Furthermore, while plaintiff and Humphrey may have been the only two surplussed in the Detroit-Toledo area during the first stage of job eliminations, 14 S2s in the area, 10 of whom were younger than plaintiff, were later surplussed as part of the RIF. We note that no evidence supports that AT&T eliminated jobs held primarily by older workers. Also, no record evidence even remotely suggests AT&T fabricated the RIF to unlawfully discriminate against plaintiff and Humphrey. Finally, plaintiff has not shown that the reasons proffered by defendants for surplussing him insufficiently justified the adverse employment action.

Plaintiff next contends that his failure to obtain an S3 position creates a factual dispute as to whether the RIF was a pretext for age discrimination. Plaintiff did not obtain an S3 position because he failed required tests, decided not to take tests, or was otherwise unqualified. Plaintiff failed to present evidence tending to prove that he was as or more qualified for a particular S3 job posting than the person eventually given the job. Plaintiff's vague and general statement that younger employees were awarded the positions is insufficient. Even if true, no evidence demonstrated that plaintiff was as or more qualified and experienced than the younger applicants. With respect to the ongoing problems with Humphrey and a manager who allegedly treated plaintiff unfairly, plaintiff has failed to put forward any evidence supporting an inference of age discrimination. As indicated in *Hazle*, 464 Mich at 465, simply showing pretext in general is insufficient; there must be evidence that it was pretext *motivated by age discrimination.* The evidence reflected that Spisak made the decision to surplus plaintiff, and Spisak denied having reviewed plaintiff's personnel record. We reject plaintiff's argument that age discrimination occurred based on Spisak claim that plaintiff's performance or personnel record played no part in the surplussing decision. We fail to see the logic in this argument, especially where it ignores that fiscal concerns motivated defendants' actions.

More importantly, in *Lytle*, 458 Mich at 178, our Supreme Court observed, "To prove that [an] RIF was a mere pretext and that age was a determining factor, plaintiff had to show that she was treated differently from *similarly situated employees.*" (Emphasis added.) In *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000), this Court stated that the plaintiff had to establish that all relevant aspects of the plaintiff and the alleged comparable person's employment situations were nearly identical.

We first examine this issue within the context of the CBA. If AT&T's actions violated the CBA, an issue of fact exists regarding whether the RIF was a pretext for age discrimination. As indicated earlier in this opinion, the CBA provides that if AT&T deems it necessary to make force adjustments through layoffs, "seniority shall be applied . . . to displace the least senior employees in the applicable departmental unit(s)." The CBA permits necessary layoffs of "regular employees performing essentially the same type of work, by location within a

departmental unit of the bargaining unit." Accordingly, the focus must be on whether S2s worked in the same departmental unit. With respect to the 39 Detroit-Toledo area S2s identified in defendants' responses to plaintiff's requests to produce and admit, all but two worked in the Corporate Graphics Center, which was not the same departmental unit in which plaintiff and Humphrey were employed.[6] Two other S2s from the list worked in the corporate headquarters, but the record contains no evidence that their employment classification fell within the Publishing or P&A Department. In fact, plaintiff's own testimony established without dispute that the two "Headquarters" S2s did not work in the same department as plaintiff and Humphrey, and plaintiff admitted that he and Humphrey were the *only* S2s in the Publishing Department.

Plaintiff points to evidence, found in his deposition testimony and affidavit, that there were a total of 70 local S2s. However, and to the extent that the S2s were not on the list of the 39 S2s noted above, the documentary evidence does not support that these S2s worked in the Publishing Department (Publishing Production or the entire bulleted grouping). Again, plaintiff testified, as did Spisak, that plaintiff and Humphrey were the only S2s in the Publishing Department. Plaintiff's suggestion that issues of seniority and bumping should entail consideration of *everyone* covered by the CBA or those in some "pool" allegedly encompassing plaintiff and the other S2s, finds no support in the CBA itself, which dictates that "departmental units" frame the layoff criteria when an RIF occurs.

To the extent plaintiff contends that "work units" and "locations" listed in the CBA and quoted earlier in this opinion, taken as a whole, actually comprise one departmental unit for purposes of seniority and bumping relative to an RIF, we reject this interpretation of the CBA. The plain language of the CBA utilizes the heading "Departmental Units," and this alone contradicts plaintiff's interpretation. Our interpretation explains why the union informed plaintiff that he could not bump other S2s, and there is no evidence establishing that the union filed a grievance regarding the surplussing of plaintiff and Humphrey.

That being said, our analysis does not end with the CBA. As part of the RIF, AT&T maintained the ability to examine S2s in departments outside of the Publishing or P&A Department for possible surplussing, even if Spisak himself did not manage and control those S2s. Stated otherwise, despite that plaintiff and Humphrey were not similarly situated to other local S2s in the context of the CBA, they may have been similarly situated for purposes of age discrimination under the CRA. If younger S2s in the Corporate Graphics Center with less seniority than plaintiff were similarly situated to plaintiff, AT&T could have chosen to surplus them as part of the RIF instead of plaintiff. But no record evidence describes the assignments and workloads of other S2s, or supports that their positions had become unnecessary or redundant, as was true for plaintiff and Humphrey. By failing to demonstrate that other S2s qualified as similarly situated, plaintiff failed to carry his burden of creating a factual dispute on the issue of pretext. Given the absence of evidence concerning the work performed by S2s

[6] Plaintiff makes no argument that S3s or S4s in the Publishing Department should have been surplussed first.

outside of the Publishing Department, no questions of material fact exist upon which reasonable minds could differ regarding whether age discrimination was a motivating factor in AT&T's decision to surplus plaintiff.[7]

Finally, we consider the trial court's statement that plaintiff and Humphrey "were not accorded the same opportunity to make a lateral transfer to survive the merger as other younger employees were." We find no specific record evidence of lateral transfers by younger employees which permitted them to avoid being surplussed, let alone similarly-situated younger employees. The trial court appears to have relied on plaintiff's deposition testimony that he *should* have been permitted to make a lateral transfer. Plaintiff conceded that no positions for which he was qualified opened up after he was surplussed. And unlike the trial court, we find irrelevant that prior to the RIF, plaintiff remained employed despite that his duties had substantially decreased. Defendants' failure to fire plaintiff before the merger and the RIF hardly creates a fact question consistent with age discrimination.

III. CONCLUSION

We hold that plaintiff established a prima facie case of age discrimination under the *McDonnell Douglas* test; however, defendants rebutted the presumption by articulating legitimate, nondiscriminatory reasons for surplussing plaintiff. Accordingly, in order to survive summary disposition, plaintiff had to present sufficient evidence demonstrating that defendants' proffered reasons for surplussing him were pretexts for unlawful age discrimination. Plaintiff has not satisfied this burden. No evidence supports that defendants treated plaintiff differently than similarly situated employees, and plaintiff has produced no evidence suggesting that age discrimination motivated AT&T's decision to surplus plaintiff. Accordingly, we reverse the trial court's order denying defendants' motion for summary disposition of plaintiff's age discrimination claim and remand for entry of an order granting summary disposition.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, defendants may tax costs pursuant to MCR 7.219.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey

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[7] Even were we to accept that an issue of fact exists regarding whether plaintiff had enough work to keep himself busy during his shifts and that his position remained necessary to some extent, evidence concerning the workloads of other S2s and the extent or level of their necessity to AT&T's operations was required under *Lytle*, which mandates evidence of similarly situated employees who were treated differently in order to show pretext where an RIF is involved.