

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
\* CASE NUMBER 00-43394  
PITTSBURGH-CANFIELD CORP., \*  
\* CHAPTER 11  
et al. \*  
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Debtor. \* HONORABLE KAY WOODS  
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M E M O R A N D U M O P I N I O N  
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Claimants Frank J. Marino, Mark A. Glasgow, Roland A. Graham and Sandra K. Moore (collectively, the "Claimants") filed administrative expense claims based on alleged age and disability discrimination in connection with their layoffs on January 17, 2003 (the "Layoff") and subsequent termination. This matter came before the Court on a motion for summary judgment (the "Motion for Summary Judgment") filed by Reorganized Debtor Wheeling-Pittsburgh Steel Corporation ("WPSC") in support of the Reorganized Debtors' Omnibus Objection to Administrative Claims and Request for an Order Disallowing Administrative Claims filed October 29, 2003 (the "Omnibus Objection") as it pertains to Claimants' administrative claims. Claimants filed a response to the Motion for Summary Judgment and a supplemental filing. WPSC filed a response to Claimants' supplemental filing and a reply to Claimants' response.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. For

the reasons set forth below, this Court finds that summary judgment in favor of WPSC is appropriate.

### **FACTS**

WPSC employed Claimants as salaried employees for many years (Statement of Facts ("SOF") ¶¶ 1, 2) prior to the Layoff on January 17, 2003, when 70 salaried employees were laid off. (Mem. of Law in Supp. of WPSC's Mot. for Summ. J. at 1.) All Claimants worked at WPSC's facilities in Ohio at the time of the Layoff. (SOF ¶ 1.)

In early 2000, WPSC experienced economic hardship as a result of the poor economy, competition from foreign steel makers and other factors that reduced steel prices. (Mem. of Law in Supp. of WPSC's Mot. for Summ. J. at 4.) WPSC lost Two Hundred Eighteen Million Dollars (\$218,000,000.00) in the year 2000. (*Id.*) No longer able to meet its debt obligations, WPSC filed a petition for relief under Chapter 11 of Title 11, United States Code, on November 16, 2000.

While under bankruptcy protection and attempting to reorganize, WPSC consolidated its operations and reduced its workforce several times in the early months after filing for bankruptcy protection. Through agreements with unions that represented certain non-salaried wage employees (the "Hourly Employees"), WPSC reduced operating expenses by placing approximately 450 Hourly Employees on layoff status and suspended variable pension programs. (Mem. of Law in Supp. of WPSC's Mot. for Summ. J. at 4.) In April 2001, WPSC eliminated 48 salaried positions at various facilities. (SOF ¶ 8.) Six months later, in October 2001, WPSC eliminated 11 more salaried

positions and implemented a 15% reduction in pay for all employees, salaried and hourly. (SOF ¶¶ 9, 10.) WPSC implemented an additional 12.75% reduction in pay between January and April 2002 (total pay reduction during this time of 27.75%). WPSC scaled back the reduction in pay to a 10% reduction between April and September 2002. Finally, WPSC implemented a 15% reduction in pay beginning in May 2003. (SOF ¶ 10.)

Post-petition, WPSC continued to lose money -- One Hundred Seventy-Two Million Two Hundred Thousand Dollars (\$172,200,000.00) in 2001 and an additional Fifty-Seven Million Three Hundred Thousand Dollars (\$57,300,000.00) in 2002. (Mem. of Law in Supp. of WPSC's Mot. for Summ. J. at 5.)

WPSC classifies this time as one of great crisis and uncertainty. (SOF ¶ 17.) WPSC asserts that it instructed its vice presidents to identify positions that could be eliminated or combined. (SOF ¶¶ 11, 17.) As a result, WPSC implemented another reduction in its salaried workforce, resulting in the elimination of approximately 100 salaried positions and the Layoff of approximately 70 salaried employees, including the four Claimants,<sup>1</sup> effective January 17, 2003. (SOF ¶ 21.) WPSC transferred 32 employees to other positions following the elimination of their respective positions (SOF ¶ 126), but informed approximately 70 employees that their layoff status would probably be converted to termination and recommended they look for other employment. (SOF ¶ 13.) These salaried employees were laid off

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<sup>1</sup>Claimants' positions were each selected by their respective vice presidents as positions that could be eliminated or combined; Claimants were, therefore, laid off as part of the reduction in force.

rather than terminated to provide for various extended company-paid benefits. (SOF ¶ 18.)

A summary of the employment history of each Claimant follows:

**A. Frank J. Marino**

Marino, who was born January 14, 1942, began his employment with WPSC on January 19, 1980 in WPSC's transportation department. (SOF ¶¶ 2, 24.) He worked in the same position and in the same department from 1980 until the position he held was eliminated and he was laid off on January 17, 2003. (SOF ¶ 25.) Marino received instruction from his general foreman and delegated track work to unionized trackmen who performed the work. Marino also inspected track for potential work that would require production and maintenance, and oversaw the work of track work gangs, primarily at WPSC's Steubenville and Mingo Junction plants. (SOF ¶ 24.) Bill Muckle and Marino were the two regular assigned track foreman for WPSC until Muckle retired. (SOF ¶ 28.) Shortly after Muckle's retirement, Marino began to train Kevin Marsh to be a track foreman. (SOF ¶ 29.) Marsh worked at the locomotive shop three days per week and as track foreman two or three days per week, depending on WPSC's needs. (SOF ¶ 29.) Marino never performed work at the locomotive shop (SOF ¶ 31); the only non-Track Foreman work Marino performed was the track repair that Lee Fowler performed, as occasionally Marino performed Fowler's work in his absence.<sup>2</sup> (SOF ¶ 31.)

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<sup>2</sup>Fowler was the general foreman whose responsibilities included track, car repair, locomotive cranes, locomotive shop and track construction. Fowler was Marino's supervisor. (SOF ¶ 26.)

Sometime before 2002, WPSC eliminated two of three turns for track gang work - the midnight turn and the afternoon turn - leaving just the day turn. (SOF ¶ 32.) As a result, there were fewer workers to be supervised. (SOF ¶ 32.) Accordingly, Donald Keaton<sup>3</sup> asked Edmon R. Asbury<sup>4</sup> to analyze the department and eliminate any jobs that could be eliminated. Asbury, in turn, asked James Huff<sup>5</sup> to consider where cuts could be made. (SOF ¶ 34.) Relying upon his 30 years of experience in operations, aware that the track gangs had been downsized and that Marino's skills and experience were in track repair, Huff determined that the department could function without Marino. Huff reasoned that Marino's work could be done by Marsh and Fowler, both of whom had done that type of work, in addition to their existing duties. (SOF ¶ 35.) Asbury attests that he did not look at or consider Marino's performance evaluations in determining which position should be eliminated. (SOF ¶ 37.) Marino was not replaced; Fowler and Marsh performed the work Marino had performed, in addition to their own work. (SOF ¶ 42.)

Marino alleges age discrimination by WPSC because he was replaced by Marsh, a younger and allegedly less competent man. Marino contends that Marsh was inexperienced and not qualified to do track supervision work. (SOF ¶¶ 43-44.) WPSC asserts to the contrary that, while Marino's skills were limited to running the track gang, Marsh

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<sup>3</sup>Keaton's date of birth was February 28, 1959.

<sup>4</sup>Asbury's date of birth was May 29, 1950.

<sup>5</sup>Huff's date of birth was September 23, 1949.

had multiple skills and broad work experience and was qualified to perform the work assigned to him. (SOF ¶ 45.) Marino does not assert - and admits that he cannot recall - that those responsible for his elimination made any comments about or relating to his age. (SOF ¶ 46.)

#### **B. Sandra K. Moore**

Moore, who was born December 27, 1940, began her employment with WPSC on July 11, 1976, working as a bargaining unit employee until August 16, 1999, at which time she became a salaried turn foreperson. (SOF ¶¶ 52-53.) Moore and William Vargo were both turn foremen at the Yorkville, Ohio facility at the time of the Layoff. (SOF ¶¶ 54-55.) Vargo, who was over 40 years of age but substantially younger than Moore, became a turn foreman at the Yorkville facility in 1989, after 11 years as a lab tester. He remained as a turn foreman for the next 15 years. (SOF ¶ 55.)

Prior to the Layoff, Robert Reynolds, the man responsible for promoting Moore in 1999, was informed by his supervisor, Harry Page, that the department had to eliminate a total of seven positions at Steubenville and Yorkville. (SOF ¶¶ 58, 62.) Reynolds identified the positions held by Moore, Gary Gaus and Daniel Nameth<sup>6</sup> as potentials for elimination, with one of these positions to be eliminated. (SOF ¶ 65.) Reynolds selected these individuals, "[b]ased on job responsibility, what the jobs were; whether or not we would continue those jobs or not; and within those, to do flexible

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<sup>6</sup>Nameth was slated to be laid off, but he was transferred to the coke plant because he had some prior coke plant experience, whereas Moore had no such experience. (SOF ¶¶ 69-70.)

jobs, mainly." (SOF ¶¶ 66-68.) Reynolds also considered the length of time each person had held his or her position. (SOF ¶ 66.) At the time of the Layoff, Moore had three years of experience as a turn foreperson, whereas Vargo had approximately 14 years of such experience. (SOF ¶ 66.) In addition to Vargo's extensive experience, he was able to perform other jobs that had been eliminated. (SOF ¶ 67.) Reynolds acknowledged that Moore had an excellent work record. (Claimants' Resp. to the Summ. J. Br. of WPSC at 10-11.) He also attested that Vargo's "job performance is exceptional." (*Id.*) In reviewing each position slated for elimination and how the functionality of the department would be impacted, Page and Reynolds discussed Moore's limited experience as a turn foreperson. (SOF ¶ 68.) Moore passed away on April 30, 2004, prior to being deposed; however, she never alleged that anyone made any age-related comments to her. (SOF ¶ 72.)

### **C. Mark A. Glasgow**

Glasgow was born February 7, 1954. Throughout his employment at WPSC, Glasgow worked in a supervisory capacity. He began his employment with WPSC on July 16, 1979, as a salaried supervisor in the boiler shop at WPSC's Mingo Junction/Steubenville South plant. His job responsibilities included supervising eight to 10 boiler and rigger crews who performed maintenance work, all under the direction of the general foreman. (SOF ¶ 73.) In the early 1980s, Glasgow became a welding supervisor responsible for supervising eight to 10 unionized welders. He was promoted to general foreman of welding in 1986 or 1987, after which he was primarily responsible for scheduling

welders, purchasing welding materials and supervising several welding supervisors. (SOF ¶¶ 75-76.) Glasgow worked under the direction of the general foreman of the weld shop, but did not perform any welding work. (SOF ¶¶ 75-76.) From the early 1990s until the Layoff, Glasgow was a structural turn foreman working in the mechanical department, supervising workers, all under the direction of the general foreman. (SOF ¶ 78.) During the five-year period prior to the Layoff, he supervised structural repair work performed in the shop, as opposed to work performed in the field. (SOF ¶¶ 78, 86.)

WPSC asserts that the decision to eliminate Glasgow's position was based upon his limited experience relative to other foremen in the weld and structural shops, particularly in performing field work. (SOF ¶ 90.) In addition to his limited background and skill set, the shop in which he primarily worked was also closed in January 2003. (SOF ¶ 90.)

Glasgow asserts that he had excellent training, years of experience and great knowledge. (SOF ¶¶ 188-93.) Glasgow bases his claim of age discrimination on the fact that two individuals under 40 years of age with less experience continued to be employed by WPSC at the time of the Layoff (SOF ¶¶ 195-99), but WPSC did not objectively measure Glasgow against these two individuals. (SOF ¶ 217.) Furthermore, the personnel manager questioned why WPSC was laying off an older employee while keeping a younger employee. (SOF ¶ 215.) Glasgow is the only one of the Claimants to allege that age-related comments were made. He states that, after his heart surgery, a superintendent at the North blast furnace made "joking

comments" about Glasgow's age and ability to climb steps necessary to do Glasgow's job. (SOF ¶ 225.)

#### **D. Roland A. Graham**

Graham, who was born November 2, 1942, began his employment with WPSC in 1963. (SOF ¶ 2.) Primarily a draftsman in the maintenance engineering department with clerical duties during his nearly 40 years of employment with WPSC, Graham also performed very limited work in production maintenance, as a millwright, in field maintenance, and at the coke plant. (SOF ¶¶ 102, 233, 242.) At the time of the Layoff, Graham's job duties included making drawings for WPSC, and locating drawings for WPSC employees, as well as for outside contractors upon request. (SOF ¶¶ 105, 241.) It is undisputed that Graham performed high quality work. (SOF ¶ 246.) During the 13 years before the elimination of Graham's position, he received fewer and fewer drawing assignments because R.T. Patterson, a consulting engineering firm in Pittsburgh, provided most of the needed drawings on a contract basis. (SOF ¶ 108.) Accordingly, Graham spent most of his time retrieving drawings. (SOF ¶ 109.)

Brian Bartels proposed that the department could manage without Graham because (i) his job responsibilities were narrow, (ii) the outsourcing of drawing continued to expand, (iii) most drawings were now done on the computer, but Graham still primarily used manual tools, and (iv) many other employees could retrieve information from the archives. (SOF ¶¶ 112, 114, 121-22.) WPSC asserts that Page looked at the number of people in the department and made decisions based on skills and capabilities. (SOF ¶ 114.)

Page claims that he did not compare Graham with other project engineers because Graham had a narrower scope of capabilities and no engineering background. (SOF ¶ 114.) Graham's position was not filled following his Layoff, instead employees who needed drawings were required to retrieve them, and those who needed sketches were required to create their own design sketches. (SOF ¶ 122.)

Page admitted that he was unaware that Graham had dedicated nearly 40 years to WPSC and that he served in the role of field coordination. (SOF ¶¶ 239-40.) Three of the employees remaining in the department that drew sketches were younger than Graham. (SOF at ¶¶ 115-120.) Graham applied for work within WPSC after the Layoff, but was not hired. (SOF ¶ 279.)

#### **E. Summary of Arguments**

Claimants assert that they were long-time employees of WPSC who performed good and valuable services. (SOF ¶ 143.) Claimants note that at the time of the Layoff, there were vacancies at WPSC's 80" mill, some of which were filled by individuals slated to be laid off on January 17, 2003. (SOF ¶ 144.) None of the Claimants were offered a transfer to a different position, although approximately 30 of the 100 salaried employees slated for Layoff were transferred to other positions. (SOF ¶ 145.) Claimants described five individuals - all except one were older than 40 and two were in their 60s - laid off on January 17, 2003 who returned to work for WPSC prior to termination. (SOF ¶ 154.) Claimants note that WPSC did not produce any documents showing how the skill sets or capabilities of the Claimants were determined. (SOF ¶ 167.) WPSC produced two

documents compiled around the time of the Layoff that contained the ages of the persons eligible and those not eligible to participate in salary enhancement. (SOF ¶ 171.) Also, at the time of the Layoff, the personnel manager knew Claimants' ages (SOF ¶ 173), but she was unaware of any complaints of discrimination related to the Layoff. (SOF ¶ 150.)

WPSC argues that the Layoff was a reduction in force ("RIF"), done for legitimate business reasons. WPSC asserts that, as of January 17, 2003, approximately 79.3% of its salaried workforce were at least 40 years of age. Consistent with that demographic, of the 70 salaried employees laid off in the January 17, 2003 RIF, 55 of the employees - 77% - were at least 40 years of age. (SOF ¶ 22.)

On August 22, 2003, Claimants filed a complaint (the "Complaint") in the Court of Common Pleas for Belmont County, Ohio at Civil Action No. 03-CV-306 (the "State Court Action") in which each Claimant asserted that he or she was unlawfully laid off on January 17, 2003 because of age discrimination, in violation of Ohio state law. (SOF ¶ 3.) Each Claimant also alleged that he or she was laid off as a result of disability discrimination, but Claimants have abandoned the disability discrimination claims. (SOF ¶ 3.) At the request of WPSC, Claimants subsequently dismissed their State Court Action and, on September 30, 2003, filed administrative expense claims (the "Administrative Claims") in WPSC's bankruptcy proceeding in which they allege that each respective lay off was a result of age discrimination. (SOF ¶ 4.) WPSC objected to the Administrative

Claims alleging that (i) they do not represent valid liabilities of WPCS because they are unproven and unadjudicated allegations that lack merit and (ii) they do not qualify as administrative expenses entitled to priority. (SOF ¶ 5; Omnibus Objection at ¶ 7(c).)

WPSC filed the Motion for Summary Judgment, requesting that the Court disallow Claimants' Administrative Claims in their entirety because the undisputed facts demonstrate that Claimants cannot carry their burden of proof to establish a *prima facie* case, nor is there any evidence that WPSC's justification for the layoffs was pretext for intentional age discrimination. Claimants responded to WPSC's Motion for Summary Judgment, alleging that there are genuine issues of material fact and therefore summary judgment is inappropriate.

The parties submitted a 42 page Statement of Facts, containing 412 numbered paragraphs. Some of the facts are stipulated and agreed to. In addition, each party set forth facts. Claimants also provided a list of disputed facts, which although disputed, are not material. Therefore, the disputed facts do not preclude summary judgment.

#### **STANDARD OF REVIEW**

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that,

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. BANKR. P. 7056(c). Summary judgment is proper if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is material if it could affect the determination of the underlying action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Tenn. Dep't of Mental Health & Retardation v. Paul B.*, 88 F.3d 1466, 1472 (6th Cir. 1996). An issue of material fact is genuine if a rational fact-finder could find in favor of either party on the issue. *Anderson*, 477 U.S. at 248-49; *SPC Plastics Corp. v. Griffith (In re Structurlite Plastics Corp.)*, 224 B.R. 27 (B.A.P. 6th Cir. 1998). Thus, summary judgment is inappropriate "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In a motion for summary judgment, the movant bears the initial burden to establish an absence of evidence to support the non-moving party's case. *Celotex*, 477 U.S. at 322; *Gibson v. Gibson (In re Gibson)*, 219 B.R. 195, 198 (B.A.P. 6th Cir. 1998). The burden then shifts to the nonmoving party to demonstrate the existence of a genuine dispute. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, in responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly

supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Street*, 886 F.2d at 1479.

#### DISCUSSION

Claimants assert that each respective Layoff was motivated by WPSC's intentional age discrimination in violation of Ohio Revised Code §§ 4112.02 and 4112.14. WPSC asserts that it eliminated each Claimant's position as part of an economically necessitated RIF without regard to age. WPSC concludes it is entitled to summary judgment because Claimants failed to prove that age was a determining factor in the decisions to terminate Claimants' employment. The Court agrees.

Ohio Revised Code §§ 4112.02 and 4112.14 make it unlawful to discriminate against any person 40 years of age or older in a job opening or to discharge such person without just cause. The plaintiff bears the initial burden to prove unlawful discrimination through direct or circumstantial evidence. *Caldwell v. Ohio State University*, No. 01AP-997, 2002 WL 992379, at ¶ 61 (Ohio App. 10th Dist. May 16, 2002) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)). "A plaintiff may establish a prima facie case of discrimination directly by presenting evidence of any nature to show that the adverse employment action taken by the employer was more likely than

not motivated by discriminatory intent." *Caldwell*, at ¶ 62 (citing *Mauzy v. Kelly Servs., Inc.*, 664 N.E.2d 1272 (1996)).

Absent direct evidence, to prove age discrimination under Ohio Revised Code § 4112.14(A), the Supreme Court of Ohio has held that the claimant

must demonstrate (1) that he [or she] was a member of the statutorily-protected class, (2) that he [or she] was discharged, (3) that he [or she] was qualified for the position, and (4) that he [or she] was replaced by, or that [the] discharge permitted the retention of, a person not belonging to the protected class.

*Kohmescher v. Kroger Co.*, 575 N.E.2d 439, 441 (1991) (citing *Barker v. Scovill, Inc.*, 451 N.E.2d 807 (1983)) (approving and slightly modifying the evidentiary standards and guidelines established by the United States Supreme Court in the seminal race discrimination case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

When a plaintiff's position is eliminated due to a RIF, the plaintiff is not required to plead the fourth prong of the *prima facie* case because in a RIF the plaintiff is not replaced. *Godfredson v. Hess & Clark, Inc.*, 173 F.3d 365, 371 (6th Cir. 1999). A RIF occurs when business considerations cause an employer to eliminate one or more positions within the company. *Id.* at 372. The main factor in deciding whether the claimant's employment was terminated in a valid RIF is whether the claimant was "replaced." If an employee is replaced then the position has not been eliminated, as required by a RIF. *Id.* at 371, 372. A person is replaced if someone is hired to perform the duties of the eliminated position or an existing employee is reassigned the duties of the eliminated position.

*Id.* at 372. A person is not replaced when existing employee(s) are assigned to perform the duties of the eliminated position in conjunction with their own duties. *Id.* In these situations, the plaintiff carries a greater burden to support the allegation of age discrimination by direct, circumstantial or statistical data to prove age was the factor in the termination. *Williams v. Emco Corp.*, 212 F. Supp. 2d. 780, 784 (S.D. Ohio 2002).

If the plaintiff makes out a *prima facie* case of age discrimination, the burden shifts to the employer to provide evidence of a nondiscriminatory reason for the discharge which, more likely than not, will be the RIF and/or the business judgment rule.<sup>7</sup> See *Caldwell*, at ¶ 61; *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 576 (6th Cir. 2003).

If the employer meets its burden, the burden then shifts back to the plaintiff to prove that the defendant's proffered reason was not the legitimate reason for discharge, but was a pretext for discrimination. *Caldwell*, at ¶ 61. The plaintiff can refute the employer's legitimate reason for discharge "by showing that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant's challenged conduct, or (3) was insufficient to warrant the challenged conduct." *Wexler*, 317 F.3d at 576 (quoting *Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021 (6th Cir. 2000)). The plaintiff could also meet this burden by showing disparate treatment discrimination or disparate impact discrimination. To prove disparate treatment

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<sup>7</sup>An employers' business judgment is not an absolute defense to age discrimination, but it is a factor to consider when deciding the reasons for the discharge. *Wexler*, 317 F.3d at 576.

discrimination, the plaintiff must prove the protected characteristic motivated the employer's decision. *Albaugh v. Columbus Div. of Police*, 725 N.E.2d 719, 723 (Ohio App. 1999). To prove disparate impact discrimination, the plaintiff must prove the employer's facially neutral policy resulted in harsher treatment to the protected group.<sup>8</sup> *Albaugh*, 725 N.E.2d. at 724.

Claimants have failed to provide any direct evidence of age discrimination. Therefore, we must evaluate the plaintiff's claims under the four prong circumstantial evidence test.

It is undisputed that none of the Claimants was replaced. In each case, the position Claimant held either no longer existed, as WPSC continued to consolidate its business structure, or the duties of the position were covered by other WPSC employees who also continued to perform their own work. Accordingly, the Court finds that the Layoff constituted a RIF and eliminates the fourth prong of the test.

Claimants met their initial burden of satisfying the three prongs of the circumstantial evidence test. Claimants were all over the age of 40 and, thus, were members of the protected class as provided by Ohio Revised Code § 4112.14. Second, Claimants were laid off, then terminated, as a result of a RIF. Third, all parties agree that Claimants were qualified for the positions they held.

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<sup>8</sup>It is not enough to allege that a company's policies or practices create a disparate impact on its employees. Instead, the plaintiff must show a specific employment practice that is responsible for any observed statistical disparities that proves or attempts to prove age discrimination. *Smith v. City of Jackson, Miss.*, No. 03-1160, 2005 WL 711605, at \*7 (U.S. Mar. 30, 2005) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656 (1989)).

Since Claimants met their initial burden, WPSC has the burden to provide a nondiscriminatory reason for the discharge. *Wexler*, 317 F.3d at 576. WPSC met this burden. WPSC's reason for discharging Claimants was the RIF, based on economic necessity. WPSC relied on senior management's business judgment to determine which positions could be eliminated or combined without great hardship on the company. The eliminated positions were evaluated on the basis of need due to WPSC's ever changing business structure and the ability of the department to function without a particular position. Employees chosen for elimination were evaluated on the basis of flexibility in the work place and their knowledge, in comparison to other employees in the same position. The eliminated positions were not based on the age or seniority of the people that held such positions and the eliminated employees were not evaluated on age or seniority. Therefore, WPSC has met its burden to establish a nondiscriminatory reason for the discharge.

Claimants now bear the ultimate burden to prove that WPSC's proffered reason was not the legitimate reason for discharge, but was, instead, a pretext for discrimination. *Caldwell*, at ¶ 61. Claimants carry a greater burden in this regard because WPSC's reason for discharge was a RIF. *Williams*, 212 F. Supp. 2d. at 784.

Claimants make several observations to support the allegation of age discrimination, however, they are of little relevance. Each Claimant noted that there were other employees who were not laid off who were (and looked) younger. Each Claimant referenced another person or persons whom had been transferred to another WPSC position

instead of being laid off. Claimants pointed out that there was a list that contained Claimants' ages, although none of the Claimants asserted that the Layoff decision was based on the list. Each Claimant also objected to "claiming meetings"<sup>9</sup> in which either they were not mentioned, or were discussed, but not in as much detail as each Claimant would have preferred. Each Claimant emphasized their undisputed records of good work performance. Several Claimants asserted that the fact they were the oldest employee in their position or department and they were laid off constitutes evidence that WPSC was motivated by age discrimination.

These assertions, even when taken as a whole, do not prove that age was a determining factor in WPSC's decisions to terminate Claimants. Claimants have not established that WPSC's RIF and business judgment (i) had no basis in fact, (ii) did not actually motivate WPSC's challenged conduct or (iii) was insufficient to warrant the challenged conduct. *Wexler*, 317 F.3d at 576. Claimants failed, also, to provide any statistical data that could warrant a finding of age discrimination.<sup>10</sup> Furthermore, Claimants failed to provide any evidence that WPSC's neutral policy in choosing positions to eliminate provided a harsher treatment to older employees - *i.e.*, the protected class.

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<sup>9</sup>At these meetings, other supervisors or vice presidents could "claim" an employee scheduled for Layoff and, thus, such employee would be transferred to another position. (SOF ¶ 146.)

<sup>10</sup>As set forth by WPSC, the statistical evidence does not support an inference of age discrimination because WPSC's salaried workforce was proportionately the same before and after the RIF and the percentage of salaried employees over the age of 40 whose positions were eliminated in the RIF was consistent with the percentage of salaried employees over the age of 40 in WPSC's salaried workforce. (SOF ¶ 22.)

Claimants have failed to clear the high hurdle of proving age discrimination by WPSC. At best, Claimants' arguments consisted of conclusory allegations and personal opinions. WPSC had tough decisions to make to maintain its operations and tougher decisions to make in deciding which positions and employees would be part of the RIF. Unfortunately, Claimants were among the employees laid off due to the RIF.

**CONCLUSION**

Even viewing the evidence and its inferences in the light most favorable to Claimants, Claimants failed to prove that WPSC's motivation for their Layoff and discharge was based on Claimants' age. Furthermore, Claimants failed to prove that WPSC's RIF and business judgment were not the legitimate reasons for their discharge or that the proffered reason - the RIF - was pretext for discrimination. Accordingly, WPSC's Motion for Summary Judgment is hereby granted.

An appropriate order will enter.

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**HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE: \*  
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PITTSBURGH-CANFIELD CORP., \* CASE NUMBER 00-43394  
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Debtor. \* HONORABLE KAY WOODS  
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O R D E R  
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For the reasons set forth in this Court's Memorandum Opinion entered this date, the Motion for Summary Judgment filed by Reorganized Debtor Wheeling-Pittsburgh Steel Corporation is granted.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE