

**BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY**

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Steven Judd,)	Human Rights Act Case No. 9901008771
Charging Party,)	
vs.)	<i>Final Agency Decision</i>
Commercial Testing and)	
Engineering Co.,)	
Respondent.)	
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I. Procedure and Preliminary Matters

Charging party filed a complaint with the Department of Labor and Industry on January 7, 1999. He alleged the respondent, Commercial Testing and Engineering Co., discriminated against him based on age when it laid him off on or about September 4, 1998. On June 15, 1999, the department gave notice Judd's complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner.

This contested case hearing convened on January 3, 2000, in Billings, Yellowstone County, Montana. Judd attended. Thomas J. Lynaugh, Lynaugh, Fitzgerald, Eiselein & Grubbs, represented Judd. The company's designated representative, Mark Rademacher, attended. Elizabeth J. Honaker, Honaker Law Firm, represented the company.

The hearing examiner excluded witnesses on Judd's motion. Steven Judd (charging party), Lauraine Jacinto and Mark Rademacher (designated representative for the company) testified. The parties stipulated to the admission of exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 101A, 101B, 101C, 101D, 101E and 101F (the hearing examiner's exhibit docket accompanies this final decision).

The hearing examiner closed the evidentiary record on January 3, 2000. The parties gave oral closing arguments and submitted the case for decision.

II. Issues

The legal issue in this case is whether the respondent unlawfully discriminated against Judd on the basis of age when it laid him off. A full statement of the issues appears in the final prehearing order.

III. Findings of Fact

1. Judd worked for the company in Billings, Montana from 1975 until September 4, 1998. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Par. 1.

2. Judd's date of birth is February 22, 1950. He worked for the company as an engineer until he became manager of the Billings office in 1983. From 1983 on he worked as both an engineer and a manager. Judd learned the work on the job, not from prior formal training or education. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Paras. 2; testimony of Judd.

3. Judd and Lauraine Jacinto (previously known as Lauraine Cooper) were the only two employees in the Billings office of the company at the time of Judd's lay-off. Jacinto's date of birth is April 17, 1959. Final Prehearing Order, "IV. Facts and Other Matters Admitted," Par. 3; testimony of Jacinto.

4. Jacinto had worked for the company for over 19 years. She, like Judd, was qualified and capable of conducting all routine testing at the Billings laboratory, having learned the work on the job. Before Judd's layoff, she also performed virtually all of the administrative responsibilities at the Billings office, such as compiling accounts payable and receivable, bookkeeping, data entry, and invoicing clients. When Judd was out of town or on vacation, Jacinto ran the entire operation at the Billings facility. Exhibits 101B through 101F; testimony of Judd, Rademacher and Jacinto.

5. Judd, as manager, always gave Jacinto good performance reviews during her course of employment with the company. Exhibits 101C through 101F; testimony of Judd and Jacinto.

6. Business in the Billings laboratory had declined in the 1990s, and the number of employees had declined from seven in the 1980s to two in 1998. At the end of 1997, Marc Rademacher, a Division Manager and Judd's immediate supervisor, discussed the Billings operating losses with Judd. Rademacher requested that Judd develop, prepare, and submit a marketing plan, and that Judd increase his marketing activities. Judd told Rademacher that he did not want to engage in travel to undertake marketing activities for the Billings facility. Testimony of Rademacher and Judd.

7. In the summer of 1998, Rademacher offered to create a position for Judd, in which he would continue to reside in Billings but would be required to travel two-to-three days a week to the other Powder River Basin area

laboratories, performing audits on these laboratories and engaging in sales. Judd believed he could dictate, to some extent, the terms and conditions of any lay-off because of his time with the company. He believed the company would close the Billings office, because he did not think that the company would entrust the sole responsibility for the operation to Jacinto. He declined the position Rademacher offered. He also told Rademacher that he did not want a sales job and that there was no additional business in Montana. Judd told Rademacher that if the company were to close the Billings facility, he would like a consulting position, so he could also work with his wife in the real estate business in Billings. Judd told Rademacher the salary and conditions that Judd expected for the consulting position, and told Rademacher that otherwise the company could lay him off and pay him a substantial amount as a severance package. Judd believed his entitlements (if he were laid off) would be substantial.¹ Testimony of Judd and Rademacher.

8. Declining business in the Billings laboratory resulted in losses rather than profits. In September 1998, the company decided to reduce the work force in the Billings laboratory. There was not enough business to keep two persons employed. Testimony of Rademacher.

9. In 1998, Jacinto maintained her very positive attitude concerning her employment with the company. Testimony of Rademacher and Jacinto.

10. The company made the decision to lay off Judd and retain Jacinto as the sole employee in the Billings office because Jacinto earned a lower wage and had a more positive attitude. Both Judd and Jacinto had sufficient experience and qualifications to run the Billings facility as a one-person operation. The company took Judd at his word, declined to make him a consultant, and laid him off. Exhibit 101E (second page); Testimony of Judd, Jacinto and Rademacher.

IV. Opinion

Montana law prohibits discrimination against an employee in terms and conditions of employment because of age. §49-2-303(1)(a) MCA.

The provisions of the Montana Human Rights Act that prohibit discrimination mirror the provisions of Title VII of the Federal Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Absent direct evidence of discrimination,

¹ Judd's testimony did not directly acknowledge this expectation, but strongly suggested it. The hearing examiner saw this expectation in the unrealistic conditions Judd set for the consulting position, and in the indignation Judd still clearly felt at the time of hearing because the company declined to hire him as a consultant.

Montana has adopted the three-tier proof analysis articulated in *McDonnell Douglas*.² *Hearing Aid Instit. v. Rasmussen*, 258 Mont. 367, 852 P.2d 628 (1993); *Crockett v. City of Billings*, 234 Mont. 87; 761 P.2d 813 (1988); *Johnson v. Bozeman School District*, 226 Mont. 134, 734 P.2d 209 (1987); *European Health Spa v. H.R.C.*, 212 Mont. 319, 687 P.2d 1029 (1984); *Martinez v. Yellowstone Co. Welf. Dept.*, 192 Mont. 42, 626 P.2d 242 (1981).

The first tier of *McDonnell Douglas* required Judd to prove his prima facie case by establishing four elements:

- (i) that he belongs to a [protected class] . . .; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite qualifications, he was rejected; and (iv) that, after rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, *supra*, 411 U.S. at 802, 93 S.Ct. at 1924.

The Court noted in *McDonnell Douglas* that this standard of proof is flexible. The four elements may not necessarily apply to every disparate treatment claim. This case involves allegations of discriminatory lay-off. Judd needed to prove that he was older than the woman who replaced him, that he was as qualified to remain in the job as the woman who replaced him, and that despite his qualifications, the employer did replace him with the younger employee.³

Judd proved his prima facie case. He was older than Jacinto. He was qualified by training, experience and performance to remain in his job. Despite his qualifications, the company replaced him with Jacinto, whose training, experience and qualifications, while sufficient for the job, were not superior to Judd's.

Judd's prima facie case under *McDonnell Douglas* raised an inference of discrimination at law. The burden then shifted to the company to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas*, 411 U.S. at 802. The company only had the burden to show, through competent evidence, that it had a legitimate nondiscriminatory

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

³ *Cf.*, *Martinez*, *supra*, 626 P.2d at 246, *citing* *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300 (5th Cir. 1980) (fitting the first tier elements of *McDonnell Douglas* to the allegations and proof of the particular case).

reason. *Crockett, op. cit.*, 761 P.2d at 817. The company must satisfy this second tier of proof under *McDonnell Douglas* for two reasons:

[It] meet[s] the plaintiff's prima facie case by presenting a legitimate reason for the action and . . . frame[s] the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255-56, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). A defendant must clearly and specifically articulate a legitimate reason for the rejection of an applicant. *Johnson, op. cit.*, 734 P.2d at 212. Judd's prima facie case shifted the burden to the company to produce a legitimate business reason for the adverse action against him. *McDonnell Douglas, op. cit.* The company's business reasons for supplanting Judd need not be well-advised reasons, but must be the truth. *Donaldson v. Merrill Lynch & Co.*, 794 F.Supp. 498, 505 (S.D.N.Y. 1992).

The company showed it had legitimate business reasons for laying off Judd. He had a higher wage than Jacinto for performing a job either of them could competently do. He was asking the company to structure a lucrative consulting position for him, as the alternative to paying him a substantial severance package that the company had no obligation to pay. Jacinto was a less expensive option for the Billings office, and had a more positive attitude.

Because the company articulated legitimate business reasons for laying off Judd, he then had the burden to prove that the defendant's reasons were in fact a pretext for age discrimination. *McDonnell Douglas* at 802; *Martinez, op. cit.*, 626 P.2d at 246. To meet this third tier burden, Judd could present either direct or indirect proof of the pretextual nature of the company's proffered reasons:

She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Burdine at 256. Ultimately, Judd had the burden to persuade the fact-finder that the company did illegally discriminate against him. *Crockett, op. cit.*, 761 P.2d at 818; *Johnson, op. cit.*, 734 P.2d at 213.

Judd failed to carry his burden. He may have been, to some limited extent, more qualified than Jacinto. He may also have been more experienced

in some aspects of the business than Jacinto. He did not prove that his better qualifications and greater experience were useful to the employer within the confines of a one-person office in Billings. The company did prove that because of Judd's deteriorating attitude, it reasonably found Jacinto a better prospect to run the reduced operation in Billings.

Judd also failed to prove that the company engaged in a pattern of discrimination against older employees, laying them off in favor of younger employees to save both wage costs and pension costs. Isolated anecdotal testimony and hearsay did not establish such a pattern. Because Judd failed to prove pretext to disguise a discriminatory motive, the company prevailed.

V. Conclusions of Law

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. Commercial Testing and Engineering Co., did not discriminate against Judd in employment because of his age.

VI. Order

1. The department awards judgment in favor of Commercial Testing and Engineering, Co., and against Steven Judd on his charges that the company discriminated against him because of age when it laid him off on or about September 4, 1998.
2. The complaint is dismissed.

Dated: May 3, 2000.

Terry Spear, Hearing Examiner
Montana Department of Labor and Industry