STATE OF MICHIGAN

COURT OF APPEALS

HENRIETTA ROGERS and HATTIE MAE JOHNSON,

Plaintiffs–Appellants,

v

RIVER ROUGE SCHOOL DISTRICT, and RIVER ROUGE BOARD OF EDUCATION,

Defendants–Appellees.

UNPUBLISHED
September 6, 1996

No. 183480
LC No. 94-404118-NZ

Before: Corrigan, P.J., and Jansen, and M. Warshawsky,* JJ.

PER CURIAM.

In this gender discrimination action, plaintiffs appeal by right the order granting summary disposition under MCR 2.116(C)(10) to defendant River Rouge School District. Plaintiffs have not renewed their claims against the River Rouge Board of Education in this Court. We affirm.

In 1980, defendants hired plaintiff Hattie Mae Johnson as a substitute custodian on an as-needed basis. In 1984, plaintiff Henrietta Rogers was also hired as a substitute custodian. Both women had applied to be full-time custodians, but defendants contended that no openings for full-time custodians existed. From 1987 through 1992, however, defendants hired other individuals as full-time custodians and hall monitors. Plaintiffs applied for these positions, but defendants did not hire them. Under the collective bargaining agreement between the River Rouge School District and the American Federation of State, City and Municipal Employees (AFSCME), Local 2555, preference in hiring is given to qualified bargaining unit members over outside applicants. Permanent full-time employees were represented by AFSCME Local 2555. Substitute employees like plaintiffs were not union members.

On appeal, plaintiffs argue that defendants discriminated against them on the basis of their gender by failing to hire them as full-time custodians and instead hiring males. Defendants submitted the

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

affidavit of the school official who maintained employment application files to establish the exact dates of plaintiffs' applications and the identities of the persons hired. Over the time period during which plaintiffs applied for full-time custodial positions, defendants hired five full-time custodians; two of those hirees were women.[1] Under the collective bargaining agreement, however, plaintiffs were eligible for only two full-time positions; defendants hired two men for those positions. Defendants produced affidavits demonstrating that the two men each had prior custodial experience and had scored highly on their interviews; one man had a builder's license and mechanical and electrical experience. Plaintiffs did not counter this evidence; rather, they merely alleged their beliefs that the men chosen did not have custodial experience.

Defendants first raise the statute of limitations as a defense to plaintiffs' claim. In their complaint, plaintiffs listed specific dates that they applied for positions in 1991 and 1992. Plaintiffs, however, offered no evidence to support the dates, and their testimony regarding when they applied and who was awarded the position is inconsistent. Later, in their brief in opposition to defendant's motion for summary disposition, plaintiffs expanded their list of dates of application for full-time custodial positions to include dates in 1988, 1989, and 1993. Defendants assert that the statute of limitations bars plaintiffs' claims occurring prior to 1991.

The circuit court did not rule on defendants' assertion under MCR 2.116(C)(7) that the statute of limitations barred plaintiffs' claims. Instead, the lower court granted defendants' motion for summary disposition on the basis of MCR 2.116(C)(10), finding no factual support for the claim. We decline to reach the statute of limitations issue as the circuit court never considered it. Appellate review is limited to issues ruled on by the lower court. *Bowers v Bowers,* 216 Mich App 491; _____NW2d ____ (1996).

Plaintiffs argue that the court improperly granted summary disposition on their gender discrimination claim. This Court reviews de novo a lower court's ruling on a motion for summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Mascarenas v Union Carbide Corp,* 196 Mich App 240, 243; 492 NW2d 512 (1992). A motion under MCR 2.116(C)(10) must be supported by affidavits, depositions, admissions, or other documentary evidence. *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994). The party opposing such a motion must set forth specific facts to show that a genuine issue of material fact exists for trial. *Patterson, supra*. Further, the opposing party must come forward with evidence, beyond mere allegations or denials in the pleadings, to establish the existence of a material factual dispute. *Boyle v Odette,* 168 Mich App 737, 743; 425 NW2d 472 (1988). This Court views the entire record in a light most favorable to the nonmoving party to determine whether a factual issue has been developed. *Farm Bureau Mut Ins Co of Michigan v Stark,* 437 Mich 175, 184-185; 468 NW2d 498 (1991).

Plaintiffs have failed to establish a prima facie case of discrimination under a disparate-treatment theory. To establish a prima facie case, plaintiffs must prove that they applied for and were qualified for an available position, but that defendants rejected them under circumstances giving rise to an inference

of unlawful discrimination. *Featherly v Teledyne Industries, Inc,* 194 Mich App 352, 358; 456 NW2d 361 (1992). Plaintiffs have not proven circumstances giving rise to an inference of unlawful discrimination.

Additionally, defendants argue that the collective bargaining agreement provides a defense to plaintiffs' action. When a defendant raises a collective bargaining agreement as a defense, the question is whether the defendant took the alleged actions adverse to the plaintiff because of race, color or gender, or solely because the defendant felt bound by the collective bargaining agreement to do so. *Hall v Kelsey-Hayes Co,* 184 Mich App 277; 457 NW2d 143 (1990).

Regarding the three positions given to members of AFSCME Local 2555, plaintiffs have offered no evidence that defendants failed to hire them because of their gender and not because they felt bound by the collective bargaining agreement. Moreover, two of those hirees were women. Therefore, plaintiffs have failed to establish a prima facie case of gender discrimination with regard to positions awarded union members.

Regarding the two custodial positions awarded to male, non-union members, plaintiffs attempt to demonstrate circumstances giving rise to an inference of unlawful discrimination in two ways. First, plaintiffs rely on this Court's decision in *Ginther v Ovid-Elsie Area Schools*, 201 Mich App 30; 506 NW2d 523 (1993). The *Ginther* opinion has no precedential force or effect, 444 Mich 1218 (1994). In *Ginther*, the plaintiff alleged that the school system's past practice was to give priority to part-time custodians if a permanent custodian position became available. Further, the plaintiff alleged that the male applicant chosen for the full-time custodial position was less qualified than she. The facts of this case are easily distinguished from *Ginther*. Plaintiffs offered no testimony to support that defendants gave them any full-time employment assurances. That plaintiff Johnson allegedly was told once in 1980 by her supervisor that she would become a full-time employee if she accumulated enough work hours is not sufficient to establish a past practice. Further, at their depositions, both plaintiffs acknowledged that they were unaware of the actual qualifications of the male applicants who were awarded the full-time positions; plaintiffs merely believed that the men were less qualified.

Second, plaintiffs contend that the testimony of Dr. Fredric Rivkin, the Director of State and Federal programs for defendants, evidences discriminatory intent. We disagree. Rivkin testified in his deposition that he had recommended plaintiff Rogers for a position as custodian because the district was looking for African-American females for the custodial staff. Plaintiffs allege that, as this statement illustrates that Rivkin considered gender in making his hiring recommendations, they have demonstrated an inference of discrimination. We agree with the lower court that this gender-based reason, if true, operates in plaintiffs' favor rather than against them and does not give rise to an inference of unlawful discrimination.

A party opposing summary disposition must come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute. *Boyle, supra* at 743. Plaintiffs have failed to do so.

Affirmed.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

[1] From 1987 through 1993, defendants hired 22 women as full-time employees. All were AFSCME members.