

STATE OF MICHIGAN
COURT OF APPEALS

PATRIC FOURSHE,

Plaintiff-Appellee,

v

CENTER FOR CREATIVE STUDIES and
RICHARD ROGERS,

Defendants-Appellants.

UNPUBLISHED
February 19, 2002

No. 227187
Wayne Circuit Court
LC No. 99-906081-CL

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's order denying their motion for summary disposition of plaintiff's age discrimination claim. We reverse.

Defendant Center for Creative Studies (CCS) offers bachelors degrees in the fine arts. Plaintiff was a member of the graphic design faculty at CCS. He was hired as an instructor in 1972. In 1983, he was promoted to associate professor and he became a professor in 1986. After becoming a full-time professor, plaintiff and CCS entered into an employment contract which was renewed in 1991 and 1995. Plaintiff consistently received pay raises and positive performance reviews.

In 1993, the North Central Association of Colleges and Schools, an accrediting organization, reviewed CCS and found it in such administrative and academic turmoil that it renewed CCS's accreditation for only a three-year term. In March 1994, an executive committee of CCS sent a memorandum to plaintiff and others concerning the importance of integrating computers into the curriculum and a planned addition of a computer class to the Fall 1994 semester. North Central again reviewed CCS in 1996 and found much improvement, but identified the graphic communications department as the weakest department and most in need of improvement. The accreditation report criticized the failure of the full-time graphic communications faculty to become familiar with and utilize the rapidly growing digital technologies relevant to the graphic design field.

In the fall of 1997, Department Chair Douglas Kisor met with all four full-time faculty members, including plaintiff, to discuss their skills and teaching strengths. Kisor informed plaintiff that he needed to update his computer skills. Kisor recommended certain software programs that he expected plaintiff to learn, such as Illustrator and Quark Express. Plaintiff

undertook to teach himself using software programs and tutorials. Plaintiff and Kisor communicated throughout the next several months regarding plaintiff's progress. Although there was some uncertainty and confusion regarding the specifics of the fall 1998 curriculum, plaintiff was aware of the "new direction" the department was taking to integrate computer software into the curriculum, as he indicated in a December 1997 memorandum to Kisor.

In May 1998, CCS hired Mark Sylvester, an outside evaluator, to evaluate the capabilities and skills of the full-time faculty to teach the new curriculum which had been updated to include the current digital technologies utilized in the graphic design field. The purpose of the evaluation was to give Kisor some guidance as to the faculty members' abilities and placement in the new curriculum for the fall semester. Plaintiff scored poorly on the evaluation and Sylvester opined that plaintiff did not possess the requisite skills to teach the current digital technologies. Sylvester communicated his assessment to Kisor. In a letter dated June 2, 1998, CCS informed plaintiff that his contract would not be renewed and terminated his employment. The letter cited plaintiff's below-average rating on the evaluation, as well as a lack of participation in outside organizations and a poor record of student advising. Plaintiff was fifty-five years old at the time.

Plaintiff brought this action against CCS and its president, defendant Richard Rogers, alleging breach of contract and age discrimination under the Michigan's Civil Rights Act, MCL 37.2101 *et seq.* Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) on both counts. With respect to plaintiff's age discrimination claim, defendants argued that summary disposition was proper because plaintiff could not demonstrate a genuine issue of material fact regarding his qualifications for the position. Alternatively, defendants argued that even if plaintiff can show an issue of fact on this question, he cannot show that he was replaced by a younger person or that defendants' reason for discharging him was pretextual. The trial court granted summary disposition of the breach of contract claim, but denied summary disposition of the age discrimination claim.¹ The trial court found genuine issues of material fact regarding whether plaintiff was qualified and whether others similarly situated with plaintiff received different treatment.

We review de novo a trial court's ruling on a motion for summary disposition. *Mitan v Neiman Marcus*, 240 Mich App 679, 680; 613 NW2d 415 (2000).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4). *Quinto v Cross & Peters Co*, 451 Mich 358; 547 NW2d 314 (1996). [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

¹ Plaintiff has not filed a cross-appeal challenging the trial court's order granting summary disposition of his breach of contract claim.

In an employment discrimination case alleging discrimination based on older age, a plaintiff must present a prima facie case demonstrating (1) the plaintiff's membership in a protected class, (2) that the plaintiff suffered an adverse employment action, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); *Harrison v Olde Financial Corp*, 225 Mich App 601, 608; 572 NW2d 679 (1997). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge. *Harrison, supra*. Thereafter, the plaintiff bears the burden of proving that the employer's articulated reason was not the true reason, but rather a mere pretext for discrimination. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295-296; 624 NW2d 212 (2001); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999).

In this case, we conclude that plaintiff cannot establish his prima facie case because he failed to show a genuine issue of material fact regarding whether he was qualified for the position. In support of their motion for summary disposition, defendants relied on Sylvester's evaluation report, which included his remarks about plaintiff that "the steps being taken to learn digital tools are to be commended but the current status of expertise is below par for effective instruction to students." Sylvester also noted: "methods/current professional tools/needs are immediate areas to fix or instruction should not continue." Most notably, defendants also cited plaintiff's deposition testimony in which he admitted that he was not qualified to teach the new curriculum:

Q. . . . You acknowledge that you were not prepared, as of May 1998, to teach the new curriculum; your point to Doug Kisor was that given the time over the summer, you can learn what's necessary to be ready by fall?

A. That's correct.

Q. And you felt that Doug Kisor should just have confidence in your representation that you would be ready by fall and just take that gamble that you would be ready?

A. Absolutely.

Plaintiff does not dispute that the curriculum changed, or CCS's need to update the curriculum in order to bring it current and conform to the current computer technologies applicable to the graphic design field. In response to defendants' motion, plaintiff offered evidence of the faculty review committee's recommendation that plaintiff's contract be renewed as well as evidence demonstrating that he had been qualified to teach the graphic design curriculum in the past, based upon past accomplishments and accolades. Plaintiff also offered evidence that he was teaching a computer graphics course part-time at Hillsdale College. However, plaintiff offers no evidence pertaining to his ability to teach the new curriculum at CCS and no evidence to contradict his deposition testimony that he was unprepared to teach the new courses. Plaintiff's argument opposing summary disposition of his age discrimination claim addresses only the disparate treatment element of the claim, and does not address plaintiff's skills in the software relevant to the new curriculum. We conclude that plaintiff's claim is unsustainable, and defendants were entitled to summary disposition.

Reversed and remanded for entry of judgment in favor of defendants. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder