STATE OF MICHIGAN

COURT OF APPEALS

MARGUERITE DEBORAH PEES JONES,

Plaintiff-Appellant,

v

MICHIGAN BELL COMMUNICATIONS, INC.,

Defendant-Appellee.

UNPUBLISHED
June 18, 1996

No. 164658
LC No. 92-436436-CZ

Before: Marilyn Kelly, P.J., and Taylor and M. R. Knoblock,* JJ.

PER CURIAM.

In this age and weight discrimination case, plaintiff appeals as of right from a grant of summary disposition for defendant pursuant to MCR 2.116(C)(10). Plaintiff argues that the judge erred in concluding that she failed to submit evidence that defendant's legitimate non-discriminatory reasons for not promoting her were merely a pretext. We affirm.

Defendant hired plaintiff as a general clerk/typist in 1985. She received positive performance evaluations and was promoted in 1987 and 1989, attaining the position of Project Coordinator II. In February, 1991, a Project Manager position opened. Defendant interviewed four selected candidates for the position. Plaintiff was not among them. Cora Glenn, age 36, was hired to fill the position. A second Project Manager position opened in April, 1992. Eight employees, including plaintiff, applied and were interviewed. Defendant promoted Karol Miller, age 30, instead of plaintiff.

Plaintiff alleged that defendant discriminated against her by passing over her for promotion because of her age and weight. In February, 1991, plaintiff was forty years old, five feet two inches tall, and weighed 280 pounds. Her weight did not change during the duration of her employment with defendant.

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

The Michigan Civil Rights Act prohibits discrimination in employment based on age or weight. MCL 37.2102(1); MSA 3.548(2102)(1). A plaintiff has the initial burden of proving a prima facie case by a preponderance of the evidence. If the plaintiff succeeds, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employee's rejection. If the defendant carries this burden, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was but a pretext for discrimination. *Manning v Hazel Park*, 202 Mich App 685, 696; 509 NW2d 874 (1993). There are three ways a plaintiff can establish pretext: (1) by showing the proffered reasons had no basis in fact; (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision; or (3) if they were the factors, by showing they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Conclusory allegations, as opposed to specific facts, are insufficient to rebut evidence of nondiscriminatory conduct. *Featherly v Teledyne*, 194 Mich App 352, 363; 486 NW2d 361 (1992). See also *Tillman v Detroit Receiving Hospital*, 138 Mich App 683, 689; 360 NW2d 275 (1984) (mere conjecture does not meet the burden to come forward with evidentiary proof to establish that there exists a genuine issue of material fact).

We agree with the judge's conclusions that plaintiff established a prima facie case of age and weight discrimination and that defendant successfully countered with legitimate nondiscriminatory reasons for not promoting her.

In an effort to demonstrate that the proffered reasons were a pretext for discrimination, and thus that a genuine issue of material fact existed, plaintiff submitted evidence showing she had received numerous positive employment evaluations and had more years of experience than Miller or Glenn.

With reference to her age claim, plaintiff testified at her deposition that she believed younger employees were preferred because they were more easily manipulated. Plaintiff's proffered evidence regarding the age claim was no more than conjecture and conclusory allegations. Thus, the age claim was properly dismissed.

As to her weight claim, plaintiff indicated that Jeanne Belcher, who was the sole decision-maker respecting the promotions, commented that plaintiff should lose some weight and should try a liquid diet program. This statement was allegedly made in an informal conversation involving plaintiff, Belcher, and a third employee, some time in 1990 prior to, and not in connection with, consideration of plaintiff for promotion. According to plaintiff's testimony, Belcher, who it is undisputed was overweight as well, commented to plaintiff "that it would benefit. . .that if I (plaintiff) lost weight, it might help my job. And the same goes for her (Belcher) too." And "We were talking about it would be in my best interest and be in all our best interest if we lost weight because we're too heavy." After a review of the record, we find that plaintiff failed to submit specific factual evidence from which a reasonable jury could conclude that defendant's proffered reasons were a pretext for weight discrimination. *Lytle v Malady*, 209 Mich App 179, 187-188; 530 NW2d 135 (1995).

The dissent's reliance upon *Paulitch v Detroit Edison Co*, 208 Mich App 656, 659; 528 NW2d 200 (1995), leave granted on an unrelated issue, ___ Mich ___ (Docket No. 103134, order issued 5/22/96), is misplaced. *Paulitch* does not stand for the proposition that a genuine issue of material fact exists solely because an employer relies upon testing procedures which include portions that are strictly subjective. While subjective testing is a factor to be considered, there must be some additional objective facts coupled with the subjective factors supporting plaintiff's position before the summary disposition for the employer is inappropriate. In *Paulitch*, this objective factors was that one of the persons promoted, rather than Mr. Paulitch, scored lower than Mr. Paulitch on the subjective testing procedures. Such was not the case here.

In conclusion, assuming plaintiff's testimony and subjective views to be true, they do not raise a genuine issue of material fact that the legitimate business reasons presented by defendant in support of its decision to promote Glenn and Miller instead of plaintiff were a mere pretext. Defendant's motion for summary disposition was properly granted.

Affirmed.

/s/ Clifford W. Taylor
/s/ M. Richard Knoblock