# STATE OF MICHIGAN

# COURT OF APPEALS

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| BARBARA KAISER, KATHERINE BECKINGHAM-OKRAGLESKI, MARY ROSE, GARIANNE HOTTON-LYKINS, SOPHIA THOMPSON, and MARY FROBERGER, | UNPUBLISHED November 20, 2001 |
| Plaintiffs-Appellants, | |
| v | No. 219132 Macomb Circuit Court |
| UTICA COMMUNITY SCHOOLS, | LC No. 97-004991-CZ |
| Defendant-Appellee. | |

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiffs Kaiser, Thompson and Froberger appeal as of right the circuit court's order granting defendant's motion for summary disposition of plaintiffs' age discrimination claims under MCR 2.116(C)(7) (statute of limitations). Plaintiffs Beckingham-Okragleski, Rose and Hotton-Lykins appeal as of right the order dismissing their age discrimination claims under MCR 2.116(C)(10).[1] We affirm.

I

Plaintiffs Kaiser, Thompson and Froberger argue that their age discrimination claims are not barred by the three-year statute of limitations, see MCL 600.5805(9), because the continuing violation doctrine is applicable to their claims. We disagree.

Whether a claim is within the period of limitation is a question of law that we review de novo. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 216; 561 NW2d 843 (1997). This Court also reviews de novo a decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion for

[1] On appeal, all six plaintiffs only challenge the dismissal of the intentional discrimination count of their first-amended complaint, not the dismissal of the disparate impact count. Thus, we need not consider the allegations or evidence introduced below pertaining exclusively to plaintiffs' disparate impact claim in analyzing plaintiffs' arguments on appeal.

summary disposition under MCR 2.116(C)(7), "the contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999), citing *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). "[A] movant . . . is not required to file supportive material, and the opposing party need not reply with supportive material," but the reviewing court must consider such material if it is submitted. *Maiden, supra* at 119, citing MCR 2.116(G)(5). If the pleadings or documentary evidence reveal no genuine issues of material fact, the reviewing court must decide whether the claim is statutorily barred as a matter of law. *Holmes v Michigan Capital Medical Center*, 242 Mich App 703, 706; 620 NW2d 319 (2000); *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 681-682; 599 NW2d 546 (1999).

Under the continuing violation doctrine, "an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred." *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986). Application of the continuing violation doctrine is appropriate where a plaintiff demonstrates either a policy of discrimination or a continuing course of discriminatory conduct. *Id*. at 528. See also *Jackson v Quanex Corp*, 191 F3d 647, 667 (CA 6, 1999), citing *Sumner, supra*, and *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1331 (WD MI, 1997), citing *Dixon v Anderson*, 928 F2d 212, 216 (CA 6, 1991). The *Sumner* Court discussed the subtheories of the continuing violation doctrine:

> The first subtheory involves allegations that an employer has engaged in a continuous policy of discrimination. In such a case, the plaintiff is alleging that "he is challenging not just discriminatory conduct which has affected him, but also, or alternatively, the underlying employment system which has harmed or which threatens to harm him and other members of his class." Schlei & Grossman, [Employment Discrimination Law,] p 901.
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> The second subtheory, the "continuing course of conduct" or "series of events" situation is relevant where an employee challenges a series of allegedly discriminatory acts which are sufficiently related so as to constitute a pattern, only one of which occurred within the limitation period. [*Sumner, supra* at 528.]

The *Sumner* court emphasized that the existence of a continuing violation is insufficient if none of the relevant conduct occurred within the limitation period. *Id*. at 539 (stating: "The mere existence of some vague or undefined relationship between the timely and untimely acts is an insufficient basis upon which to find a continuing violation").

In the present case, the record is not clear as to which subtheory of the continuing violation doctrine plaintiffs advanced.[2] The trial court interpreted plaintiffs' claim as involving a

[2] Plaintiffs' first-amended complaint does not specify reliance on a particular subtheory. Plaintiffs alleged in their first amended complaint that they repeatedly sought to become teachers and/or administrators within defendant school district. According to plaintiffs, they made repeated efforts in past years to obtain and submit necessary application forms and to sit for interviews required by defendant, but were passed over for less qualified, younger candidates. Plaintiffs' response to defendant's motion for summary disposition under MCR 2.116(C)(7) also
(continued…)

continuing course of conduct theory. In their brief on appeal, plaintiffs maintain that defendant engaged in an ongoing policy of discrimination. As will be discussed, *infra*, regardless of whether plaintiff advanced a continuing course of conduct or ongoing policy theory, the claims brought by plaintiffs Kaiser, Thompson and Froberger fail as a matter of law.

A. Continuing course of conduct subtheory

In order to sustain a claim under the continuing course of conduct subtheory, a plaintiff must show that at least one incident of discrimination occurred within the limitation period, *Sumner, supra* at 539, and satisfy the following factors:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g. a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [*Sumner, supra* at 538 (citation omitted).]

We conclude that plaintiffs failed to satisfy the third factor; degree of permanence. "Permanency depends on what the plaintiff knew or should have known at the time of the violation," and the inquiry is "whether the acts have the degree of permanence which should alert the employee to the duty to assert her rights." *Rasheed v Chrysler Motors Corp*, 196 Mich App 196, 208; 493 NW2d 104 (1992), rev'd on other grounds, 445 Mich 109 (1994); see *Novak, supra* at 692, and *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 344-345; 483 NW2d 407 (1992).

Accepting plaintiffs' well-pleaded factual allegations as true and considering plaintiffs' documentary evidence, the following facts are established. Plaintiff Kaiser submitted an application for a regular teaching position with defendant in 1981. Each year thereafter, Kaiser attended the annual substitute teachers' meeting and indicated her interest in a regular teaching position on a form submitted to defendant. In 1988, at age 44, plaintiff received two interviews, which she attended. Each time, she was not hired for the position she sought even though she believed she was equal to or more qualified than the candidates hired by defendant. In August

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does not make clear which subtheory plaintiffs advanced in relation to their continuing violation claim. While plaintiffs analogized a case within their response brief that involved an ongoing policy theory, plaintiffs relied on facts in the present case that appeared to support a continuing course of conduct subtheory, not a policy claim (i.e., facts indicating that plaintiffs' repeated efforts to submit necessary paperwork and to obtain full-time positions were met by a series of allegedly discriminatory acts).

1992, Kaiser again attended a mass interview for regular teaching positions, but was not hired for a position.

Plaintiff Thompson submitted an application for a regular teaching position with defendant in 1985. She again submitted applications in 1986 and 1992. In 1992, she sent letters to junior high schools in defendant school district. In fall 1993, she took a perceiver exam, which is a step toward employment. Thompson was never hired, even though she believed she was equal to or more qualified than the candidates who were hired.

Similarly, plaintiff Froberger submitted an application for a regular teaching position in January 1972, and thereafter was granted an interview. Defendant did not give her a reason for failing to hire her at that time. At some point in the late 1970s, plaintiff Froberger began substitute teaching for defendant. Froberger next submitted an application for a regular teaching position in 1985, when she was 35. Again, she was not given a reason why she was not hired. She also submitted applications in 1992 and 1993, and had interviews in 1991, 1992, 1993 and summer 1994. Each time, she was not hired for the position she sought even though she believed she was equal to or more qualified than the candidates hired by defendant.

We conclude that the events, which transpired before the October 1997 filing of plaintiffs' original complaint, gave rise to a level of permanence that should have alerted plaintiffs of any injury caused by defendant at least three years before filing suit, or before October 1994. *Sumner, supra*; *Novak, supra.* Plaintiffs do not allege and the evidence does not indicate that plaintiffs lacked knowledge of the alleged unequal treatment regarding hiring and only learned of it within the three years before filing the complaint in October 1997. Under these circumstances, plaintiffs' claims fail as a matter of law under a continuing course of conduct subtheory.[3]

B. Ongoing policy subtheory

Plaintiffs claim in their brief on appeal that they were subject to an ongoing policy of discrimination by defendant. Even assuming that plaintiffs and the dissent are correct that plaintiffs, in fact, advanced a continuing violation argument based on a policy subtheory, plaintiffs' discrimination claims fail as a matter of law. In regard to the policy subtheory, the *Sumner* Court noted:

> In post-*Evans* cases [*United Air Lines Inc v Evans*, 431 US 553; 97 S Ct 1885; 52 L Ed 2d 571 (1977)], the federal courts have been nearly unanimous in holding that
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> "[a] continuously maintained illegal employment policy may be the subject of a valid complaint until a specified number of days after the last occurrence of an

[3] Given that such a claim fails on the basis of permanence, we need not analyze in regard to this subtheory whether at least one incident of discrimination forming the basis of a continuing course of conduct theory occurred within the limitation period. *Sumner, supra*.

> instance of that policy." *Acha v Beame*, 570 F2d 57, 65 (CA 2, 1978) (emphasis in the original).
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> In *Williams v Owens-Illinois, Inc*, 665 F2d 918, 924 (CA 9, 1982), the Ninth Circuit Court of Appeals determined that
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> "the relevant strain of continuing violation doctrine is that a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. . . . The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions. A minority employee, who is not promoted in 1973, for example, and is subject to a continuing policy against promotion of minorities, may then file a timely charge in 1976, because the policy against promoting him or her continued to violate the employee's rights up to the time the charge was filed." [*Sumner, supra* at 534-535.]

As stated prior, in order for a continuing violation theory to apply, there must be an act of alleged discrimination that falls within the three-year limitation period. *Sumner, supra*; *Meek, supra* at 345.

We accept plaintiffs' well-pleaded allegations within their complaint as true. *Maiden, supra*. Plaintiffs' first-amended complaint generally alleged that plaintiffs were more qualified than younger candidates that were hired for the positions sought by plaintiffs. Plaintiffs further claimed that they were denied the opportunity to apply and interview for job openings. According to plaintiffs' deposition testimony, they took the following action within three years of filing their complaint. In spring 1995, plaintiff Thompson telephoned defendant's personnel office and spoke with personnel director Michael Murphy regarding her interest in employment. Thompson further testified that she submitted a job application for the final time with defendant in spring 1995 and arranged for a letter of recommendation to be placed in her personnel file in 1997. In August 1995, plaintiff Froberger telephoned Murphy to express her interest in employment with defendant school district. In summer 1997, plaintiff Kaiser wrote personnel director Glenn Patterson to inquire about open positions in the district. Plaintiff Kaiser also arranged for a letter of recommendation to be placed in her personnel file that same year. Neither Froberger not Kaiser alleged or introduced evidence that they submitted employment applications within the three years preceding the filing of their compliant.

Significantly, plaintiffs did not allege[4] and did not introduce evidence that their actions during the three years prior to the October 1997 filing of their complaint were subject to a policy of discrimination. While it is clear that plaintiffs were not hired to the positions they sought during the three years prior to the filing of their complaint, there is nothing to suggest that they were denied those positions because of a policy of age discrimination. Allegations and evidence

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[4] See, *supra* n 1.

that plaintiffs simply inquired and expressed interest in positions within the three years preceding their complaint are insufficient to prove a continuing violation where there is no evidence that the alleged continuing harassment occurred within the limitation period. *Sumner, supra*. Cf. *Roberts v North American Rockwell Corp*, 650 F2d 823, 827 (CA 6, 1981) (holding that the plaintiff was subject to an ongoing pattern of discrimination where she repeatedly submitted employment applications and visited the defendant to inquire about open positions *and* was repeatedly informed that the defendant "did not hire women.") Under these circumstances, plaintiffs Kaiser, Thompson and Froberger have failed to establish an issue of fact as to whether their claims are not barred by the three-year statute of limitations, and their claims fail as a matter of law.

II

Plaintiffs Beckingham-Okragleski, Rose and Hotton-Lykins argue that the trial court erred in dismissing their intentional age discrimination claims under MCR 2.116(C)(10). We disagree.

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court should consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The disputed factual issue must be material to the dispositive legal claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). All reasonable inferences are resolved in the nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

The Civil Rights Act (CRA), MCL 37.2101 *et seq*., prohibits age discrimination in employment decisions, providing:

> (1) An employer shall not do any of the following:
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> (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 religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

Absent direct evidence, a plaintiff may establish a prima facie case of discrimination under the CRA by showing:

> (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class. [*Feick v Monroe Co*, 229 Mich App 335,

338; 582 NW2d 207 (1998), citing *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).]

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Id.* at 696-697.

Assuming that plaintiffs established a prima facie case of age discrimination, they have failed to present evidence to create an issue of fact as to whether defendant's nondiscriminatory reasons for not hiring plaintiffs were pretext. Defendant met its burden of presenting a legitimate, nondiscriminatory reason for not hiring plaintiffs to the positions they sought when it asserted that plaintiffs were not hired because they were not as qualified as other applicants. *Town*, *supra* at 695-696.

In regard to plaintiff Beckingham-Okragleski, the evidence showed that she received a very low score on the perceiver exam, which is a step toward regular employment with defendant. Further, it is undisputed that a principal submitted a request, asking that Beckingham-Okragleski not be assigned any further substitute teaching assignments in her school. Personnel director Patterson indicated that such a negative request is fatal to an applicant being given a regular position.

With respect to plaintiff Rose, the younger applicant hired by defendant for an adult education position earned a bachelors degree from Wayne State University in 1988, with a 3.8 grade point average. Rose did not submit her grade point average. The younger applicant had teaching experience, dating back to 1987. Further, the evidence indicated that defendant was agitated by Rose's approach to applying for a position. In regard to the business teacher's position sought by Rose, a fifty-one-year-old woman was hired to fill that position.

Finally, in regard to plaintiff Hotton-Lykins, defendant maintained that the younger teacher hired to fill the position Hotton-Lykins sought in 1995, Heather Chase, was simply a better candidate. The evidence showed that Hotton-Lykins received a 27 on the perceiver exam, while Chase received a 28. Defendant's administration sought a social studies teacher who could also coach a sport. Hotton-Lykins relied on her experience as a cheerleading coach, while Chase could coach boys' track and cheerleading. Further, Chase was a long-term substitute teacher and had student-taught for defendant, and was involved in extracurricular activities. Hotton-Lykins claimed that a principal recommended her for the position. That principal testified at deposition that he could not specifically remember doing so, but that he "could have, sure." The evidence establishes that Chase was highly recommended by defendant's administration.

We conclude that, based on the foregoing evidence, plaintiffs have failed to raise an issue of fact regarding whether defendant's stated reasons for not hiring plaintiffs were mere pretext. *Town*, *supra*. In opposition to defendant's motion, plaintiffs 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 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." Notwithstanding this documentary support, we do not believe that plaintiffs raised any triable issue that age was "a motivating factor" underlying defendant's decision not to hire plaintiffs. Undisputed evidence shows that defendant had hired certified K-12 teachers from the protected class. The fact that defendant hired more younger people as teachers than older people, by itself, will not support a claim of age discrimination. *Eliel v Sears, Roebuck & Co*, 150 Mich App 137, 141; 387 NW2d 842 (1985). Moreover, simply casting suspicion upon defendant's legitimate reasons for its actions does not raise a genuine issue of material fact showing that age was "a motivating factor" underlying the decision not to hire plaintiffs, see *Irvin v Airco Carbide*, 837 F2d 724, 726 (CA 6, 1987), nor does the mere fact that defendant used subjective tests, such as a screening interviews, standing alone, raise a triable issue of age discrimination, see *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/ Kurtis T. Wilder
/s/ Brian K. Zahra