

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD E. BARBER,

Plaintiff-Appellant,

v

COUNTY OF KALAMAZOO, DOUGLAS W.
SLADE, and SUSAN SAYLES,

Defendants-Appellees.

UNPUBLISHED

May 16, 2006

No. 266320

Kalamazoo Circuit Court

LC No. A04-000434-CZ

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this case involving alleged age discrimination and an alleged violation of the Veterans Preference Act, MCL 35.401 *et seq.*, plaintiff appeals as of right from the trial court's order granting summary disposition to defendants under MCR 2.116(C)(10).

In August 2004, plaintiff filed a complaint alleging that defendants¹ committed age discrimination by terminating his employment as a Finance Officer with the Family Division of the Kalamazoo Circuit Court and subsequently failing to hire him for a newly created position. In 2003, plaintiff's job and that of his supervisor, Phil Grabowski, were eliminated² and a new position – Child Care Fund Specialist (CCFS) – was created that incorporated both jobs. The posting for the new position occurred in December 2003. Plaintiff, fifty-five years old at the time of the posting, alleged that he was fully qualified for the new position and was not hired because of his age. Sheila Parkman, a woman in her thirties, was hired instead.

Plaintiff, a veteran, also filed in August 2004 a petition for a writ of mandamus, alleging that defendants violated the Veterans Preference Act, MCL 35.401 *et seq.*, by failing to hire him for the new position.

¹ During the times pertinent to this case, defendant Douglas Slade was the Court Administrator and defendant Susan Sayles was the Administrator of Finance Services for the Kalamazoo Circuit Court.

² Defendants indicated that the elimination of the two positions occurred because of economic constraints.

On August 2, 2005, defendants moved for summary disposition of both claims under MCR 2.116(C)(10), arguing in their supporting brief that age played no role in their decision and that defendant was not hired as the CCFS because he was not qualified for the position and had a reputation as a person who “wasted time,” interrupted others as they tried to work, and had a “bad attitude about the [c]ourt.” Defendants attached to their supporting brief excerpts from numerous depositions.

Rebecca Abbs-Kucks testified that she worked with plaintiff and that he would often want to chat with her when she had work to complete. She stated that she perceived him to be “critical of [the] administration of the court in general.” Patricia Conlon, a judge with the court, testified that plaintiff was a successful worker and that she sent a letter to defendant Susan Sayles inquiring why plaintiff had not been interviewed for the CCFS position. Gloria Dennis, a coworker of plaintiff’s, testified that plaintiff “was only willing to do his job responsibilities and . . . nothing else.” Stephen Gorsalitz, another judge with the court, testified that plaintiff “did a good job,” but Gorsalitz admitted that plaintiff had a reputation for taking too many smoking breaks.

Plaintiff testified that Grabowski had informed him that he had been spending too much time talking with colleagues and smoking cigarettes. He testified as follows regarding what Sayles told him when he asked why he was not being interviewed for the CCFS position: “[S]he said I would change for a short time and be back to my old ways, that I wouldn’t accept change. And I looked at it as low opinion of my ability and old dog/new tricks type statement [sic].” Plaintiff testified that, in his prior job with the court, he supervised another employee “indirectly.”

Susan Sayles testified that the CCFS position was a combination of plaintiff’s and Grabowski’s prior positions. She stated that she did not think plaintiff could handle the new job “[b]ecause it was adding some additional duties to the job that I wasn’t sure that he could handle.” Sayles stated that she did not believe that plaintiff would be an effective supervisor of Gloria Dennis,³ another court employee, because he “talk[ed] down to her” and often complained about her. Sayles mentioned her belief that plaintiff would not effectively prepare and submit various reports as required by the CCFS position because he “did not want to try anything new.” Sayles indicated that another reason she did not interview plaintiff was because he “didn’t have the attitude that he would want to work with [the] administration” and “lots of times he didn’t have a positive attitude.” She also stated that he “didn’t want to have to do any more work.” Sayles acknowledged that plaintiff met the educational requirements for the position, but she stated that he “did not meet the computer requirement in that he did not know [Microsoft] Word, he did not know [Microsoft] Excel.” When asked how she knew that plaintiff did not know how to use Word or Excel, Sayles stated:

Because he would not use it [sic]. He would, if anything needed to be typed, he would give it to Gloria Dennis to be typed on paper, and then he would check it

³ The CCFS position encompassed the supervision of Dennis.

after it was typed. We set up spreadsheets for him to use and he wouldn't use them because he wanted to do it on paper instead of using the computer.

Douglas Slade testified, in contrast to earlier testimony given by plaintiff, that the job eliminations were not "geared around who was eligible for early retirement."

Plaintiff filed a response to defendants' motion on September 2, 2005. He attached to his response several pieces of documentary evidence, including "certificates of achievement" demonstrating that he completed introductory courses for Word and Excel. He attached a performance review indicating that he had performed his job duties at the level of "Met Standard." Plaintiff also attached an affidavit from a business professor who opined that defendants "did not follow their procedures relative to the decision[s]" to not interview or hire plaintiff for the CCFS position and that "[t]he record of this case creates an inference that a primary factor in the decision to not interview nor hire [plaintiff] for the position . . . was his age." Elizabeth Parker, a former coworker of plaintiff's, stated in an attached affidavit that plaintiff "was very competent in working with his computer in fulfilling his job functions." Sidney Paul, another former coworker of plaintiff's, stated in an affidavit that he had observed plaintiff "performing his job responsibilities in an outstanding manner throughout the twenty (20) years I worked with him." Douglas Weldon, yet another former coworker, concurred with Paul that plaintiff had been an outstanding employee and concurred with Parker that plaintiff "was very competent in working with his computer in fulfilling his job functions."

Plaintiff also attached to his response excerpts from several depositions. In plaintiff's deposition, he stated that he had some supervisory duties over Gloria Dennis. Richard Kinast testified that the subject of the Veterans Preference Act was not covered in training sessions for county employees. Sheila Parkman testified that she had some supervisory experience with the Grand Rapids Public Schools because she would oversee operations when "the director of the specially funded programs was absent." Susan Sayles testified that she did not know that plaintiff was a veteran until he filed his lawsuit. Virginia Goodacre, a former supervisor of plaintiff's, testified that "he performed the duties that were required of the position as best they could be performed."⁴

On September 12, 2005, the trial court issued an opinion and order granting defendants' motion for summary disposition. The court stated that the county was forced to combine plaintiff's and Grabowski's jobs because of budgetary restrictions and that discrimination did not play a role in the decision. With regard to plaintiff's failure-to-hire claim, the court stated that, even assuming, arguendo, that plaintiff presented a prima facie case of age discrimination, defendants set forth sufficient nondiscriminatory reasons for their decision. The court concluded that plaintiff "has not submitted evidence to raise a genuine issue of material fact regarding

⁴ We note that we are not considering any documentary evidence attached to the parties' appellate briefs if the evidence was not also included in the lower court record. A party may not enlarge the record on appeal. See *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989).

whether [d]efendants' nondiscriminatory reasons were a pretext for illegal age discrimination." The court further stated, in part:

Plaintiff has failed to present any evidence showing that youthful age was a required or desirable qualification for the position.

* * *

. . . Ms. Sayles testified that [p]laintiff was not qualified for the position. She testified that [p]laintiff did not have some of the core competencies and was not deemed qualified to do several of the jobs [sic] duties. Thus, the [c]ounty policy did not require that [p]laintiff be interviewed for the new position [Emphasis in original.]

The court stated that plaintiff Veterans Preference Act claim was not viable because he was not qualified for the CCFS position.

Plaintiff first argues that the trial court erred in dismissing his age discrimination claim. We review de novo a trial court's decision with regard to a motion for summary disposition. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Moreover,

[a] motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. [*Hazle, supra* at 461.]

In the present case, plaintiff admits that he had no *direct* evidence of age discrimination. Accordingly, he proceeded with his case using the framework set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Hazle, supra* at 462-463.

Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Id.* at 463.]

If a plaintiff satisfies the above elements, a presumption of unlawful discrimination arises. *Id.* "[O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id.* at 464. "If the employer makes such an articulation, the presumption created by the McDonnell Douglas prima facie case drops away." *Id.* at 465.

At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that

discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. . . . [A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination. [*Id.* at 465-466 (internal citations and quotation marks omitted).]

“[F]or purposes of a motion for summary disposition or directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision.” *Id.* at 466.

Here, we conclude that plaintiff did not even satisfy his first necessary step of establishing a prima facie case. The position description for the CCFS job clearly stated, “Knowledge of Windows, Microsoft Word and Excel are required.” Sayles testified that plaintiff did not meet this requirement. She testified that he “did not meet the computer requirement in that he did not know Word, he did not know Excel.” When asked how she knew that plaintiff did not know how to use Word or Excel, she stated:

Because he would not use it [sic]. He would, if anything needed to be typed, he would give it to Gloria Dennis to be typed on paper, and then he would check it after it was typed. We set up spreadsheets for him to use and he wouldn't use them because he wanted to do it on paper instead of using the computer.

Plaintiff provided affidavits from individuals who stated that plaintiff was competent in using his computer, but the individuals did not specifically comment on plaintiff's knowledge of Word or Excel. Plaintiff also provided “certificates of achievement” demonstrating that he completed introductory courses for Word and Excel in May and June of 2002. In our view, the fact that plaintiff completed these *introductory* courses one and one-half years in the past was simply insufficient to contradict Sayles's testimony that plaintiff did not know how to use Word or Excel. Accordingly, Sayles testimony was essentially un rebutted. Plaintiff did not meet the minimum qualifications for the position and therefore did not succeed in setting forth a prima facie case of age discrimination.⁵ *Id.* at 463. Therefore, the trial court did not err in granting defendants' motion for summary disposition with respect to plaintiff's claim of age discrimination.

Even assuming, arguendo, that plaintiff *did* satisfy the minimum qualifications for the position, we would still find no basis for reversing the trial court's decision with regard to plaintiff's failure-to-hire claim. Indeed, defendants articulated a legitimate, nondiscriminatory reason for failing to hire plaintiff: his reputation as someone with a less-than-positive attitude towards his work. After defendants articulated this legitimate, nondiscriminatory reason for failing to hire plaintiff, plaintiff failed to set forth sufficient evidence demonstrating that “discrimination was a motivating factor for the adverse action taken by the employer toward” him and that defendants “proffered reason was . . . a pretext for [unlawful] discrimination.” *Id.*

⁵ Moreover, defendants, contrary to plaintiff's argument, were not obligated to interview plaintiff, given that he did not meet the minimum qualifications for the CCFS position.

at 465-466 (internal citations and quotation marks omitted). Plaintiff's proffered evidence was simply insufficient to demonstrate the existence of a genuine issue of material fact.

Plaintiff next argues that the trial court erred in dismissing the Veterans Preference Act claim. We disagree. MCL 35.401 states, in part:

In every public department and upon the public works of the state and of every county and municipal corporation thereof honorably discharged veteran as defined by Act No. 190 of the Public Acts of 1965, as amended, being sections 35.61 and 35.62 of the Michigan Compiled Laws, shall be preferred for appointment and employment. Age, loss of limb, or other physical impairment which does not, in fact, incapacitate, shall not be deemed to disqualify them. When it shall become necessary to fill by appointment a vacancy occurring in an elective office, the appointment shall be deemed to be within this act. The applicant shall be of good moral character and shall have been a resident of the state for at least 2 years and of the county in which the office or position is located for at least one year, *and possess other requisite qualifications*, after credit allowed by the provisions of any civil service laws. [Emphasis added.]

Unless they are specifically defined in the statute, the words or phrases used in a statute should be interpreted according to their plain and ordinary meaning. *Bio-Magnetic Resonance, Inc v Dep't of Public Health*, 234 Mich App 225, 229; 593 NW2d 641 (1999). The above statute clearly states that "[t]he applicant shall . . . possess other requisite qualifications" for the position sought. As we noted above, plaintiff failed to establish that he possessed the requisite qualifications for the CCFS position. Therefore, no violation of the Veterans Preference Act occurred, and the trial court did not err in dismissing plaintiff Veterans Preference Act claim.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey