

STATE OF MICHIGAN
COURT OF APPEALS

MARGARET HINMAN,

Plaintiff-Appellant,

v

UTICA COMMUNITY SCHOOLS,

Defendant-Appellee.

UNPUBLISHED

February 11, 2000

No. 211855

Macomb Circuit Court

LC No. 96-007999-CZ

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition under MCR 2.116(C)(10), thereby dismissing plaintiff's claims for age discrimination under the Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). We affirm.

A trial court's grant or denial of summary disposition is reviewed de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999).]

The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

To establish a prima facie case of age discrimination, plaintiff must prove by a preponderance of the evidence that (1) she is a member of a protected class; (2) she suffered an adverse employment

action [failure to hire]; (3) she was qualified for the position; and (4) she was not hired under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed2d 668 (1973); see also *Town v Michigan Bell*, 455 Mich 688, 697; 568 NW2d 64 (1997). Once plaintiff has established a prima facie case, a presumption of discrimination arises, and the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for plaintiff's adverse employment action to dispel this presumption. *Lytle*, *supra* at 176. "[I]n the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, 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.*

In this case, plaintiff filed a two-count complaint, alleging intentional and disparate impact age discrimination based on defendant's refusal to hire her as an elementary school teacher. On appeal, plaintiff does not challenge the dismissal of her disparate impact claim, but only contends that the trial court erred in dismissing her claim of intentional age discrimination. We disagree.

Assuming that plaintiff established a prima facie case of age discrimination, defendant established a "legitimate, nondiscriminatory reason" for not hiring plaintiff, setting forth evidence that plaintiff was not hired because she was not as qualified as other applicants. Defendant presented evidence that plaintiff did not do well on her interview, scoring four out of a possible ten points, and that her "perceiver interview" score was thirty-three, whereas individuals under the age of forty received an average score of thirty-seven. In his deposition, defendant's current personnel director, Glenn Patterson, testified that an applicant was not likely to be hired if he or she had a low interview score, but would be "considered as one of many, many candidates." Patterson averred in his affidavit that plaintiff was not hired because her interview score was low, she was not recommended by a school principal or administrator, and her immediate supervisor had given only a neutral recommendation about her qualifications. Moreover, plaintiff had not taught as an elementary school teacher for eighteen years, and her more recent teaching experience was as an adult education teacher with class sizes ranging from five to seventeen students, whereas she would be required to teach twenty-five to thirty-five children in an elementary school classroom. Based on this evidence, defendant rebutted any presumption of age discrimination, clearly articulating legitimate non-discriminatory reasons for not hiring plaintiff.

In opposition to defendant's motion, plaintiff presented the affidavit of Joan Uhrick, an adult education teacher who sought a position in the K-12 program during the 1980s, when she was in her forties. Uhrick's affidavit indicated that Mr. Michael Murphy, the *former* personnel director, told her that "if he had a twenty-three year old competing against a fifty year old for employment, he would hire the twenty-three year old every time because she was younger." Plaintiff also presented the affidavit of Nora Lee Jobe, an adult education teacher over forty years old, who, although hired for a full-time position, claimed that "it was extremely difficult for an adult education teacher to obtain a position" and that it was easier for "recent college graduates, which [sic] are the primary applicants hired for teaching positions in this school district." Plaintiff also presented the affidavit of Linda Visnaw, who was associated with adult education in Utica for twenty-three years and was the supervisor of adult

education until April 1995. Visnaw stated that defendant's personnel office did not consider adult education teachers for full-time positions in the day program, primarily because they were teachers in their forties.

Notwithstanding this documentary support, we do not believe that plaintiff thereby raised a triable issue that age was "a motivating factor" underlying defendant's decision not to hire her as a full-time teacher in the K-8 program. As the trial court observed, defendant presented evidence showing that it had hired certified K-12 teachers from the protected class. Hiring records from 1992 indicated that five of sixteen people hired for K-6 teaching positions were over the age of forty, and records from 1996 indicated that four of the thirty-three teachers hired were over the age of forty. Although plaintiff claimed that defendant did not hire teachers from the adult education program to teach in the K-12 program, the trial court correctly observed that adult education teachers are not members of a protected class. Even so, evidence was presented that defendant had hired nine teachers from the adult education program in recent years, including six teachers who were over the age of forty.

As the trial court indicated, "[t]he fact that Defendant hired more younger people as teachers than older people, by itself, will not support a claim of age discrimination. *Elie v Sears, Roebuck & Co*, 150 Mich App 137, 141; 387 NW2d 842 (1985)." Moreover, as defendant notes, simply casting suspicion upon its legitimate reasons for its action does not raise a genuine issue of material fact showing that age was "a motivating factor" underlying its decision not to hire plaintiff, see *Irvin v Airco Carbide*, 837 F2d 724, 726 (CA 6, 1987), nor does the mere fact that it used subjective tests, such as a screening interviews, standing alone, raise a triable issue of age discrimination. See also *Grano v The Dept of Development of the City of Columbus*, 699 F2d 836, 837 (CA 6, 1983) ("[t]he ultimate issue . . . is whether the subjective criteria were used to disguise discriminatory action"). Accordingly, we conclude that summary disposition was properly granted.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot