

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARGARET E. FURZE and MELANIE  
SMALLIDGE,

UNPUBLISHED  
December 3, 1999

Plaintiffs-Appellants,

v

No. 212515  
Genesee Circuit Court  
LC No. 96-052584 CZ

CLIO CONVALESCENT CENTER, INC., and  
PEARL FREDELL,

Defendants-Appellees.

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Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order denying reconsideration of its order granting defendants' motion for summary disposition of plaintiffs' age discrimination claims pursuant to MCR 2.116(C)(10). We affirm.

In November 1993, fifty-seven-year-old Margaret Furze was hired by defendants as a Minimum Data Set Coordinator. Furze was responsible for assessing and planning patient care at Clio Convalescent Center (CCC) and recording assessments onto Minimum Data Set (MDS) forms used during inspections by the Michigan Department of Consumer and Industry Services (MDCIS). In July 1995 and again in December 1995, state inspectors noted errors in forms completed by Furze. In January 1996, defendants terminated Furze's employment.

Defendants hired Melanie Smallidge in 1981 and promoted her to the position of Activities Director in 1992. In early December 1995, Smallidge was instructed to investigate a patient's family member's complaint that patients were left unattended and unoccupied before evening meals. On an evening prior to Christmas 1995, Smallidge investigated the matter and found some patients had, indeed, been left unattended in urine-soaked clothing. Smallidge did not report the situation to center administrators until she returned from her winter vacation in early January 1996. Thereafter, defendants terminated Smallidge's employment. She was forty-eight years old.

Plaintiffs filed suit, alleging defendants terminated them based on their age in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and the Age Discrimination in Employment Act, 29 USC 621 *et seq.* Defendants brought a motion for summary disposition, claiming that plaintiffs were terminated for the legitimate, nondiscriminatory reason that they failed to adequately perform their assigned tasks. At about the same time, plaintiffs brought a motion to compel the production of documents. They argued that there were documents in defendants' possession that would enable them to show that defendants' proffered reasons for terminating plaintiffs' employment were a pretext for discrimination.

The trial court granted summary disposition. It found that even if plaintiffs were able to establish a *prima facie* case of discrimination, there was insufficient evidence to show defendants' asserted nondiscriminatory reasons for terminating plaintiffs' employment were pretext for discrimination. The court stated, however, that it would not enter the order for thirty days, during which time defendants were required to produce the requested documents. After examining the requested documents, plaintiffs filed a motion for reconsideration. The court heard oral arguments and denied the motion. The court found that plaintiffs still had not provided evidence sufficient to raise a triable issue that defendants' proffered reason for terminating plaintiffs' employment was pretextual.

On appeal, plaintiffs argue that the trial court erred in granting summary disposition because there was sufficient evidence to establish a *prima facie* case of age discrimination and to create a genuine issue of material fact as to whether defendants' asserted nondiscriminatory reasons for terminating plaintiffs were a pretext for age discrimination. On appeal, we review a trial court's grant of summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* This Court reviews the record, considering affidavits, pleadings, depositions, and any other documentary evidence presented by the parties in the light most favorable to the party opposing the motion, to determine whether a genuine issue of material fact exists for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the documentary evidence shows that there is no genuine issue with regard to any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

To establish a *prima facie* case of age discrimination under an intentional discrimination theory, the plaintiff must show that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position; and (4) she was replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). Once the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate and set forth admissible evidence of a legitimate nondiscriminatory reason for its decision. *Id.* at 173. If the defendant satisfies this burden of production, "the presumption drops away, and the burden of proof shifts back to plaintiff," who must show "that there was a triable issue of fact that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Id.* at 174. The Michigan Supreme Court has adopted the "intermediate position," or standard, of proof for surviving summary disposition of a discrimination claim under the Elliott-Larson Civil Rights Act:

Under this position, disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age or sex discrimination. Therefore, we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. [*Id.* at 175-176. Footnotes omitted.]

We agree with the trial court that even assuming that plaintiffs can establish a prima facie case of age discrimination, they failed to put forth admissible evidence to raise a question of fact with regard to whether defendants' proffered nondiscriminatory reasons for discharging plaintiffs were a pretext for age discrimination. As an initial matter, plaintiffs did not submit evidentiary material in opposition to defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). When a defendant brings a motion for summary disposition pursuant to MCR 2.116(C)(10), the moving party must specifically identify the matters which have no disputed factual issues, and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The party opposing the motion then has the burden of showing, by evidentiary materials, that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto, supra* at 362.

Here, defendants attached affidavits to their motion for summary disposition, wherein the director of nursing at CCC explained that defendants discharged plaintiffs because they failed to adequately perform their assigned tasks. In their response to defendants' motion for summary disposition, plaintiffs argued, among other things, that there existed a pattern at CCC of discharging older employees and that the existence of this pattern rebutted defendants' assertion that plaintiffs had been discharged for nondiscriminatory reasons. In support of their arguments, plaintiffs made general statements regarding defendants' treatment of other employees and, in some instances, referred to deposition testimony of former employees. However, plaintiffs did not attach any of those depositions or any other documentary evidence.<sup>1</sup> Because plaintiffs failed to present documentary evidence establishing the existence of a material factual dispute, the trial court properly granted summary disposition to defendants. Given that the court then permitted plaintiffs to pursue further discovery, however, we will consider the documentary evidence submitted with their motion for reconsideration.

Plaintiffs provided affidavits from plaintiffs, two former employees, and one current employee. The current employee stated that she observed that CCC regularly discharged older employees and replaced them with younger ones and that she was fifty-eight years old and felt as though they were "trying to get rid of [her]." One of the former employees stated that after working for defendants for nine years, she was accused of engaging in sexual harassment. She stated that she believes she was

fired at the age of forty-four because she had nine years experience and a correspondingly high hourly wage, not because she engaged in wrongdoing. The other former employee stated that she quit because, among other things, CCC did not treat its employees fairly. These statements, based on the affiants' subjective beliefs, are insufficient to raise a genuine issue of fact with regard to whether discrimination was the motivating factor in plaintiffs' discharge. Plaintiffs also included with their motion for reconsideration a list of forty former employees whom they contend were over forty years of age and were discharged from CCC. However, plaintiffs provided no evidence that defendants discharged older employees at any greater rate than younger employees.

Finally, plaintiffs included deposition testimony from an employee discharged from CCC nearly ten years earlier and from the supervisor who discharged both plaintiffs. With regard to statements that the former employee alleged were made at the time of her discharge, we find that they do not necessarily suggest discrimination and they are too remote in time to be a reliable indicators of defendants' intent with regard to plaintiffs. Likewise, the supervisor's testimony that other employees involved in the incident that led to Smallidge's discharge were not punished does not, in and of itself, suggest discriminatory animus. There is no evidence that the other employees were similarly situated to Smallidge, who was a department head.

Because plaintiffs failed to meet their burden of showing, by documentary evidence, that there is a genuine issue of fact for trial, we conclude that the trial court properly granted summary disposition to defendants.

Affirmed.

/s/ Jeffrey G. Collins  
/s/ David H. Sawyer  
/s/ Mark J. Cavanagh

<sup>1</sup> Neither was the evidence referenced in plaintiffs' brief included with defendants' brief in support of their motion for summary disposition.