STATE OF MICHIGAN

COURT OF APPEALS

PAUL B. BRICKER,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF ATTORNEY GENERAL,

Defendant-Appellant.

UNPUBLISHED
April 23, 2002

No. 230409
Wayne Circuit Court
LC No. 98-834044-CZ

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted from an order denying its motion for summary disposition under MCR 2.116(C)(10). Plaintiff, an attorney within defendant's Collections Division, contended that he did not receive two promotions – for a First Assistant position in 1997 and for a Section Head position in 1998 – because of his age,[1] and the trial court ruled that his age discrimination claim should be submitted to a trier of fact. We reverse.

Defendant argues that the trial court should have granted its motion for summary disposition because plaintiff failed to establish a prima facie case of age discrimination. Defendant further contends that even assuming, arguendo, that plaintiff established a prima facie case of age discrimination, the trial court nonetheless should have granted defendant's motion because plaintiff failed to raise a genuine issue of material fact regarding whether defendant's articulated, nondiscriminatory reason for the failure to promote was merely a pretext for age discrimination.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In evaluating a motion brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The moving party is entitled to a judgment as a matter of law if the proffered

[1] Plaintiff was fifty-five and fifty-six years old, respectively, when he sought the positions.

evidence fails to establish a genuine issue with regard to any material fact. See *Maiden, supra* at 120-121.

To establish a prima facie case of age discrimination, a plaintiff must show that (1) he was a member of the protected class, (2) he suffered an adverse employment decision, (3) he was qualified for the position sought, and (4) a younger person received the position. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Elements 1, 2, and 4 are not in dispute. Defendant claims that plaintiff did not establish element 3 because the desired promotions required interpersonal skills that plaintiff lacked. However, E. David Brockman, the head of the Collections Division and one of plaintiff's supervisors, explicitly testified that he considered plaintiff "qualified" for the 1998 Section Head position. Moreover, the evidence shows that the 1997 First Assistant position was similar to the 1998 position, thereby raising a reasonable inference that plaintiff was also qualified for the 1997 position. Additionally, plaintiff's overall performance appraisal rating in April 1997 was between "meets" and "exceeds" expectations. Under these circumstances, we conclude that plaintiff did indeed establish a prima facie case of age discrimination.

Because plaintiff established a prima facie case, defendant bore the burden of production to demonstrate "some legitimate, nondiscriminatory reason for its actions." *Meagher v Wayne State University*, 222 Mich App 700, 711; 565 NW2d 401 (1997). Defendant did so. With regard to the 1998 Section Head position, Brockman testified that he declined to recommend plaintiff for the promotion because of his relatively poor interpersonal skills, which were also noted on plaintiff's April 1997 performance appraisal. Moreover, the evidence demonstrated that the First Assistant, Marci McIvor, concurred in this assessment, and presumably, Attorney General Frank Kelley relied on the recommendations of these individuals in ultimately choosing Daniel Levy for the position.[2] Accordingly, defendant proffered a legitimate, nondiscriminatory reason for failing to promote plaintiff in 1998.

With regard to the 1997 First Assistant position, Deputy Attorney General Joe Sutton testified that he recommended McIvor for the promotion because "I just found her to be the person that I knew that I had worked with that had the people skills that I thought would . . . serve [defendant]." This statement, combined with the unfavorable comments plaintiff received on his April 1997 performance appraisal with regard to his interpersonal skills, sufficed to demonstrate a legitimate, nondiscriminatory reason – again, poor "people" skills – for defendant's failure to promote plaintiff in 1997.

Plaintiff appears to contend that defendant cannot be deemed to have articulated a legitimate reason for the failure to promote him because it is not clear who the decision makers were with regard to the promotions. This argument is disingenuous. Indeed, the testimony was consistent that Kelley was ultimately responsible for choosing promoted supervisors and that he relied on others' recommendations in making the decisions.[3] The "others" decided that plaintiff did not possess the requisite interpersonal skills for the positions.

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[2] Deputy Attorney General Joe Sutton testified that any position of a supervisory nature would ultimately be filled by Kelley.

[3] While Kelley did not specifically remember choosing McIvor for the 1997 position, he noted (continued…)

Because defendant proffered a legitimate reason for failing to promote plaintiff, plaintiff, in order to avoid summary disposition for defendant, was then required to raise a genuine issue of material fact regarding whether "the legitimate reason offered by the defendant was a mere pretext." *Id.* at 711. As stated in *Meagher*, *id.* at 712:

> A "mere pretext" may be proved (1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision. However, the soundness of an employer's business judgment may not be questioned as a means of showing pretext. Moreover, unfairness will not afford a plaintiff a remedy unless the unfair treatment was because of age discrimination. [Citations omitted.]

We conclude that plaintiff failed to raise a genuine issue of material fact regarding a possible pretext. Indeed, the testimony and performance appraisals established plaintiff's less-than-stellar interpersonal skills, and plaintiff himself admitted to shortcomings in this area. Plaintiff also admitted that good interpersonal skills are necessary for supervisory positions. Moreover, there was simply no evidence that plaintiff's lack of these skills was not the motivating factor in the adverse employment decision and that age, instead, was the motivating factor. First, Kelley himself was in his seventies when he made the choices, and a reasonable inference is that a member of a protected class will be less likely to discriminate against one of his own. Second, the evidence showed that in 1997, over fifty percent of available promotions with defendant went to individuals over the age of fifty. Third, Kelley denied ever using age as a factor in deciding whom to promote. Finally, and most importantly, plaintiff simply presented no evidence, circumstantial or otherwise, of an age bias with regard to the promotion decisions. Plaintiff points to a July 21, 1997 letter from Brockman to Sharon Whitmer, the Division Coordinator, and alleges that this letter proves that the job description of the First Assistant had to be rewritten to accommodate McIvor's shortcomings in the enforcement area. However, the letter indicates that Brockman was in fact satisfied with McIvor spending her extra time on bankruptcy work and in no way considered McIvor's lack of enforcement experience to be a problem or shortcoming. Moreover, McIvor's 1998 overall performance appraisal rating was "outstanding." Additionally, even assuming, arguendo, that defendant rewrote the job description to fit McIvor's qualifications, this alone does not establish age discrimination. There could very well have been other reasons, besides her youth and in spite of her alleged shortcoming, for defendant to favor McIvor over defendant. Indeed, defendant proffered such a reason: McIvor's superior interpersonal skills.

Plaintiff also points to Sutton's testimony that in 1997, in the wake of a number of early retirements, "there was concern about continuity of the advice to agencies in the department." Plaintiff alleges that this establishes a motive for age discrimination, because "[d]efendant wanted to stabilize things by promoting younger people, who would presumably be there longer." This argument is mere speculation. Indeed, as noted by defendant, a rational approach

(…continued)

that this was because many positions were all being filled around that same time due to the institution of an early retirement program.

to the need for continuity would be to promote older, more established employees, not younger ones with new ideas and advice. Sutton's testimony does not raise a question of fact regarding pretext.

Plaintiff also points to an affidavit in which he alleges that Brockman gave him lower performance ratings in order to justify raises for younger employees. This affidavit failed to create a question of fact regarding pretext. Indeed, plaintiff does not dispute that the allegedly undervalued performance ratings did not affect his salary. Moreover, Brockman allegedly undervalued plaintiff's overall performance ratings and not, specifically, his ratings with regard to his interpersonal skills, and there is no allegation that Brockman intentionally falsified the unfavorable comments about plaintiff's interpersonal skills that he made on plaintiff's April 1997 performance evaluation or that other evidence about plaintiff's interpersonal skills was falsified. The testimony established that it was plaintiff's interpersonal skills that were the deciding factor in the promotional decisions. Under these circumstances, the affidavit did not raise a genuine issue of material fact regarding pretext.

In light of all the circumstances described above, we conclude that plaintiff failed to raise a genuine issue of material fact regarding whether defendant's proffered reasons for failing to promote him were merely pretextual. Accordingly, the trial court erred in denying defendant's motion for summary disposition.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter