

STATE OF MICHIGAN
COURT OF APPEALS

NORMAN S. DICKSON,

Plaintiff-Appellant,

v

FARMINGTON PUBLIC SCHOOL DISTRICT,
FARMINGTON BOARD OF EDUCATION,
MICHAEL P. FLANAGAN Superintendent of the
Schools, and FARMINGTON ASSOCIATION OF
SCHOOL ADMINISTRATORS, Jointly and
Severally,,

Defendant-Appellees..

UNPUBLISHED

June 14, 1996

No. 175963

LC No. 93-458784 N0

Before: Reilly, P.J., and Michael J. Kelly and C. L. Bosman,* JJ>

PER CURIAM.

This is an age discrimination in employment case.

Plaintiff Norman Dickson was an employee of the Farmington School District for twenty-five years, and at the time he brought his claim against defendants, he was employed as an assistant principal in the district. Plaintiff was a member of a collective bargaining unit known as the Farmington Association of School Administrators.

In March of 1993, defendant Farmington School District posted an opening for a principal position in the Farmington School District and plaintiff applied. At the time of the application, plaintiff was fifty-five years old. The Board of Education utilized a three-member "screening committee" to evaluate the qualifications of applicants for the position. Members of the screening committee were the director of personnel for the school district, the principal of North Farmington High School, and a teacher at Harrison High School. The screening committee members reviewed 50 applications. At the second meeting of the screening committee, each committee member identified and graded the highest scoring applicants. The committee decided that if an applicant was recommended by two members,

* Circuit judge, sitting on the Court of Appeals by assignment.

that applicant's name would be forwarded to the "interviewing committee" for consideration. Plaintiff was not one of the six candidates chosen by the screening committee to be referred to the interviewing committee. As a result, plaintiff was not interviewed or considered for the position of principal. The posted position was offered to and accepted by a younger candidate, who, plaintiff claimed, had fewer qualifications.

Plaintiff filed a complaint for age discrimination claiming violation of Michigan's Elliott-Larsen Act, MCL 37.2202; MSA 3.548(202), and gross negligence against the district and board of education; gross negligence against district superintendent Michael P. Flanagan; and violation of the Freedom of Information Act, MCL 15.231 et seq; MSA 4.1801(1) et seq. and the Bullard-Plawecki Employee Right to Know Act, MCL 423.50; et seq; MSA 17.62(1) et seq. against all defendants. Plaintiff filed a first amended complaint on January 20, 1994, for breach of the collective bargaining agreement against defendant Farmington School District.

On March 2, 1994, the district, board of education and Flanagan filed a motion for summary disposition asserting governmental immunity as to the gross negligence counts; and no genuine issue of material facts as to the FOIA and Right-To-Know counts.

On March 22, 1994, plaintiff filed a second amended complaint alleging breach of collective bargaining agreement against all defendants plus the Farmington Association of School Administrators (FASA); as well as breach of duty of fair representation against FASA. On March 29, 1994, the Oakland Circuit Court granted defendants' motion as to the gross negligence, FOIA, Right-to-Know, and breach of collective bargaining agreement counts against the district, Board of Education and Flanagan. The court did not give an explanation for its ruling.

On April 20, 1994, plaintiff filed a motion for reconsideration and a motion to reopen discovery on issues relating to the collective bargaining agreement claim, which the court denied, finding no grounds for reopening discovery, nor for reconsidering the grant of summary disposition.

The district, the board and Flanagan filed a motion for summary disposition based on MCR 2.116(C)(10) as to the remaining age discrimination claim. FASA filed a motion for summary disposition as to the fair representation claim against it. The court granted the motions, thus dismissing plaintiff's complaint in toto. The court ruled that plaintiff had failed to establish a prima facie case of breach of collective bargaining agreement.

A trial court's grant of summary disposition is reviewed de novo on appeal. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). In deciding a motion for summary disposition, a court must accept the plaintiff's well pled allegations as true and construe them most favorably to the plaintiff. *Simmons v Apex Drug Stores Inc*, 201 Mich App 250, 252; 506 NW2d 562 (1993).

For motions under MCR 2.116(C)(10), this Court must consider all affidavits, pleadings, depositions, admissions, and documents filed by the parties. MCR 2.116(G)(3)(b); *Patterson v*

Kleiman, 447 Mich 429, 432; 526 NW2d 879 (1994); *Weaver v University of Michigan Bd of Regents*, 201 Mich App 239, 241-242; 526 NW2d 264 (1993). Motions under this section test the factual support for the claim. *Weaver, supra, at* 241-242.

The trial court correctly granted summary disposition to defendants regarding plaintiff's claim that his failure to be considered for the position of principal of Harrison High 'School was motivated by age discrimination. Plaintiff presented no evidence that defendant's denial of plaintiff's application was pretextual. He relied on the fact that the last three high school principals selected by defendants were under fifty years old.

The Elliott-Larsen Civil Rights Act precludes discrimination in employment on the basis of age. MCL 37.2202; MSA 3.548(202). In any age discrimination case, the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff is successful, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. The plaintiff must then show by a preponderance of the evidence that the legitimate reason offered by the defendant is merely pretextual. *Barnell v Taubman Co Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993).

In general, age discrimination claims can be based on two theories: (1) disparate treatment, which requires a showing of either a pattern of intentional discrimination against protected employees aged forty to seventy years, or against an individual plaintiff. *Consolidated Coin Caterers Corp. ___ US ___ (1996) (Decided 4/1/96)* or (2) disparate impact, which requires a showing that an otherwise facially neutral employment policy has a discriminatory effect on members of a protected class. *Lyle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995).

The elements of intentional age discrimination in this case are: (1) that plaintiff was a member of a protected class, (2) that he was qualified for the position, (3) that despite his qualifications, he was rejected, and (4) that the position was filled by a younger person. *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986)., with reference to *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Dubey v Stroh Brewery Co*, 185 Mich App 561, 563-564; 462 NW2d 758 (1990).

Plaintiff meets the requirements. First, he was a member of a protected class; he was fifty-five years old at the time he applied for the position of principal. See *Lilley v BTM Corp*, 958 F2d 746, 752 (CA 6, 1992), cert den ___ US ___; 113 S Ct 376; 121 L Ed 2d 287 (1992). It is undisputed that plaintiff was not hired and that defendants ultimately hired a younger person. The most difficult question, however, is whether plaintiff was "qualified." Plaintiff's list of accomplishments and qualifications was extensive.. The trial court found that the prima facie element of "qualification" was not met because plaintiff was not as qualified as other applicants. However, taken in the light most favorable to plaintiff, the evidence shows that plaintiff was qualified for the position of principal. The trial court agreed with defendants that plaintiff was not considered for an interview for a legitimate, non-discriminatory reason, and that the method utilized to screen applicants was even-handedly applied in a

reasonable manner. Plaintiff was not considered because the other applicants possessed better, more recent, or stronger qualifications for the position of principal.

Plaintiff fails to resurrect his prima facie case by presenting reasons why defendant's stated reason for not promoting plaintiff, i.e., lesser qualifications, was a mere pretext. The depositions establish that each member of the screening committee made an independent evaluation based on enumerated criteria, but that empirical figures were not used to compute scores. Neither was age used to enhance or reduce any of the criteria. Plaintiff's charge that one evaluator testified he, plaintiff, lacked "recent" experience and training in administration fails to show improper emphasis. Plaintiff cannot attribute any statement or objective to defendants which suggests a policy of discrimination based on age. His lack of recent training credentials was compared to the other candidates' better informed, more respected training accomplishments. Old, musty skills may be legitimately compared to newer, sharper more meaningful ones.

When viewing the evidence in a light most favorable to plaintiff, and drawing all reasonable inferences in his favor, there is no genuine issue of material fact whether defendants' proffered nondiscriminatory reasons were mere pretext. There simply is no evidence to suggest they were. This Court affirms the trial court's grant of summary disposition.

Plaintiff's claim of gross negligence is barred by qualified governmental immunity. In forming the two-tiered candidate selection system, defendant Flanagan eliminated the possibility of bias inherent in having a single individual select applicants. In order to insure fairness, Flanagan did not instruct the committees on how to operate. The committees themselves were comprised of highly qualified and objective individuals. No reasonable juror could possibly have concluded that Flanagan or the screening committee was so reckless as to demonstrate a substantial lack of concern with regard to the initial screening process. Summary disposition was proper. The practice instituted by Superintendent Flanagan and FASA by which a screening committee would screen all applicants, narrowing the field before submitting selected candidates to an interviewing committee for further scrutiny is not substantially distinct from the process described in the contract. There is essentially no difference between the hiring system described in the contract and that mutually formulated by the Board and FASA to substantiate the claimed breach of the collective bargaining agreement. There was no genuine issue of material fact whether defendants breached the terms of the collective bargaining agreement because based on essentially undisputed facts, the terms were substantially complied with.

The trial court did not err in granting summary disposition in favor of defendant FASA with respect to plaintiff's breach of fair representation claim. A labor organization has a duty, imposed by statute and case law to fairly represent its members. *Goolsby v Detroit*, 419 Mich 651, 660; 358 NW2d 856 (1984). In this case, as analyzed, there was no substantive difference between the screening system delineated in the contract and that instituted by Superintendent Flanagan. Both practices provided for screening of all applicants and forwarding of a limited number of candidates to the superintendent for an interview. Plaintiff simply has produced no evidence indicating that FASA's

“acquiescence” to the two-tier system was done in bad faith, caprice, arbitrariness, or unworthy motive. The modification did not discriminate against any member.

Finally, we find no error on discovery. Review of a trial court’s denial of a motion for discovery is for an abuse of discretion. *Michigan Millers v Bronson Plating*, 197 Mich App 482, 495; 496 NW2d 373 (1992). The trial court was within its discretion in refusing to grant plaintiff’s motion to reopen discovery. It is clear from the file that the motion for reopening of discovery was filed following the dismissal of Count V of plaintiff’s complaint, along with a motion for reconsideration of the summary disposition of that count. Summary disposition was proper as to that count of plaintiff’s complaint. The issue for which discovery was sought related only to Count V. Since the trial court determined correctly that there was no need to reconsider its grant of summary disposition, discovery as to that issue would be useless.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Michael J. Kelly

/s/ Calvin L. Bosman