

STATE OF MICHIGAN
COURT OF APPEALS

JAMES GRACE,

Plaintiff–Appellant,

v

THE DETROIT BOARD OF EDUCATION,

Defendant–Appellee.

UNPUBLISHED

June 28, 1996

No. 180114

LC No. 93-315797-CL

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). Plaintiff had filed a claim against defendant Detroit Board of Education, his former employer, for an alleged violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We affirm.

In June, 1990, plaintiff was discharged from his employment as a high school teacher with the Detroit Board of Education because of unsatisfactory performance. Plaintiff appealed to the State Tenure Commission, which ultimately upheld plaintiff’s discharge on the basis of incompetence. Plaintiff then filed an appeal in Wayne Circuit Court pursuant to MCR 7.105. However, plaintiff failed to properly perfect the appeal and, instead, instituted a new, original action for age discrimination under the Civil Rights Act.¹ The trial court granted defendant summary disposition of plaintiff’s claim on the grounds that the State Tenure Commission’s determination of incompetence was binding upon plaintiff.

The Civil Rights Act precludes discrimination in employment on the basis of age. To prevail in an age discrimination action, a plaintiff has the burden of proving a prima facie case of discrimination. If the plaintiff is successful, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory 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). A prima facie case of age discrimination can be based on two

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

theories: (1) disparate impact, requiring a showing that a facially neutral employment policy has a discriminatory effect on a protected class; or (2) disparate treatment, requiring a showing of a pattern of intentional discrimination against a protected class. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995).

First, the only allegation which could arguably support a disparate impact claim is plaintiff's assertion that, in order to reduce expenditures, defendant implemented a plan in 1987 to encourage older employees at maximum pay levels to retire. However, since the targeted employees were given a reasonable option to retire or remain employed, a determination of disparate impact is precluded. See *Farmington Ed Ass'n v Farmington School Dist*, 133 Mich App 566, 576; 351 NW2d 242 (1984). Establishment and implementation of a bona fide retirement policy for economic reasons is not prohibited under the Civil Rights Act. *Zoppi v Chrysler Corp*, 206 Mich App 172, 176; 520 NW2d 378 (1994).

Next, plaintiff's claim for disparate treatment is precluded by collateral estoppel. Collateral estoppel precludes relitigation of an issue which has been necessarily determined in an administrative proceeding if (1) the proceedings were adjudicatory; (2) a method of appeal was provided; and (3) there is clear legislative intent that the administrative determination was to be final in the absence of an appeal. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995). As in *Nummer*, the first two requirements are satisfied: the proceedings were adjudicatory before an administrative law judge, and a method of appeal was provided under the Administrative Procedures Act (APA), MCL 24.301; MSA 3.560(201).

As to the third requirement, *Nummer* is instructive. The *Nummer* Court reasoned that collateral estoppel applied to Civil Service Commission decisions because the Legislature enacted MCL 37.2606(1); MSA 3.548(606)(1), providing for de novo review of Civil Rights Commission determinations on appeal; but not the right to file a new complaint raising the same issues. The *Nummer* Court concluded that the Legislature intended to make Civil Service Commission decisions final in the absence of an appeal. We find that similar legislative intent is evident as to decisions from agencies governed under the APA. Pursuant to the APA, the only procedure available to a person aggrieved by a final decision of the State Tenure Commission is direct review by the courts. MCL 24.301; MSA 3.560(201). The APA also requires exhaustion of administrative remedies before remedy is sought in the court system, further indicating the Legislature's intent to hold an aggrieved party to its choice of an administrative forum. Accordingly, we find that the Legislature intended that determinations of the State Tenure Commission were to be final in the absence of an appeal and that collateral estoppel therefore applies to those determinations.

In his civil rights claim, plaintiff was required to show (1) that he was a member of a protected class and was discharged; (2) that he was qualified for the position at the time of discharge; and (3) that age was a "determining factor" in the decision to discharge him. *Lytle, supra* at 186. Because the State Tenure Commission necessarily determined that plaintiff was

not qualified for the position and relitigation of this issue is barred by collateral estoppel, summary disposition pursuant to MCR 2.116(C)(10) was appropriate.

Affirmed.

/s/ Richard Allen Griffin

/s/ Richard A. Bandstra

/s/ Meyer Warshawsky

¹ Plaintiff's complaint also included a claim for breach of collective bargaining agreement in violation of the Michigan Public Employment Relations Act (PERA, MCL 423.210; MSA 17.455(10)); however, this claim was voluntarily dismissed by plaintiff.