

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STEPHEN THOMAS and CATHY THOMAS,

Plaintiffs-Appellants,

v

CITY OF FRASER,

Defendant-Appellee.

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UNPUBLISHED

February 6, 2001

No. 214458

Macomb Circuit Court

LC No. 97-004214-NO

Before: Smolenski, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal by right from an order granting summary disposition to defendant under MCR 2.116(C)(10). Plaintiff Stephen Thomas, an elected city council member for defendant who applied for a position as a city public safety officer, claimed that defendant refused to hire him because of his age, thereby violating the Civil Rights Act, MCL 2101 *et seq.*; MSA 3.548(101) *et seq.* The trial court ruled that (1) defendant properly refused to hire Thomas because an ordinance prohibited defendant from hiring elected officials until one year after they had left office, and (2) plaintiffs failed to produce evidence that defendant used the ordinance as a pretext for age discrimination. Plaintiffs contend that they raised genuine issues of material fact regarding whether defendant violated the Civil Rights Act. We disagree and affirm.

We review de novo a motion for summary disposition under MCR 2.116(C)(10), which tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999); *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85-86; 514 NW2d 185 (1994). We review the entire record, including affidavits, pleadings, depositions, admissions, and documentary evidence, in the light most favorable to the nonmovant and determine whether there exists a genuine issue of material fact. *Smith, supra* at 454-455; *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); *McCluskey v Womack*, 188 Mich App 465, 469; 470 NW2d 443 (1991).

To establish a prima facie case of age discrimination, a plaintiff must prove by a preponderance of the evidence that (1) he was a member of the protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position he sought, and (4) others who were similarly situated but outside the protected class were unaffected by the adverse conduct, or the adverse action took place under circumstances giving rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 185; 579 NW2d 906 (1998); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997); *Hall v McRae Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999). Once the plaintiff establishes a prima facie case, the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for the adverse employment action. *Hall, supra* at 370. The defendant need not persuade the court that it was actually motivated by the proffered reason, as long as the defendant raises a genuine issue of fact regarding whether it discriminated against the plaintiff. *Id.* Once the defendant produces such evidence, the presumption of discrimination raised by the prima facie case drops away and the burden of proof shifts back to the plaintiff. *Id.*; *Lytle, supra* at 173-174, 185.

The plaintiff must then come forward with admissible evidence sufficient to show that defendant's proffered reason was a pretext and that discrimination was the defendant's true motive in making the adverse employment decision. *Lytle, supra* at 175-176, 185; *Hall, supra* at 370-371. The plaintiff's evidence may be direct or circumstantial, but it must be admissible evidence 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. *Lytle, supra* at 176, 185; *Hall, supra* at 371.

Our review of the record indicates that plaintiffs set forth a prima facie case of age discrimination, which shifted the burden to defendant to articulate a legitimate, nondiscriminatory reason for not hiring Stephen Thomas. Defendant's proffered reason was that an ordinance prohibited elected officials from eligibility for employment with the city until one year after they left office. See Fraser City Code § 2-1(b). This shifted the burden back to plaintiffs to show that this proffered reason was merely pretextual and that age discrimination was defendant's true motive in not hiring Thomas. The record indicates that the trial court properly found that plaintiffs produced no evidence showing that the proffered reason was pretextual for the real reason of age discrimination. Indeed, there was no evidence sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the

adverse action taken by defendant.<sup>1</sup> Accordingly, the trial court did not err in granting summary disposition for defendant.

Affirmed.

/s/ Michael R. Smolenski

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder

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<sup>1</sup> Although it is not necessary for us to reach this issue, given that plaintiffs failed to produce evidence that defendant's proffered reason for failing to hire Thomas was pretextual for the real reason of age discrimination, we briefly address plaintiffs' claim that the ordinance in question did not apply to Thomas' situation. The ordinance prohibited elected officials from eligibility for "appointment to an employee status" for one year after they vacated their offices. As stated in *People v Philabaun*, 461 Mich 255, 261; 602 NW2d 371 (1999), *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998), and *Livingston Co Bd of Social Services v Dep't of Social Services*, 208 Mich App 402, 406; 529 NW2d 308 (1995), if the plain and ordinary meaning of an ordinance is clear, judicial construction is inappropriate and the ordinance must be enforced as written. Here, the ordinance was clear in indicating that an elected official such as Thomas was prohibited from being appointed to "an employee status," such as a city public safety officer, for one year after vacating office. The trial court correctly held that the ordinance was applicable to Thomas' situation.