STATE OF MICHIGAN

COURT OF APPEALS

BARBARA KAISER, KATHERINE BECKINGHAM-OKRAGLESKI, MARY ROSE, GARIANNE HOTTON-LYKINS, SOPHIA THOMPSON, and MARY FROBERGER,	UNPUBLISHED November 20, 2001
Plaintiffs-Appellants,	
V	No. 219132 Macomb Circuit Court
UTICA COMMUNITY SCHOOLS,	LC No. 97-004991-CZ
Defendant-Appellee.	

Before: White, P.J., and Wilder and Zahra, JJ.

WHITE, P.J. (*concurring in part and dissenting in part*).

I concur in the majority's determination that plaintiff Beckingham-Okragleski's age discrimination claim was properly dismissed on the basis that she did not present evidence to support that defendant's reasons for not hiring her were pretextual. As to the dismissal of the remaining five plaintiffs, I respectfully dissent.

I

Regarding the age discrimination claims dismissed on statute of limitations grounds, MCR 2.116(C)(7), plaintiffs Kaiser, Thompson and Froberger alleged[1] and submitted

[1] Plaintiffs' first amended complaint alleged that defendant Utica Community Schools administered the employment of teachers and several adult and youth education programs in the district. The amended complaint alleged that plaintiffs were current or former teachers or administrators employed by defendant school district, as follows. Kaiser was a substitute teacher and taught remedial reading as part of the adult and alternative education programs. Rose taught in the adult education program, and was also an academic advisor and grant coordinator. Hotton-Lykins substitute taught and taught social studies, French and English. Thompson taught in the adult education program and also was a senior citizen specialist in the community education program. Froberger taught in the adult education program and in the latchkey summer program. Plaintiffs' amended complaint further alleged that plaintiffs Rose and Hotton-Lykins, after years of substitute teaching and other participation in the school district, were no longer employed by defendant.

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documentary evidence to support that each had submitted employment applications and had, within the three years preceding the filing of their complaint in October 1997, also made repeated oral or written inquiries to defendant's administration regarding regular teaching positions.[2] Defendant does not dispute this evidence, and defendant did not present evidence that plaintiffs were required to submit formal applications more than they had in order to be considered active candidates for employment. In fact, personnel director Glenn Patterson testified at deposition that applications of persons already employed by the district, such as plaintiffs, are kept forever. See n 7, *infra*. Further, the circuit court did not rule that plaintiffs' actions within the three-year period preceding the filing of the complaint were inadequate to render defendant's response an adverse employment action. Rather, the court seemed to focus on when plaintiffs first sought employment, rather than when they last sought employment.

Moreover, plaintiffs' amended complaint alleged a long-standing policy of age discrimination by defendant in its selection process of full time teachers, including in interviewing and hiring.

Accepting as true plaintiffs' well-pleaded factual allegations and other documentary evidence, and construing them in plaintiffs' favor, plaintiffs alleged a continuing violation under the "policy of discrimination" subtheory of the continuing violation doctrine. See *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505; 398 NW2d 368 (1986)*; Phinney v Perlmutter,* 222

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Plaintiffs' amended complaint alleged intentional age discrimination by defendant. The complaint alleged that plaintiffs, whose ages at the time the complaint was filed ranged from forty-five to fifty-six, had "repeatedly over the last several years and currently continue to seek to become teachers and/or administrators" within defendant school district. The amended complaint alleged that plaintiffs "have substantial qualifications that are equal and superior to numerous other candidates including those candidates that, over the last several years, have been hired in the positions sought by Plaintiffs."

Plaintiffs' amended complaint alleged that plaintiffs were certified to teach elementary and/or secondary school, that all except Thompson had substitute taught in those grades, and that all were repeatedly denied employment as teachers in those programs. Plaintiffs further alleged that they had been denied a fair and comparable opportunity to apply and interview for openings in the district programs, while younger and less experienced applicants had been given a greater opportunity to apply and interview for various openings, and were hired on numerous occasions for positions for which plaintiffs had applied. Plaintiffs alleged that the positions defendant filled with younger, less experienced persons were the same positions plaintiffs had sought "and to which they applied through all means known to them." Plaintiffs further alleged that they

> have made repeated efforts to obtain the necessary application forms and submit all necessary paperwork and sit for any interviewing process as required by Defendant. Nonetheless, they have been denied the same opportunity to be considered as teachers in the kindergarten through twelfth grades, as younger, less experienced applicants. In addition, Plaintiff Rose has been denied a position as an administrator in favor of younger, less experienced applicants.

[2] Thompson also submitted a written application within the three-year period.

Mich App 513, 546; 564 NW2d 532 (1997); see also *Hollowell v Michigan Consolidated Gas Co*, 50 F Supp 2d 695, 702-703 (ED MI, 1999), aff'd __ F3d __ (CA 6, 2001), 2001 WL 1006277; and *Dixon v Anderson*, 928 F2d 212 (CA 6, 1991). Plaintiffs' response to defendant's motion for summary disposition relied on *Dixon, supra*, a case involving the "policy of discrimination" subtheory of the continuing violation doctrine.[3] However, the circuit court

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[3] Defendant's motion for summary disposition under MCR 2.116(C)(7) argued that the claims of plaintiffs Kaiser, Thompson, Froberger and Hotton-Lykins were time-barred because they had last sought employment with defendant more than three years before filing their complaint in October 1997.

Plaintiffs' response to defendant's motion argued that each plaintiff made oral and/or written inquiries regarding their position in the hiring process well within the three year limitations period. Plaintiffs argued that each of them had testified at deposition that to become employed by defendant it was necessary to contact the personnel office, and obtain and complete an application, and that it was uncontested that each plaintiff did so. Plaintiffs noted that each of them supplemented her resume and continually called defendant regarding job prospects. Plaintiffs attached to their response brief excerpts from the depositions of Froberger, Hotton-Lykins, Kaiser, and Thompson; a copy of Thompson's teacher application dated June 8, 1993, and several other documents.

Plaintiffs' response to defendant's motion relied on *Dixon, supra*, a case involving application of the continuing violation doctrine in which the plaintiffs, school system employees, brought suit under 42 USC 1983 alleging that the defendants, directors of state retirement programs, denied them the right to participate in the pension system in violation of equal protection. Plaintiffs in the instant case rely on a portion of *Dixon* that discusses a separate case, *Roberts v North American Rockwell Corp*, 650 F2d 823, 827 (CA 6, 1981), to support their continuing violation argument:

> The second category of "continuing violation" arises where there has occurred a "longstanding and demonstrable policy of discrimination." Unrelated incidents of discrimination will not suffice to invoke this exception; rather, there must be a continuing "over-arching policy of discrimination." Generally, "[r]epeated requests for further relief from a prior act of discrimination will not set the time limitations running anew." However where there has been a long-standing policy of discrimination, repeated attempts to gain employment or promotions may each trigger the running of a new limitations period. *Roberts v. North American Rockwell Corp.*, 650 F.2d 823, 827 (6th Cir. 1981).
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> In *Roberts*, a woman continually made oral inquiries about her employment application while it was on file with a company that had an alleged policy of considering only men for the plant. *Id.* at 827. She never received a formal rejection but was told each time of the company's policy of not hiring women at that plant. *Id.* at 827-29. The court concluded that the woman's claim was timely because one of her oral inquiries concerning her application fell within the relevant limitations period, measured backward in time from the date of her complaint. *Id.* at 828.

The plaintiff in *Roberts, supra*, went to a local unemployment office in December 1972 to apply

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for a job at the defendant axle plant, and was told by the unemployment office personnel that the defendant did not hire women and she was refused an application. The plaintiff had a male relative get an application at the unemployment office after she was again refused an application. 650 F2d at 824. The plaintiff mailed the application directly to the defendant, heard nothing, and periodically returned to the unemployment office from December 1972 to August of 1973 to inquire about the status of her application. She was repeatedly told that she would not be hired because she was a women. In September 1973, the plaintiff, one of her sisters and a friend went to the unemployment office and were refused applications. The women called the Kentucky Commission on Human Rights, which called the unemployment office. As a result, the women got applications and the plaintiff's sister and friend sent them in to the defendant. The plaintiff did not send another application because she had done so already and was aware that it was still on file. Later that month, in September 1973, the plaintiff wrote to the EEOC complaining about the defendant's policies. The end result was that the defendant and the Kentucky Human Rights Commission entered into a conciliation agreement in September 1974, under which the plaintiff was offered a position at the plant. The EEOC adopted the conciliation agreement. *Id.* at 825. The plaintiff received her right-to-sue letter from the EEOC and brought suit on January 6, 1978. The district court granted the defendant's motion for summary judgment on statute of limitations grounds, concluding that the plaintiff had not filed the charge with the EEOC within 180 days after an act of discrimination occurred, measuring the 180 day time period from December 1972, when the plaintiff had sent her application to the defendant. The United States Court of Appeals for the Sixth Circuit reversed, noting:

> [ ] Mrs. Roberts' charge with the EEOC was not filed until October of 1973 far more than 180 days from the date she sent in her application to the company.
>
> The problem is that both the complaint filed in this case and the limited record before us support the plaintiff's contention that she was subjected to an ongoing pattern of discrimination.
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> Mrs. Roberts mailed in her application to the company in December of 1972. But things did not end there. She repeatedly visited the Unemployment Office, only to be repeatedly told that Rockwell did not hire women. And there appears to be no question that she, her sister . . . and [friend] were all refused applications on September 11, 1973, when they visited the Unemployment Office as a group. As noted above, only a telephone call from the Kentucky Human Rights Commission led the Unemployment Office to give application forms to the women.
>
> If a company discriminates by firing an employee because of his/her race or sex, the discriminatory act takes place when the employee is fired. The statute of limitations ordinarily starts running from this date.
>
> The issue becomes more difficult when a company fails to hire or promote someone because of their race or sex. In many such situations, the refusal to hire or promote results from an ongoing discriminatory policy which seeks to keep blacks or women in low-level positions or out of the company altogether. In such cases, courts do not hesitate to apply what has been termed the continuing violation doctrine.

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applied the standards applicable to the "continuous course of conduct" subtheory, when it should have analyzed the case under the "policy of discrimination" subtheory of the continuing violations doctrine, and further failed to focus on the three-year period preceding the filing of the action. Summary disposition of plaintiffs Kaiser, Thompson and Froberger's claims was improperly granted under MCR 2.116(C)(7).

II

Regarding plaintiffs Hotton-Lykins and Rose, defendant's motion argued that it had legitimate business reasons for not selecting plaintiffs. Defendant attached to its motion an unsigned affidavit of Glenn Patterson, personnel director for defendant school district, which stated in pertinent part:

> 2. That Ms. Lykins' perceiver score was 27 and [is] considered low.
>
> 3. That upon the hiring of a teacher the perceiver and screener scores are considered as well as other factors, such as, experience, references, education, District needs and interview results.
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> 4. That in the last several years the only Business Administration teacher hired was Ms. Bye. Ms. Bye was from the Adult Education Department and was 51 years of age at the time of hire.
>
> 5. That Ms. Chase, [sic] was a better candidate than Ms. Lykins for the position of social studies teacher at Davis Junior High. Ms. Chase received a higher perceiver score. She was a long term substitute teacher, she was active in extracurricular activities and highly recommended by Administration.
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> * * *
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> 7. As the attached records from 1992-94 indicate, the District has and does hire persons over the age of 40.
>
> 8. That the failure to hire Ms. Rose [and] Ms. Lykins was not based upon their age.[4]

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> * * *
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> Rockwell's alleged policy of not considering women for employment in its Winchester axle plant is a patent violation of Title VII. . . . Rockwell's alleged policy was a clear, continuing violation of Title VII. . . . [*Roberts, supra,* 650 F2d at 826-828.]

[4] Defendant also attached to its motion lists of teachers defendant hired by academic year, for 1992-1993, 1993-1994, and 1994-1995, that stated names, dates of hire, and dates of birth. (continued…)

Plaintiffs' response to defendant's motion argued that defendant's personnel office, headed by Michael Murphy and then Glenn Patterson, had a predisposition against hiring older teachers; that of 301 teachers defendant hired from 1992 through 1996, 253 or 84% were under age forty; and that plaintiffs were more qualified than comparable, but younger, applicants who were hired.

To support their claim that defendant's personnel office was predisposed to discriminate against older teachers, plaintiffs submitted documentary evidence including an affidavit of Joan Uhrick in a separate age discrimination case against defendant, *Hinman v Utica Community Schools.*[5] Uhrick's affidavit stated that she was born in 1941, had a certification in physical education and social studies and taught those subjects for 6 ½ years in another school district before having children, stayed home to raise her children while they were young, and then tried to resume her teaching career in defendant school district beginning in the 1980's. The affidavit stated that when she was unsuccessful in getting a full-time position with defendant, she asked defendant's administration how best to proceed and was told to substitute teach. Uhrick's affidavit stated that she substitute taught for fifteen years and "took every job possible in order to expand my contacts." Uhrick further stated that despite her qualifications and experience, she was not hired by defendant, and:

> 10. After Michael Murphy became the personnel director, I met with him in his office so that I could get an explanation as to why, despite my experience and credentials, I was not being hired, while people just out of college were getting full-time jobs.

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These lists show that for the 1992-1993 school year, defendant hired twenty-nine teachers, of which seven were forty or older, twelve were thirty or older, and seventeen were under thirty. For the 1993-1994 school year, defendant hired fifty-six teachers, of which ten were forty or older. For the 1994-1995 school year defendant hired sixty-two teachers, of which fourteen were forty or older. Plaintiffs submitted the equivalent list for 1995-1996 and 1996-1997. Of eighty-one teachers hired in 1995-1996, eighteen were forty or older. Of ninety-seven teachers hired in 1996-1997, seven were forty or older.

[5] Macomb Circuit Court case No. 96-007999-CZ. Plaintiffs in the instant case are represented by the same counsel as was the plaintiff in *Hinman.* Plaintiffs in the instant case stated in their response to defendant's motion that the circuit court in *Hinman* denied their motion to be added as plaintiffs to the *Hinman* case, apparently because of docket concerns, and that "the use of evidence from one case to another involving the same or similar parties" was recognized in *Eide v Kelsey-Hayes*, 154 Mich App 142, 159; 397 NW2d 532 (1986), rev'd in part on other grounds 431 Mich 26; 427 NW2d 488 (1988). The circuit court dismissed Hinman's claim. During the pendency of the instant case, a different panel of this Court affirmed the dismissal of *Hinman*. *Hinman v Utica Community Schools*, unpublished opinion per curiam (Docket No. 211855, issued 2-11-00). We note that while Hinman had not taught as an elementary school teacher for eighteen years, Hotton-Lykins had substitute taught in the K-12 program, and Rose's claim involves an administration position.

11. Mr. Murphy told me clearly that if he had a twenty-three year old competing against a fifty year old for employment, he would hire the twenty-three year old every time because she was younger.

12. I knew after talking to Mr. Murphy that, because of my age, I would not get a job in this school district.

13. Thereafter, I found a position in the Byron School District, where I have a permanent position.

Also before the circuit court was Murphy's deposition testimony. Murphy retired from defendant's employ in September 1996, after having held the personnel and employee relations director position for seven years. Before that he was a principal for about nineteen years. When asked to describe how one would go about applying for a teaching position with defendant, Murphy answered "[f]ill out an application," and that one could obtain an application by contacting the personnel office. Murphy further testified:

Q Do you know how a prospective applicant would be aware of any openings in the Utica Community School District?

A No, I don't know.

Q During your tenure as personnel director, did the Utica Community School District have any advertisement of openings or any other general public notices regarding openings for school teachers?

A No.

Q Do you have any idea how prospective applicants became aware of potential openings in the Utica Community School District?

A No, I don't.

Murphy testified that completed applications would be filed in the personnel office in a "teacher application file," which he described as a "huge file" with all the applications in it. He testified that the applications were alphabetized, but that each applicant did not get his or her own file.[6]

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[6] When asked at deposition how persons were chosen to receive a perceiver test, Murphy responded that it was usually at the recommendation of an administrator, but they could also be chosen through the personnel office's review of applications in the teacher application file for a given position. After the perceiver test and scoring is done, the candidates may or may not be interviewed by an administrator/building principal. Murphy testified that there was no policy to decide whether the candidate would get an interview—that that decision could be made by personnel staff and/or by a specific building principal where a job was open, and that a number of factors were looked at, including experience, grade point average, certification area, perceiver score, and others.

Defendant did not dispute below that 84% of the teachers it hired from 1992-1996 were under forty. The record supports plaintiffs' assertion that they attempted in discovery to obtain information on the pool of applicants for those teaching positions, and that defendant apparently kept no such information. Further, plaintiffs attempted to discover who had evaluated their credentials, for which positions they had been considered and by whom, and defendant responded by providing only the sketchiest of information, as follows:

> 4. Please identify by name and then-current employment position of all individuals employed by Defendant who evaluated Plaintiffs' applications and other credentials for positions within the day program of Defendant school district. Please reference your response according to each Plaintiff.
>
> ANSWER: Kaiser - unknown. Believed to have occurred in 1992. Defendant is unable to answer.
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> * * *
>
> Rose - unknown.
>
> Lykins - unknown. Believed to have occurred in 1992. Defendant is unable to answer.
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> * * *
>
> 5. To what position did each Plaintiff apply? []
>
> ANSWER: Kaiser - Unknown beyond what the Plaintiff has testified.
>
> * * *
>
> Rose - Unknown beyond what the Plaintiff has testified.
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> Lykins - 7-12 Social Studies
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> * * *
>
> 6. What were all of the positions for which Plaintiff was considered? []
>
> ANSWER: See answer to #5 above.
>
> 7. In respect to the Plaintiffs, please set forth by name and position all persons who evaluated each Plaintiff for a particular position. []
>
> ANSWER: See answer to #4 above.

8. As to each Plaintiff st [sic] forth all reasons why she was not hired for the position that she sought in the K-12 program.

ANSWER: A better candidate was selected for the position.[7]

Hotton-Lykins testified at deposition that defendant hired recent college graduates for positions that she was qualified to assume, and for which she was not even interviewed. Hotton-Lykins testified that the principal of Davis Junior High School, Tom Bodell, told her personally that he wanted to hire her in 1995 and also told her that the personnel office would not allow him to interview her and that she should speak to then-personnel-director Murphy, which she did. Murphy told Hotton-Lykins that principals were looking for social studies teachers that could coach "real sports," and not just cheerleading. Plaintiffs submitted excerpts of the deposition of the person selected for that position, Heather Chase. Chase testified that, after student-teaching, she taught summer school, substitute taught in Rochester Community Schools for approximately two months, and coached boy's track and cheerleading. Defendant hired Chase the year after she graduated, in 1995, at age twenty-five.

Defendant argued below that Hotton-Lykins was not hired because: her certified subjects were not in great demand, she had a low screener score, had no outstanding qualities, and because Chase was a "long term" substitute teacher, Chase scored higher on the screener and perceiver interview and Chase "was very active in extra curricular activities."

Plaintiffs argued below, and defendant did not dispute, that defendant had hired nine teachers in Hotton-Lykins' certification area of social studies between 1993 and 1996, and that their average age was 26. Hotton-Lykins had substitute taught for 3 ½ years, much longer than Chase; Chase's perceiver score was one point higher than Hotton-Lykins' and no documentation was submitted pertinent to Chase's screener score. Hotton-Lykins testified that a principal, Bodell, had told her in 1995 that he wanted to hire her and that Murphy prevented him from doing so. Bodell testified at deposition that he could not specifically remember doing so but that he "could have, sure."

I conclude that Hotton-Lykins presented evidence below from which a jury could conclude that defendant's reasons for not interviewing and hiring her were pretextual.

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[7] Plaintiffs attached to their response defendant's answers to these and other interrogatories.

Plaintiffs attached numerous other documents to their response to defendant's motion. Portions of Glenn Patterson's depositions in the instant case and the *Hinman* case were attached, in which he testified that he had been the director of personnel and employee relations since July 1, 1996, and that Michael Murphy had preceded him. Patterson testified that he had been a teacher in defendant district from 1969 through the 1991 school year, and then held administrative positions at three secondary schools, in addition to working in personnel. Regarding the application process, Patterson testified that the applications of persons already employed by the district are kept "forever," while applications of non-district employees are moved to microfilm after three years.

Plaintiff Rose applied for the administration position of coordinator or supervisor of career and technical education[8] and was not hired for that position in 1990, 1995 and 1996. Plaintiffs presented evidence that Rose was qualified for the position, that defendant hired a twenty-five year old in 1990, and named a twenty-nine year old interim coordinator in 1995, and that these persons had much less experience than Rose. Rose served as business partnership program coordinator for defendant from 1983 to 1996 and her certification is in business. She received a Master's degree in curriculum instruction and leadership in 1992. Her experience with defendant included supervising employees, managing a budget and writing grant applications.

Defendant argued below that Rose was not hired for this position because she "maintained an attitude toward administration." Defendant states that Rose wrote letters to the personnel department questioning when they were going to post and fill the administrator position. The letters are not before us and defendant does not explain how or why inquiring about a position makes Rose any less qualified for the position.[9] I conclude that plaintiffs presented evidence that a triable issue of fact existed whether defendant's proffered reasons for not hiring Rose were pretextual.

I would affirm the circuit court's dismissal of plaintiff Beckingham-Okragleski's claim, and reverse the dismissal of the remaining plaintiffs' claims, and remand for further proceedings.

/s/ Helene N. White

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[8] As the circuit court noted, Rose had also sought a business teacher's position with defendant and was never interviewed. However, a fifty-one year old woman was hired in 1997 for that position, and as to that position Rose has not established that age was a factor in defendant's decision to not hire her.

[9] Although Rose's undergraduate grade point average is apparently not available, neither is the grade point average available for Tammy Matthies, the person hired for the administrative position in 1990 at age twenty-five.