

STATE OF MICHIGAN
COURT OF APPEALS

MONA COOPER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

October 14, 2010

No. 292852

Wayne Circuit Court

LC No. 08-111828-CD

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's grant of summary disposition to defendant with regard to plaintiff's claim of age discrimination. We affirm.

A court may grant summary disposition under MCR 2.116(C)(10) when there is no genuine issue regarding any material fact. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). In making this determination, the court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in the light most favorable to the nonmoving party. *Id.*

When a plaintiff claiming age discrimination creates a rebuttable prima facie case, the burden shifts to the defendant to articulate a nondiscriminatory reason for the decision. *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Hazle v Ford Motor Co*, 464 Mich 456, 462-465; 628 NW2d 515 (2001). To establish a prima facie case, plaintiff in the present case was required to offer evidence that (1) she was a member of a protected class, (2) she experienced an adverse employment action, (3) she was qualified for the job, and (4) "the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Hazle*, 464 Mich at 463. Plaintiff clearly met the first three prongs; therefore, the issue was whether she met the fourth.

The hiring of younger candidates who objectively appear less qualified can be sufficient to infer discrimination. *Hazle*, 464 Mich at 471-472. Such a hiring decision can be significant even if the plaintiff had lower interview scores, so long as there is additional evidence regarding a pattern of discrimination. See *Campbell v Human Services Dep't*, 286 Mich App 230, 242-243; 780 NW2d 586 (2009). Statistics can also be used as evidence of the fourth element of a prima facie case, *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361 (1992), although we note that, in the present case, plaintiff failed to offer direct, competent

evidence that other older candidates were passed over and that she was not the only applicant in her age group. Comments can also be evidence creating an inference of discrimination; however, it is relevant whether they were vague or isolated. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 136 n 8; 666 NW2d 186 (2003).

Plaintiff offered evidence that, taken together and viewed in the light most favorable to her, arguably could have created an inference that age discrimination occurred, if one were to ignore defendant's reasons for its decision. However, the circuit court did not err in granting defendant summary disposition because plaintiff did not create a genuine issue of fact regarding whether defendant's cited reasons for not hiring her were merely pretextual. See *Hazle*, 464 Mich at 464-466.

The evidence used to create an inference of discrimination is also relevant in determining whether the cited reason is a pretext for discrimination, and the amount and type of evidence required varies case by case. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697; 568 NW2d 64 (1997). Plaintiff showed that she had more direct experience as a probation/parole officer than most of those hired; however, defendant showed that plaintiff's interview rating was slightly lower than all other candidates hired and that her resume raised some concerns. Nearly all of those hired had related experience, and, significantly, the position in question did not require any specific work experience. The trier of fact cannot second-guess whether defendant's decision to hire other candidates was sound or wise. *Hazle*, 464 Mich at 464 n 7, 475-476; *Meagher v Wayne State University*, 222 Mich App 700, 712; 565 NW2d 401 (1997). Indeed, "the soundness of an employer's business judgment may not be questioned as a means of showing pretext." *Id.* It was reasonable to value communication skills and knowledge demonstrated during interviews.

Plaintiff did not claim any clearly biased comments were made, nor did she offer any evidence of a pattern of discrimination. She relied on guesses and suspicion regarding defendant's apparent difficulty in reaching her references and the possible conflict between two reports regarding how one reference rated her. Although plaintiff claims on appeal that defendant changed its reasons for not hiring her, she did not sufficiently demonstrate as much; there was insufficient evidence that defendant's reasoning changed in any significant way. Plaintiff's evidence was insufficient for a reasonable trier of fact to conclude that defendant's cited reasons for not hiring her were merely a pretext for age discrimination. See *Hazle*, 464 Mich at 465.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter