

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

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JULIE A. MEAD,

Plaintiff-Appellant,

v

NATIONAL CITY and DOUG MORGENSTERN,

Defendants-Appellees.

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UNPUBLISHED

March 18, 2010

No. 289780

Saginaw Circuit Court

LC No. 07-065451-CD

Before: Servitto, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's order granting summary disposition in favor of defendants on her age discrimination action, and the order denying her motion for reconsideration. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff began working for defendant National City's predecessors in 1972. She started as a teller and worked her way up into many different jobs throughout the various transitions and restructurings over the years. In 2004, plaintiff was a direct sales executive (DSE).

Plaintiff received a negative written performance appraisal in 2005 that assessed her work for the 2004 calendar year with an overall rating of "improvement needed." Following that assessment, she received performance improvement feedback and coaching action plans from her supervisor at the time, defendant Morgenstern, in November 2005, January 2006, and May 2006, all of which indicated that improvement was needed in her job performance. Plaintiff's performance appraisal for the 2005 calendar year gave her an overall rating of "does not meet expectations." Plaintiff disagreed with that rating, and noted that she felt she had met some expectations.

Starting with the May 2006 action plan, plaintiff's stack rankings were also noted. Those rankings listed all 129 or 130 DSE's in order of performance, based on the target areas of core deposits, loans/lines, and profitability. Plaintiff was consistently in the bottom 20% of the stack rankings and was told that getting out of the bottom 20% was a required improvement. Plaintiff received a probationary notice in September 2006, and was terminated from employment with defendant National City on November 7, 2006.

Plaintiff filed this lawsuit claiming that unlawful age discrimination was the reason for her termination. She was 52 years old when she was terminated.

The trial court granted defendant's motion for summary disposition, finding that plaintiff had not shown evidence of similarly situated younger employees who were treated differently than plaintiff.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(10) tests the factual support of a claim, and the evidence is reviewed in the light most favorable to the nonmoving party. *Id.* Summary disposition under MCR 2.116(C)(10) is properly granted, "if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Michigan's Civil Rights Act provides that it is unlawful for employers to discriminate against individuals on the basis of age. MCL 37.2202(1)(a). In cases where there is no direct evidence of impermissible age discrimination, a plaintiff can present a rebuttable prima facie case from which a fact finder could infer unlawful discrimination. *Hazle*, 464 Mich at 462.

A prima facie case of discrimination is established when a plaintiff presents evidence showing the following four elements: (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) that others similarly situated and outside the protected class were not affected by the employer's adverse actions, thereby giving rise to an inference of unlawful discrimination. *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); *Town v Michigan Bell Telephone*, 455 Mich 688, 695; 568 NW2d 64 (1997). An employee is qualified for a job if she performs at a level that meets the employer's legitimate expectations. *Town*, 455 Mich at 699.

Once a prima facie case of discrimination is shown, then the burden shifts to the defendant. *Hazle*, 464 Mich at 464. Defendant can rebut the prima facie case of discrimination by articulating a legitimate, nondiscriminatory reason for its employment decision concerning plaintiff. *Id.*

If a defendant successfully rebuts the plaintiff's prima facie case, then plaintiff must demonstrate that defendant's stated nondiscriminatory reasons were merely a pretext for unlawful discrimination that was actually a motivating factor for the adverse action taken against the plaintiff. *Hazle*, 464 Mich at 465-466.

In this case, there is no dispute that plaintiff, at age 52, was a member of a protected class and that she suffered an adverse employment action when she was terminated in November 2006. In order to establish the third required element in a prima facie case of discrimination, plaintiff must show she was qualified for the position of DSE. See *Town*, 455 Mich at 695.

Defendant claims that plaintiff was not qualified because she did not meet the legitimate expectations for the job as was shown in her poor performance evaluations for 2004-2006, and in her consistently low stack rankings. Plaintiff, however, provided deposition testimony from her 2004 supervisor who stated she was qualified for the position of DSE. Taken in the light most

favorable to the nonmoving party, plaintiff has provided evidence that she was qualified for the position of DSE.

The final element to establish a prima facie case of discrimination is to show that other similarly situated people were not subject to the same adverse employment actions or that persons outside the protected class were favored. *Town*, 455 Mich at 695. Plaintiff claims that a younger DSE was also in the bottom 20% of the stack ranking and at times ranked lower than plaintiff. The stack ranking for August, September, and October 2006 showed that the younger DSE was ranked 105, 108, and 100, while plaintiff was ranked 117, 119, and 119 for the respective months. Additionally, the stack rankings show not only the last month's rank, but also the year-to-date rank. As of October 2006, the younger DSE ranked 95 while plaintiff ranked 120 out of 130.

The stack rankings show that the younger DSE was not similarly situated to plaintiff because her rankings were consistently higher. One of her monthly rankings was not in the lowest 20%, and her overall year-to-date ranking for 2006 was also not in the lowest 20%. Accordingly, plaintiff has not shown the fourth element necessary to establish a prima facie case of discrimination. Therefore, the trial court properly granted summary disposition in favor of defendants.

Affirmed.

/s/ Deborah A. Servitto

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood