

STATE OF MICHIGAN  
COURT OF APPEALS

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ROBERT MCPHEE,

Plaintiff-Appellant,

v

UTICA COMMUNITY SCHOOLS,

Defendant-Appellee.

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UNPUBLISHED

September 11, 2012

No. 305126

Macomb Circuit Court

LC No. 2010-003477-CD

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting defendant's motion for summary disposition. We affirm.

The lower court's decision regarding a motion for summary disposition is reviewed de novo with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Issues involving statutory interpretation present questions of law reviewed de novo. *Klooster v City of Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011).

Plaintiff alleges age discrimination in violation of Michigan's Civil Rights Act (CRA), MCL 37.2202, which provides 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.

(b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff has the burden of proving a prima facie case of discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001).<sup>1</sup> This requires the plaintiff to present evidence that (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Id.* Once the plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises. *Id.* However, “the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff’s prima facie case.” *Id.* at 464. To meet this burden, the defendant must present evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. *Id.* If the employer presents such proofs, the presumption of a prima facie case fades away. *Id.* at 465. At this point, to survive a motion for summary disposition, the plaintiff must demonstrate that discrimination was a motivating factor for the adverse employment action taken by the employer against the plaintiff. *Id.* Stated otherwise, the plaintiff must establish that the employer’s proffered reason was merely a pretext for unlawful discrimination. *Id.* at 465-466.

“In an age discrimination claim, the plaintiff must present evidence not only of possession of qualifications comparable to the person ultimately selected, but must also demonstrate that age was a determining factor in the defendant’s refusal to hire plaintiff.” *Dubey v Stroh Brewery Co*, 185 Mich App 561, 564-565; 462 NW2d 758 (1990). “[T]he plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.” *Town v Mich Bell Tel Co*, 455 Mich 688, 704; 568 NW2d 64 (1997) (Opinion by Brickley, J.) (further citation omitted). When a plaintiff’s proofs compare qualified employees, at most, the plaintiff merely raises issues regarding the employer’s business judgment. *Id.* “Accordingly, the plaintiff [does] not create an issue of fact regarding whether the defendant’s nondiscriminatory explanation for the plaintiff’s [adverse employment action] was a pretext, much less a pretext for discrimination.” *Id.* A plaintiff’s subjective opinion is insufficient to meet the burden of proof in opposition to the defendant’s motion for summary disposition. *Marsh v Dep’t of Civil Serv (After Remand)*, 173 Mich App 72, 81; 433 NW2d 820 (1988).

In the present case, plaintiff contends that he established a prima facie case of age discrimination because he was qualified for the position and defendant’s non-discriminatory reason was a mere pretext. We disagree. A review of the record reveals that plaintiff primarily takes issue with the qualifications of Peter Ishioka, one of two successful candidates for the permanent supervisor of operations and security (SOS) position.<sup>2</sup> For example, plaintiff contends that Ishioka did not have the security experience required for the position when he

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<sup>1</sup> Michigan has adopted the burden-shifting approach established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) for use in age discrimination cases when there is no direct evidence of discrimination. *Hazle*, 464 Mich at 462-463.

<sup>2</sup> Plaintiff did not submit the deposition testimony of the other successful candidate for the position, but only submitted a resume and application.

merely observed computer monitors whereas plaintiff had experience in physical foot patrols decades earlier when he served in the Navy. This subjective view of the evidence is insufficient to oppose summary disposition. *Marsh*, 173 Mich App at 81. Plaintiff failed to present evidence that Ishioka was unqualified, but merely demonstrated that the type of security experience varied. He did not present the testimony of a current SOS regarding whether the security experience necessary for the position involved the physical patrols similar to those performed by plaintiff in the Navy or the computer security performed by Ishioka. More importantly, plaintiff's contention that the two successful candidates were not qualified for the position is belied by the fact that those two performed the SOS position in a temporary capacity, irrespective of the content of their resumes. The contention that the two successful candidates were not qualified is contradicted by the fact that they held the position, without any claims of lack of qualifications or incidents, months before obtaining the permanent position. Additionally, defendant's administrators denied that age had any bearing on the decision-making process and agreed that plaintiff performed poorly in the interview process. The trial court correctly held that plaintiff failed to present evidence that age was a determining factor in the failure to promote him to the SOS position, *Dubey*, 185 Mich App at 564-565, and at most, plaintiff merely presented evidence regarding the propriety of the exercise of defendant's business judgment by its administrators, *Town*, 455 Mich at 704.

Affirmed. Defendant, the prevailing party, may tax costs.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray