

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND BRAATE, GAYLORD GRAY,
JAMES REDINGER and DAVID VANDERWALL,

UNPUBLISHED
December 21, 1999

Plaintiffs-Appellants,

v

CITY OF GRAND RAPIDS and GRAND RAPIDS
FIRE DEPARTMENT,

No. 208507
Kent Circuit Court
LC No. 95-002621 CZ

Defendants-Appellees.

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting defendants' motion for directed verdict in this age discrimination case. Plaintiffs are all captains with the Grand Rapids Fire Department and claim they were denied promotions to the rank of battalion chief because of their ages. We affirm.

Plaintiffs first argue that the trial court used the wrong legal standard in deciding defendants' motion for directed verdict because the court stated that it was considering all of the evidence presented, including that which detracts from, as well as supports, a claim of age discrimination. We find no error. While a court is required to *view* the evidence in the light most favorable to the nonmoving party when deciding a motion for directed verdict, it properly may *consider* all of the evidence presented up to the time of the motion. *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 398-399; 586 NW2d 549 (1998). Examining the trial court's comments in context, it is apparent that the trial court employed the correct legal standard in considering defendants' motion for directed verdict.

Next, plaintiffs contend that the trial court erred in finding that plaintiff Redinger failed to establish a prima facie case of age discrimination. Plaintiffs do not dispute that Redinger was younger than one of the candidates who was promoted. Instead, they argue that three out of the four candidates who received promotions were younger than Redinger and, therefore, as to those three, a prima facie case was established.

In *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177 (Weaver, J.), 185 (Brickley, J.); 579 NW2d 906 (1998), our Supreme Court held:

To establish a prima facie case of age discrimination, plaintiff must prove, by a preponderance of the evidence, that (1) she was a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was replaced by a younger person.

Plaintiffs have provided no legal support for their interpretation of requirement (4) under the facts of this case, with respect to Redinger. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997). Moreover, even if we were to accept plaintiffs' argument here, the trial court's rationale for granting a directed verdict with respect to the other three plaintiffs is equally applicable to plaintiff Redinger and, therefore, any error is harmless.

Plaintiffs argue that they presented direct evidence of age discrimination and, therefore, the trial court erred in utilizing the *McDonnell-Douglas*¹ framework when deciding defendant's motion for a directed verdict. "[W]here a plaintiff presents direct evidence of discriminatory animus, it is erroneous for a trial court to use the *McDonnell Douglas* framework." *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 807; 584 NW2d 589 (1998), as adopted by *Lamoria v Health Care & Retirement Corp*, 233 Mich App 560, 562; 593 NW2d 699 (1999) (special conflict panel). "Direct evidence" of discrimination is evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." *Harrison v Olde Financial Corp*, 225 Mich App 601, 606, 610; 572 NW2d 679 (1997), quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997).

Upon de novo review of the record, *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997), we find that plaintiffs failed to present direct evidence of age discrimination. As the trial court observed, the statements made by the fire chief and the other evidence relied upon by plaintiffs do not rise to the level of direct evidence of age discrimination. *Lamoria, supra* at 811; *Downey v Charlevoix Co Bd of Co Road Comm'rs*, 227 Mich App 621, 633-635; 576 NW2d 712 (1998).

Finally, plaintiffs claim that the trial court erred in finding that the evidence was insufficient to create a question of fact for the jury as to age discrimination. We disagree. To determine this question, this Court examines the evidence in a light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference that can be drawn from the evidence. If reasonable jurors could differ, then the question is one for the jury. *Price v Long Realty, Inc*, 199 Mich App 461, 472; 502 NW2d 337 (1993).

The evidence demonstrated that the candidates who were promoted were all rated higher and received superior recommendations than plaintiffs. Plaintiffs failed to demonstrate that they deserved a ranking equal to or better than the firefighters who were promoted. Additionally, plaintiffs failed to demonstrate a pattern of age discrimination. Apart from their unsupported assertions and subjective beliefs that they were as good or better than the firefighters who received higher ratings, plaintiffs

presented no evidence to demonstrate that their lower ratings were due to age discrimination. Nor did plaintiffs show that defendants' proffered nondiscriminatory reason was not the true reason for not promoting them, or that age was a motivating factor in the decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697 (Brickley, J.), 707-708 (Riley, J.); 568 NW2d 64 (1997). Examining the evidence in the light most favorable to plaintiffs and giving plaintiffs the benefit of every reasonable inference, we conclude that the trial court did not err in determining that the evidence failed to establish a question upon which reasonable minds could differ as to whether plaintiffs were discriminated against on the basis of age. *Price, supra*.

We affirm.

/s/ Richard A. Bandstra

/s/ Patrick M. Meter

Judge Markman did not participate.

¹ *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).