

STATE OF MICHIGAN
COURT OF APPEALS

SALINA NELSON,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

May 19, 2000

No. 212691

Wayne Circuit Court

LC No. 97-715031-CK

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition on plaintiff's age discrimination claim. We affirm.

Plaintiff's claim of intentional age discrimination arises under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* In an age discrimination case in which there is no direct evidence of age-based animus on the part of the employer, the plaintiff must establish a prima facie case of discrimination on the basis of circumstantial evidence to avoid a grant of summary disposition under MCR 2.116(C)(10). *Cole v West Side Auto Credit Union*, 229 Mich App 639, 648; 583 NW2d 226 (1998). To establish a prima facie case of discrimination, a plaintiff must show:

(1) she was a member of the protected class; (2) she suffered an adverse employment action, in this case, demotion and then discharge; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. [*Lytle v Malady (On Rehearing)*, 458 Mich. 153, 172-173; 579 NW2d 906 (1998).]

If the plaintiff establishes a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment decision. *Id.* at 173. The defendant must set forth, through the introduction of admissible evidence, the reasons for the adverse employment decision. *Id.* at 174. The explanation must be legally sufficient to justify judgment for defendant. *Id.* If the defendant satisfies this burden of production, the presumption raised by the prima facie case is rebutted and the burden of proof shifts back to the 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.*

The trial court determined that plaintiff had not established a prima facie case because she could not show that defendant's actions were motivated by her age. Plaintiff argued to the trial court, as she does on appeal, that the violation of company policies is evidence of age discrimination. Plaintiff cited *Herold v Hajoca Corp*, 864 F2d 317 (CA 4, 1988), in support of her argument, but we conclude that *Herold* is not dispositive. As the trial court noted, *Herold* involved a reduction in work force. The court held that evidence that the employer violated its own long standing policy of laying off workers with the least seniority first would present a triable issue that the employer's proffered reason for the adverse employment action, reduction in its work force, was a pretext for discrimination. *Id.* at 320-321.

In the present case, plaintiff did not establish a prima facie case of age discrimination sufficient to survive summary disposition, and thus the burden of proof never shifted to defendant. Plaintiff presented no documentary evidence to show that her performance was the same as younger workers in her job classification who were treated differently. She could not show that she was replaced by a younger worker. Nor did she show that defendant violated company policy in demoting her. Mere evidence that she was a member of the protected age class and suffered an adverse employment decision is not sufficient and, accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Plaintiff also argues that the trial court erred in granting summary disposition because discovery was not complete. Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 N.W.2d 654 (1996). However, summary disposition is not premature if further discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *Id.*

Here, the trial court asked what evidence plaintiff believed she could produce through further discovery. Accepting as true all of the evidence that plaintiff argued she could establish through discovery, the court determined, and we agree, that it would still fall short of establishing a prima facie case of age discrimination. Therefore, further discovery did not stand a fair chance of uncovering factual support for plaintiff's opposition to defendant's motion, and the trial court did not err in granting summary disposition.

Plaintiff's remaining two issues were not decided by the trial court and, therefore, are not preserved for this Court's review. See *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).

Affirmed.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Jane E. Markey