

STATE OF MICHIGAN
COURT OF APPEALS

JOHN E. HARRIS,

Plaintiff-Appellant,

v

DETROIT PUBLIC SCHOOLS and ANN C.
SMITH,

Defendants-Appellees.

UNPUBLISHED

May 13, 2008

No. 277308

Wayne Circuit Court

LC No. 05-532947-NO

Before: Fort Hood, P.J., and Talbot and Borrello, J.J.

PER CURIAM.

Plaintiff appeals as of right the grant of summary disposition in favor of defendants on his claim of age discrimination.¹ We affirm.

Plaintiff began his career with defendant, Detroit Public Schools, in 1963 when he was hired as a middle-school science teacher. Plaintiff held various positions with the school district during his tenure, including the position of principal, until his retirement in 1993. After retiring, plaintiff accepted employment in the private sector as principal at University Public Charter School. In 1999, plaintiff returned to work for Detroit Public Schools in the newly created position of executive director.² The position of executive director was contractual and subject to renewal or non-renewal on a yearly basis. Plaintiff acknowledged that rumors of a reduction in work force had been circulating from the time he accepted the executive director position. Although an anticipated reduction of employees in the executive director position did not occur during the 2003-2004 school year, in March 2005, plaintiff was notified, by letter that Detroit Public Schools was considering non-renewal of his contract. The reasons provided for non-renewal included:

¹ Plaintiff stipulated to dismissal of his additional claims of retaliation and intentional infliction of emotional distress.

² Reportedly, there were 26 executive director positions filled when the classification was initiated.

1) Reorganization within the school district resulting from budgetary constraints or economic necessity; and/or 2) Reorganization within the school district resulting from school closures and consolidations; and/or 3) Modification of the compensation provision of Plaintiff's 2004-2005 contract to allow for a discretionary compensation reduction.

On April 25, 2005, plaintiff received written confirmation that his contract with the Detroit Public Schools would not be renewed. The executive director's contract for Dr. Patricia Dignan was also not renewed at this time. While the lower court proceedings in this case were being conducted, plaintiff secured employment as a retired science teacher at Northwestern High School in Detroit.

Plaintiff filed his complaint alleging violation by defendants of the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq.*, specifically asserting age discrimination pursuant to MCL 37.2202(1)(a). In support of his claim of discrimination plaintiff contends that the criteria used to determine which executive directors would not be renewed was altered from the 2003-2004 school year when position seniority would be used to eliminate employees as opposed to district seniority, which was the defining criteria in 2004-2005.³ Plaintiff asserts his immediate supervisor, defendant Ann C. Smith, made the decision to use district seniority in order to eliminate the oldest employees holding the position of executive director. Subsequently, a new position entitled assistant superintendent was created by Detroit Public Schools, which is reported to be comparable to the duties and responsibilities of the executive director position. Plaintiff contends that all six individuals holding the job title of assistant superintendent are, like plaintiff, former principals but are younger and less experienced. Plaintiff further cites to his application for vacant principal positions posted by the Detroit Public Schools without being granted an interview as additional evidence of age discrimination.

In their motion for summary disposition, filed pursuant to MCR 2.116(C)(10), defendants asserted plaintiff failed to set forth a *prima facie* case of age discrimination. In addition, even if plaintiff had established a *prima facie* case of discrimination, defendants asserted summary disposition was appropriate because they had demonstrated a non-discriminatory basis for their decision to not renew plaintiff's contract. Defendants contend that non-renewal of the contract was attributable solely to the need to implement a reduction in work force in accordance with a deficit elimination plan initiated to address the Detroit Public Schools' general fund deficit of \$48.7 million.

At the hearing on March 16, 2007, the trial court reviewed case law and the respective arguments of the parties and ruled, in relevant part:

Plaintiff has presented no evidence to rebut the claim of the Defendant that the nonrenewal of Plaintiff's contract was due to economic necessity. Rather,

³ Position seniority is defined is the length of time an individual was employed in a designated position or job title. District seniority is defined as the amount of time an individual was employed within a specific district.

Plaintiff claims that it was age discrimination to use board seniority to terminate him, and Plaintiff claims he was more qualified than other people who ultimately ended up in the Assistant Superintendent positions . . . [A]ge alone is insufficient to establish discrimination. The fact that board seniority was used in the decision not to renew Plaintiff's contract merely establishes that the person with the least seniority would not be rehired. It does not establish age discrimination even though the Plaintiff was the oldest Executive Director whose position was not renewed. Nor is board seniority an inappropriate or discriminatory method to determine which employees are laid off. Likewise, the fact that others were made Assistant Superintendents may have had less qualifications also does not support Plaintiff's position of age discrimination. First, there is no evidence with respect to the qualifications of any of the six individuals who were named Assistant Superintendents. Second, this apparently occurred after the Plaintiff's contract was not renewed. Third, there is no evidence of any discrimination of Plaintiff with respect to this issue.

Finding that plaintiff "clearly failed to demonstrate that the Defendant's [sic] economic layoffs were pretextual and/or that there was any age discrimination with respect to Defendant's [sic] decision not to renew Plaintiff's contract" the trial court granted summary disposition in favor of defendants on plaintiff's age discrimination claim.

A trial court's decision regarding the grant of summary disposition is reviewed by this Court de novo. Specifically:

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to a judgment as a matter of law. [*Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001) (citations omitted).]

In addition, the nonmoving party must go beyond their pleadings to provide specific facts and evidence to demonstrate the existence of a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The Civil Rights Act, MCL 37.2202(1)(a), prohibits discrimination in employment by providing, in relevant part:

(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 religion, race, color, national origin, age, sex, height, weight, or marital status.

When filing a claim for age discrimination, a plaintiff must demonstrate not only that he suffered an adverse employment action, *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 362; 597NW2d 250 (1999), but also that age was a factor in the adverse employment decision, *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001). Either direct or circumstantial evidence may be used to prove unlawful discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Direct evidence is defined “as evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.* at 133 (internal quotation marks and citations omitted).

Plaintiff has acknowledged the absence of direct evidence regarding unlawful discrimination. Plaintiff admits that he was not subjected to any comments, inferences or actions referencing his age during his tenure or when his contract was not renewed. As a result, he relies solely on circumstantial evidence, asserting that he was the victim of unlawful age discrimination based on the fact that he was the eldest person terminated from the position of executive director. Plaintiff also contends that the alteration of the criteria used to determine contract non-renewal from position seniority to district seniority resulted in a negative impact on his employment status and resulted in the oldest employees being terminated while younger, less experienced employees were maintained. However, evidence that an older worker was terminated while a younger employee was retained is insufficient to establish a prima facie case of age discrimination. *Matras v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986).

Consequently, due to the absence of direct evidence of unlawful discrimination, the burden-shifting analysis of the *McDonnell Douglas*⁴ framework is applicable to the circumstances of this case. Following *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), a plaintiff is required to first make a prima facie showing of discrimination by establishing that (a) plaintiff was a member of a protected class, (b) plaintiff suffered an adverse employment action, (c) plaintiff was qualified for the position, and (d) the action taken by defendant gives rise to an inference of unlawful discrimination. *Hazle, supra* at 463. The parties do not dispute the establishment of the initial three factors. The only contested factor is whether plaintiff can demonstrate the final prong of the framework, i.e., that he was terminated under circumstances giving rise to an inference of unlawful discrimination based on his age.

Although plaintiff alleges younger employees were not terminated or received favorable consideration for the position of assistant superintendent, he fails to come forward with any supporting evidence. Plaintiff submits no documentation or proof that the type of seniority criteria used by defendants in the terminations was based on an improper or discriminatory basis. Opinions, conclusory denials, unsworn statements, and other inadmissible materials are not sufficient to create a genuine issue of material fact. *Marlo Beauty Supply, Inc v Farmers Ins Group*, 227 Mich App 309, 321; 575 NW2d 324 (1998), rev’d in part on other grounds 474 Mich 1119 (2006). Contrary to plaintiff’s contention, defendants assert the assistant superintendent

⁴ *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

positions were created more than 15 months after the determination to not renew plaintiff's contract and more than 23 months after implementation of the deficit elimination plan. Defendants argue that plaintiff's executive director position was not replaced and that the responsibilities and duties were merely subsumed by other existing executive directors. Plaintiff fails to contradict or provide evidence to dispute these assertions. In addition, we note that the same individual, Dr. Kenneth Burnley, was the final decision maker at the time when plaintiff was both hired and his contract was not renewed, leading to an inference that discrimination did not exist. *Town v Michigan Bell Tel Co*, 455 Mich 688, 700-701; 568 NW2d 64 (1997).

Even if plaintiff had established a prima facie case of discrimination, this merely shifted the burden to defendants to articulate a legitimate, nondiscriminatory reason for the termination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). If defendants produce such evidence, the burden is once again on plaintiff to demonstrate that the employer's proffered reasons are not true and constitute a mere pretext for discrimination. *Id.* at 174. A plaintiff may establish that a defendant's reasons for termination were pretextual "(a) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision." *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

In this instance defendants have provided documentary evidence of the financial problems facing the school district and the existence of a deficit elimination plan. As such, economic necessity comprised a legitimate and nondiscriminatory basis for defendants' decision to terminate plaintiff's employment. Plaintiff fails to demonstrate or provide any evidence that the proffered reason was pretextual. In fact, plaintiff does not dispute the existence of significant economic concerns faced by the school district necessitating a work force reduction. Further, plaintiff does not contest the fact that his previous retirement impacted his seniority status or assert that his seniority ranking was incorrectly determined. Neither does he demonstrate that the seniority methodology chosen by defendants to effectuate their deficit reduction plan was inherently discriminatory. At best, plaintiff merely contends that he was negatively impacted by the decision. Standing alone, this is insufficient to establish a factual issue regarding whether defendants' legitimate, nondiscriminatory reason for plaintiff's employment termination was merely a pretext for illegal age discrimination.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Stephen L. Borrello