

STATE OF MICHIGAN
COURT OF APPEALS

DEBRA L. PIPER,

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

UNPUBLISHED

February 26, 1999

No. 202778

Ingham Circuit Court

LC No. 96-083885 NZ

Before: Saad, P.J., Kelly and Bandstra, JJ.

PER CURIAM.

The trial court granted defendant's motion for summary disposition of plaintiff's age discrimination action under MCR 2.116(C)(10) and sanctioned plaintiff for filing a frivolous lawsuit. Plaintiff appeals both orders. We affirm.

I

We review a trial court's grant of summary disposition de novo. This Court must review the record to determine whether defendant was entitled to judgment as a matter of law. *Borman v State Farm*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 521 NW2d 266 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the benefit of doubt to the non-movant, this Court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc.*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff's age discrimination claim is based upon the Elliott-Larsen Civil Rights Act, which provides:

(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 . . . age. [MCL 37.2202; MSA 3.548 (202).]

Absent special circumstances, in an age discrimination case, the burden of proof is generally allocated as follows: “(1) the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; and (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext.” *Plieth v St Raymond Church*, 210 Mich App 568, 571-572; 534 NW2d 164 (1995). See also *Lytle v Malady*, 456 Mich 1, 28-30; 566 NW2d 582 (1997) (J. Riley).

A prima facie case of age discrimination can be established by proving either intentional discrimination or disparate treatment. *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 11; 486 NW2d 75 (1992). This case involves only intentional discrimination. To establish a prima facie case of age discrimination based on defendant’s failure to promote plaintiff to the position of Operations Supervisor, plaintiff must show that (1) she was a member of a protected class, (2) she was denied the promotion, (3) she was qualified for the position, and (4) a younger person was given the job. *Id.* (citing *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986)). Plaintiff’s age does not need to be the only reason or even the main reason for the adverse employment decision, but it must be one of the reasons that *made a difference* in determining whether to promote plaintiff. *Plieth, supra* at 571-572; *Barnell, supra* at 120-121; *Matras, supra* at 682.

To establish a prima facie case of age discrimination based on the elimination of her part-time position, plaintiff must show that (1) she was a member of a protected class, (2) she had skills, experience, background, or qualifications comparable to other employees who were not laid off, and (3) that age was a determining factor in plaintiff’s layoff. *Bouwman v Chrysler Corp*, 114 Mich App 670, 680; 319 NW2d 621 (1982). However, to establish a “prima facie case,” “there must be at least a logical connection between each element of the prima facie case and the illegal discrimination for which it establishes ‘a legally mandatory, rebuttal presumption.’” *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 410 (1997). A plaintiff must produce enough evidence to create a rebuttable presumption of age discrimination. *Id.* Such an inference can arise when an older individual is replaced by a *significantly younger* worker. *Id.* (emphasis added).

The trial court concluded that plaintiff failed to establish a prima facie case of age discrimination because the age difference between plaintiff (aged 42) and the alleged replacement employee and successful candidate for promotion (aged 39, one month from her fortieth birthday) was too insignificant. Plaintiff argues that a significant age difference is not necessary to establish a prima facie case. Michigan Courts have not specifically addressed this issue, but this Court held in *Meagher, supra*, that an inference of discrimination “can be drawn from the replacement of an older worker with a *significantly younger* worker.” *Id.*, 711 (emphasis added). *Meagher* relied upon a decision by the United States Supreme Court, *O’Connor v Consolidated Coin Caterers Corp*, 517 US 308; 116 S Ct 1307; 134 L Ed 2d 433 (1996), which stated that an inference of age discrimination under the federal Age Discrimination in Employment Act¹ “can not be drawn from the replacement of one worker

with another worker insignificantly younger.” *Id.*, 313. Although federal decisions in civil rights cases are not binding on Michigan Courts, they are often used for guidance in interpreting Elliott-Larsen. *Meagher*, 710.

However, we need not delve into the issues of whether or to what extent *O'Connor* and *Meagher* altered the elements of a prima facie age discrimination claim or how this affects plaintiff's claim.² Defendant was entitled to summary disposition because it successfully carried its burden of coming forth with legitimate, nondiscriminatory reasons for its employment decisions. With regard to the elimination of plaintiff's accounting position, defendant stated that plaintiff's part-time position was eliminated to promote efficiency by centralizing the accounting department. With regard to its decision not to promote plaintiff, defendant asserted that plaintiff simply was not the best candidate for the position. The successful candidate had the requisite box office experience, while plaintiff did not. Furthermore, the Operations Supervisor position entailed extensive computer use and computer training duties. Plaintiff was not a suitable candidate because she had documented problems operating defendant's computer system.

Because defendant raised legitimate, nondiscriminatory reasons for its decision to eliminate plaintiff's clerical position and its decision not to promote plaintiff, the burden shifted to plaintiff to establish that the reasons offered by defendant were merely a pretext for discrimination. Plaintiff was unable to carry this burden.

[A] plaintiff must present factual allegations allowing the inference that the defendant had a discriminatory reason that was more likely its true motivation or factual allegations that show the defendant's proffered reason was unworthy of credence. The plaintiff must set forth specific facts showing that there is a genuine issue for trial; conclusory allegations are insufficient to rebut evidence of nondiscriminatory conduct. [*Featherly v Teledyne Industries, Inc.*, 194 Mich App 352, 362-363; 486 NW2d 361 (1992) (citing *Clark v Uniroyal Corp.*, 119 Mich App 820, 826; 327 NW2d 372 (1982)).]

In an effort to prove pretext, plaintiff relies on the same evidence that she used to establish a prima facie case of age discrimination. However, as the nonmoving party, plaintiff must offer more than allegations and the assertions contained in her pleadings in order for her claim to survive a motion for summary disposition; she must set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). Plaintiff failed to offer any factual evidence to establish that defendant's legitimate reasons for selecting a younger candidate for promotion were unworthy of credence or a pretext for discrimination. She merely offered conclusory allegations that she was more qualified for the position of Operations Supervisor. Therefore, summary disposition in favor of defendant was proper.

II

Plaintiff also claims that the trial court erred by imposing sanctions against her for filing a frivolous lawsuit. We disagree.

The imposition of a sanction under MCR 2.114 is mandatory upon the finding that a pleading was signed in violation of the court rule or a frivolous action or defense had been pleaded. We review a trial court's decision regarding the imposition of a sanction to determine if it is *clearly erroneous*. The trial court's decision is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. [*Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997) (emphasis added).]

Under MCR 2.114(F), “[a] party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2).” MCR 2.114(F). If the trial court determines on the motion of a party that an action is frivolous, costs shall be awarded pursuant to MCL 600.2591; MSA 27A.2591. MCR 2.625(A)(2).

Here, plaintiff filed her claim of age discrimination based on nothing more than the fact that an employee, two years younger, was granted the position of Operations Supervisor and that the same employee took over a portion of plaintiff's job duties after her accounting clerk position was eliminated. There was evidence that plaintiff was not even qualified for the position of Operations Supervisor because of her difficulties mastering defendant's computer system. Even plaintiff admitted that neither her supervisor nor her coworkers made any comments related to her age. In fact, based on the affidavit of plaintiff's supervisor, all the women who worked with plaintiff were her contemporaries.

Based on these circumstances, we believe that plaintiff's legal position was devoid of arguable legal merit. Plaintiff's counsel should have realized, at least once discovery was underway, that plaintiff's claim lacked merit. Moreover, we agree with the trial court that plaintiff's attorney should have used his judgment as a lawyer and concluded that such a minimal difference in age between employees, without additional evidence, could not support a meritorious claim of age discrimination. The trial court's finding was not clearly erroneous.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

¹ 29 USCS 621 *et seq.*

² In any event, plaintiff's prima facie case with respect to the elimination of her position is questionable because part of her duties were reassigned to a 57-year-old employee. While plaintiff claims that Nicholson did not take over any of her job responsibilities because she did not work in the same department or even on the same floor as plaintiff, such an assertion is contrary to plaintiff's affidavit in which she stated that Nicholson did not handle the “bulk of the job duties previously performed by the Plaintiff.” Such a statement suggests that Nicholson assumed at least a part of plaintiff's work assignments.