STATE OF MICHIGAN

COURT OF APPEALS

RICHARD A. BELL,

Plaintiff-Appellant,

v

BUCHANAN COMMUNITY SCHOOLS, BUCHANAN COMMUNITY SCHOOLS BOARD OF EDUCATION, and BUCHANAN COMMUNITY SCHOOLS SUPERINTENDENT,

Defendants-Appellees,

and

PROFESSIONAL EDUCATIONAL SERVICES GROUP, L.L.C.,

Defendant.

UNPUBLISHED
January 21, 2016

No. 323863
Berrien Circuit Court
LC No. 13-000099-CZ

Before: BECKERING, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

In this employment dispute, plaintiff, Richard A. Bell, appeals by right the trial court's order resolving the last pending claim in this case. He specifically challenges the trial court's previous order granting the motion for partial summary disposition by defendants, Buchanan Community Schools, Buchanan Community Schools Board of Education, and Buchanan Community Schools Superintendent (collectively, Buchanan Schools). Because we conclude the trial court did not err when it granted Buchanan Schools' motion, we affirm.

Bell was Buchanan Schools' business manager for many years. In 2010, Bell helped Buchanan Schools establish an early retirement scheme whereby certain professionals working for Buchanan Schools could retire and then provide the same services to the district through an independent contractor. In that way, the professionals who accepted early retirement could begin

to collect their pensions and yet also draw a paycheck by providing services to Buchanan Schools through a third-party entity without suffering any penalties.[1]

In May 2010, Buchanan Schools executed an agreement with defendant, Professional Educational Services Group, LLC (Educational Services), in which Educational Services agreed to provide Buchanan Schools with staff for certain positions. Thereafter, four administrators, including Bell, were given the option to retire from the school district and enter into an employment agreement with Educational Services. Each administrator who was given the option to retire was eligible to receive pension benefits. After Bell and the other administrators agreed to the arrangement, they continued their same positions at the school district—albeit as contractors from Educational Services. They also began to receive pension benefits while earning their salary from Educational Services. Notably, Bell's agreement with Educational Services provided that he was an "at-will" employee.

Andrea van der Laan became the Superintendent of Buchanan Community Schools in August 2010. In February 2013, after working with Bell for 2-1/2 years, van der Laan informed Educational Services that she wished to terminate Bell's assignment to Buchanan Schools. The business manager position was filled on an interim basis by Marjorie Halquist, who was approximately seven years older than Bell. Eventually, Buchanan Schools hired a permanent replacement, Tricia Gaideski, who was significantly younger than Bell.

In April 2013, Bell sued Buchanan Schools for, in relevant part,[2] unlawfully terminating his employment on the basis of age and violating the Open Meetings Act (OMA), MCL 15.261, *et seq*. In June 2014, Buchanan Schools moved for summary disposition under MCR 2.116(C)(10). The trial court found no genuine issue of material fact with respect to either claim and dismissed them.

After the remaining claim was resolved, Bell appealed the dismissal of his claims against Buchanan Schools in this Court.

On appeal, Bell first argues that the trial court erred when it granted Buchanan Schools' motion for summary disposition of his discrimination claim. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

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[1] The plan was structured to avoid the forfeiture provision for retired persons who continue to provide services to a reporting unit through a third-party or as an independent contractor, which was to take effect in June 2010. See MCL 38.1661(8); see also, e.g., *Irla v Public School Employees Retirement System*, unpublished opinion per curiam of the Court of Appeals, issued December 23, 2014 (Docket No. 317890) (discussing the application of the statute to a retired professional who unwittingly forfeited a portion of his pension by performing work for a school district through a third-party entity).

[2] The parties eventually stipulated to the dismissal of Bell's claim under MCL 380.1229, which is not at issue on appeal.

A court may dismiss a party's claim if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). "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 trial court granted Buchanan Schools' motion after determining that Bell could not establish a prima facie case of age discrimination under the *McDonnell Douglas* burden-shifting analysis. See *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Our Civil Rights Act prohibits an employer from discriminating on the basis of age.[3] See MCL 37.2202(1)(a). In order to establish a claim for unlawful discrimination, a plaintiff may cite "direct evidence" of discrimination. See *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Alternatively, the plaintiff may rely on circumstantial evidence using a modified version of the *McDonnell Douglas* burden-shifting analysis. *Id.*; *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697-698; 568 NW2d 64 (1997).

Here, there was no direct evidence that Buchanan Schools engaged in unlawful discrimination against Bell on the basis of age. Thus, the trial court properly analyzed the claim under the burden-shifting approach. In such cases, the plaintiff bears the initial burden of establishing a prima facie case of age discrimination. *Town*, 455 Mich at 695. To establish a prima facie case, the plaintiff must show that "(1) [he] was a member of the protected class; (2) [he] suffered an adverse employment action . . . ; (3) [he] was qualified for the position; but (4) [he] was discharged under circumstances that give rise to an inference of unlawful discrimination." *Lytle v Malady*, 458 Mich 153, 172-173, 177; 579 NW2d 906 (1998). If the plaintiff is successful in establishing a prima facie case, a presumption of discrimination arises and the burden shifts to the defendant to "articulate a legitimate, nondiscriminatory reason for [the] plaintiff's termination." *Id.* (quotation marks and citation omitted). If the defendant states a nondiscriminatory reason, the presumption of discrimination is rebutted, and the burden shifts back to the plaintiff "to show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a *mere pretext* for discrimination." *Id.* at 174 (emphasis added). If the plaintiff is successful in establishing a triable issue of fact, then summary disposition is precluded. *Town*, 455 Mich at 698.

We consider separately whether Bell established a prima facie case of age discrimination with respect to the "retire-and-hire scheme" and his termination from his assignment with the

[3] Although not at issue on appeal, the relationship between Bell and Buchanan Schools retained all the hallmarks of an employment relationship, notwithstanding that he was ostensibly Educational Services' employee. See, e.g., *Clark v United Technologies Automotive, Inc*, 459 Mich 681, 688-689; 594 NW2d 447 (1999) (applying the economic realities test to determine whether an entity was a person's employer for purposes of the exclusive remedy provision of the workers' compensation act).

school district. First, regarding the "retire-and-hire scheme," Bell's argument fails because he is unable to establish that this was an "adverse employment action." As this Court has explained, there is no exhaustive list of what constitutes an adverse employment action, but there must be some objective basis for demonstrating that the action adversely affected the plaintiff:

> [W]hat might constitute an adverse employment action in one employment context might not be actionable in another employment context. Hence, whether [a plaintiff] suffered an adverse employment action must be ascertained in light of the unique characteristics of his [or her] status . . . . Nevertheless, regardless of the employment context, in order to be actionable, an employment action must be materially adverse to the employee—that is, it must be more than a mere inconvenience or minor alteration of job responsibilities. In addition, there must be an objective basis for demonstrating that the employment action is adverse because a plaintiff's subjective impressions are not controlling. Materially adverse employment actions are akin to termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation. [*Chen v Wayne State University*, 284 Mich App 172, 201-202; 771 NW2d 820 (2009) (quotation marks and citations omitted).]

Although Bell became an "at-will" employee when he retired from Buchanan Schools and entered into the employment agreement with Educational Services, he did so voluntarily. At most, he testified that he felt pressure to participate in the arrangement, but admitted that he was not told that he would lose his job if he refused. He also continued to serve as Buchanan Schools' business manager, received an increased salary in addition to his pension benefits, and obtained other pecuniary advantages from the arrangement. There is, therefore, no evidence that his decision to retire early—even if motivated by pressure to help alleviate the district's financial pressure—amounted to an employment action by Buchanan Schools that was adverse to Bell. Because Bell cannot establish that the "retire-and-hire scheme" constituted an adverse employment action, his prima facie case of age discrimination on this basis fails. *Lytle*, 458 Mich at 172-173.

With regard to Bell's claim that van der Laan's decision to terminate his assignment to Buchanan Schools amounted to unlawful discrimination, there is no dispute that Bell satisfied the first three elements of a prima facie case. Bell was a member of a protected class, suffered an adverse employment action, and was qualified for the business manager position. *Id.* However, he failed to present evidence that he was "discharged under circumstances that give rise to an inference of unlawful discrimination." *Id.* In *Lytle*, our Supreme Court recognized that this factor may be established when an employee is "replaced by a younger person." *Id.* at 177. Although Bell's ultimate replacement was significantly younger, there is no evidence that Buchanan Schools intended to replace him with a younger person at the time he was terminated from his assignment with the school district. Rather, Bell was immediately replaced by Halquist, who was older.

Bell also argues that he established a prima facie case of age discrimination because van der Laan inquired into Bell's retirement plans a few months before his termination. However, standing alone, "questions about retirement plans are not evidence of age discrimination." *Scuderi v Monumental Life Ins Co*, 344 F Supp 2d 584, 600 (ED Mich, 2004). Therefore, on this record, that inquiry alone does not permit an inference that his termination of assignment occurred "under circumstances that give rise to an inference of unlawful discrimination." *Lytle*, 458 Mich at 172-173. The trial court properly granted summary disposition on this claim.

Even if we were to conclude that Bell established a prima facie case of discrimination on the basis of his age, we would nevertheless conclude that summary disposition was appropriate because he failed to establish a triable issue of fact under the remainder of the burden-shifting analysis. Buchanan Schools presented a legitimate, nondiscriminatory reason for Bell's termination. See *Town*, 455 Mich at 695. Specifically, it claimed that Bell's assignment was terminated following numerous instances where Bell was not forthcoming with pertinent financial information or where he failed to comply with van der Laan's requests. Buchanan Schools further presented evidence that van der Laan relied on information from Bell in negotiations with the teachers' union, only to later discover from an audit that the information Bell provided was inaccurate. And Bell failed to present any evidence to permit an inference that these reasons were mere pretext. *Lytle*, 458 Mich at 174.

Bell next argues that the trial court erred by granting summary disposition on his claim that Buchanan Schools violated the OMA. He argues that the trial court improperly analyzed the alleged violation of the OMA in light of van der Laan's actions, given that he only brought this claim against the Buchanan Community Schools Board of Education. Under the OMA, "[a]ll decisions of a public body shall be made at a meeting open to the public." MCL 15.263(2). Because Bell's assignment with Buchanan Schools was terminated by the decision of van der Laan—an individual, as opposed to a "public body"—the trial court correctly determined that there was no violation of the OMA in this regard. See *Herald Co v Bay City*, 463 Mich 111, 129-130; 614 NW2d 873 (2000).

Bell argues that the Board violated the OMA because it was required to provide him with the opportunity for an open meeting before his assignment with the school district was terminated.[4] The OMA concerns "decision[s] of a public body" and whether those decisions were made in conformity with the act. See MCL 15.270(5); *Davis v City of Detroit Financial Review Team*, 296 Mich App 568, 576; 821 NW2d 896 (2012). Importantly, the Board, as a "public body," made no "decision"[5] with respect to plaintiff's termination; thus, the OMA is

[4] To the extent that Bell argues that he was entitled to notice and a hearing under MCL 380.1229, he raised this issue in the second count of his complaint, and the claim was dismissed by stipulation of the parties with prejudice. Therefore, we need not address it.

[5] The OMA defines a "decision" as "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." MCL 15.262(2)(d).

inapplicable to the circumstances of this case. See *St Aubin v Ishpeming City Council*, 197 Mich App 100, 102-103; 494 NW2d 803 (1992). It was not improper for van der Laan to speak with the members of the Board individually to determine their opinions on her decision to terminate plaintiff. See *id.* There was no evidence of a deliberate attempt to avoid the OMA in this case, as it is apparent from the evidence that van der Laan believed that she was acting within the scope of her own authority. See *id.* at 103. Bell failed to establish a violation of the OMA; therefore, the trial court properly dismissed Bell's claim premised on a violation of the OMA.[6] For the same reason, his argument that he is entitled to court costs and attorney fees for the violation is also without merit. See MCL 15.271(4).

The trial court properly dismissed Bell's claims against Buchanan Schools.

Affirmed.

/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

[6] Bell also claimed in his reply that Buchanan Schools continued to violate the OMA after the trial court's summary disposition order. He cites to a meeting held by the Board in February 2015, at which the Board made a retroactive decision to terminate his assignment. Any issue pertaining to this action is not properly before this Court because Bell may not raise a new issue on appeal in a reply brief. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003), citing MCR 7.212(G).