

STATE OF MICHIGAN
COURT OF APPEALS

AARON K. GUYTON, CARNELL G. BUTLER,
LINDA HARDY, ORION E. PAGE, JOHN W.
NELSON, GEORGE A. IWANKOVITSCH,
VAVERY O. SMITH, RAYMOUND L. FAIR,
WILLIAM R. ANTER, SANDRA HINES-
JENKINS, and WALLACE BATES,

UNPUBLISHED
March 31, 2009

Plaintiffs-Appellants,

v

DETROIT PUBLIC SCHOOLS,

No. 283730
Wayne Circuit Court
LC No. 06-607323-CZ

Defendant-Appellee.

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs were head custodians working for defendant. In 2005, in an effort to reduce costs and deal with declining enrollment, defendant terminated a number of workers, eliminating all the head custodian positions in the school district (along with cuts in other departments) and retaining assistant custodians (a lower position) and facilities managers (a higher position). Defendant also posted new assistant custodian positions and filled them with employees who were younger than the senior staff who had been cut. Plaintiffs brought suit, alleging age discrimination under Michigan's Civil Rights Act, MCL 37.2101 *et seq.* Plaintiffs alleged that the cuts had not produced any cost savings to defendant, and therefore defendant's assertion that this was an economic decision was a pretext for discriminatory action.

Defendant moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), arguing that there was no direct evidence of age discrimination or any circumstantial evidence because *all* head custodians were terminated without regard to their ages. The circuit court agreed with defendant, finding no evidence of any age-related or other improper motives. The circuit court held that defendant had a legitimate, non-discriminatory

reason, economics, for the terminations, and plaintiffs failed to show that this was merely a pretext.

We review a trial court's decision to grant or deny a motion for summary disposition de novo. *DeBrow v Century 21 Great Lakes, Inc.*, 463 Mich 534, 537; 620 NW2d 836 (2001). A claim of unlawful discrimination may be established either by direct evidence or by circumstantial evidence. *Id.* at 537-538. "Direct evidence" is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 133; 666 NW2d 186 (2003). If the plaintiff has no direct evidence of discrimination, he is required to establish a prima facie case within the balancing framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *DeBrow, supra* at 539-540. To establish a prima facie case of age discrimination, a plaintiff must show by a preponderance of the evidence that (1) he was a member of the protected class; (2) he suffered adverse employment action; (3) he was qualified for his position; but (4) he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Id.* at 538 n 8, citing *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. *Id.* (internal citations omitted). If it does so, the burden returns to the plaintiff to show that the employer's stated reason for its action was actually a mere pretext. *Id.*

In this case, the circuit court was correct when it stated that plaintiffs have no evidence of anything other than an adverse employment action. Plaintiff had no direct evidence of a discriminatory animus. Nor is there any circumstantial evidence. The terminated employees were not replaced at all; instead, their supervisory duties were assigned to the facilities managers and their cleaning duties were assigned to the assistant custodians. Assistant custodians did not take on supervisory duties, so they were not doing the same work as the terminated head custodians. A review of the record shows that many assistant custodians who were retained were older than the head custodians that were terminated; there is no pattern of terminating people who had reached a certain age. Moreover, the financial data indicates that money *was* saved overall. Thus, even if a prima facie case was made, plaintiffs have no evidence that the economic reason for the terminations was a mere pretext.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto