

STATE OF MICHIGAN
COURT OF APPEALS

PATRICIA LAHAR,

Plaintiff-Appellant,

v

OAKLAND COUNTY,

Defendant-Appellee.

UNPUBLISHED

August 25, 2005

No. 254457

Oakland Circuit Court

LC No. 2003-049268-CL

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment that granted defendant's motion for summary disposition. Plaintiff's claim alleged that defendant, her employer, committed age discrimination in violation of MCL 37.2202 by rejecting her application for promotion to a manager position in favor of a younger, less-qualified candidate. The trial court held that plaintiff failed to present any evidence establishing that plaintiff's age was a motivating factor in hiring someone else or that defendant's failure to hire plaintiff was a pretext for unlawful discrimination. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Shortly after plaintiff's supervisor announced his retirement from Oakland County's Children's Village, plaintiff applied for his position. However, three months later, defendant appointed another employee, Joanna Overall, who was ten years younger than plaintiff.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Defendant brought its motion for summary disposition pursuant to MCR 2.116 (C)(10), arguing that plaintiff failed to establish any evidence that age was a determining factor in defendant's decision not to promote plaintiff. When deciding a motion under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Meyer v City of Center Line*, 242 Mich App 560, 574; 619 NW2d 182 (2000).

Considering this standard of review, the question is whether a material factual dispute exists as to whether defendant's decision to promote another employee was based on plaintiff's age. MCL 37.2202(1)(a) provides:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Intentional discrimination can be proven by direct and circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). Direct evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). In this case, the record contains no direct evidence of age discrimination. In addition, neither plaintiff's motion for summary disposition below nor her brief on appeal allege that any direct evidence of age discrimination exists; instead both allege that Overall's lack of qualifications, compared to plaintiff's superior qualifications, constitute circumstantial evidence of discrimination.

Absent direct evidence, a plaintiff may establish a prima facie case of discrimination under the Civil Rights Act by showing that: (1) the plaintiff was a member of a protected class; (2) an adverse employment action was taken against the plaintiff; (3) the plaintiff was qualified for the position; and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Town, supra* at 696-697.

In this case, the dispute rests on the fourth element, whether the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. To establish an inference of unlawful discrimination, plaintiff must present evidence that the employer's actions, if unexplained, are more likely than not based on impermissible factors. *Hazle, supra* at 470-471. An inference of unlawful discrimination does not arise merely because an employer chose between two qualified candidates. *Id.* Under such a scenario, an equally, if not more reasonable inference would be that the employer simply selected the candidate that it believed to be the most qualified for the position. *Id.* Plaintiff argues that Overall's former jobs did not require any supervisory and/or administrative responsibility as required for the position and, therefore, that Overall bolstered her claims of supervisory and administrative experience. Defendant presented evidence that Overall had the requisite experience, but plaintiff failed to present any evidence to support her assertions. The nonmovant may not rest upon mere allegations, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

By failing to set forth specific facts establishing that defendant's actions were likely based on impermissible factors, plaintiff has not established a prima facie case of age discrimination. *Hazle, supra* at 470.

Even assuming plaintiff presented evidence that established a presumption of discrimination, defendant may still rebut this presumption by articulating a legitimate, nondiscriminatory reason for hiring a younger person. *Town, supra* at 695-696. If the defendant employer articulates such a reason, the presumption of discrimination goes away. *Hazle, supra* at 465. In this case, defendant's legitimate, nondiscriminatory reason for not promoting plaintiff was that Overall showed more interest in the job, and came to the interview with ideas for improving the Children's Village, while plaintiff appeared stagnant and less enthusiastic about the manager position. Dr. Gordon, who interviewed both women, testified that timeliness was an ongoing problem with plaintiff and that "sometimes her reports and her recommendations were ponderous and they just took a long time." Courts must not second-guess whether the employment decision was "wise, shrewd, prudent, or competent." *Town, supra* at 704. Instead, the proper focus is on whether the decision was "lawful," that is, one that is not motivated by a "discriminatory animus." *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 257; 101 S Ct 1089; 67 L Ed 207 (1981). Plaintiff has presented no evidence of such animus.

Plaintiff also argues that the trial court erred by excluding her expert's testimony, and that his testimony created a genuine issue of material fact about whether circumstantial evidence existed from which discrimination could be inferred. Plaintiff hired her expert to testify on defendant's hiring standards and process. He provided an affidavit in which he opined "that the process was flawed, executed in a cursory fashion, and resulted in appointment of the less qualified of the two candidates." Evidence in support of, or in opposition to, a motion for summary disposition shall be considered only to the extent it is admissible at trial. MCR 2.116(B)(6). We review a trial court decision as to whether a particular witness qualifies as an expert for an abuse of discretion. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). In this case, plaintiff failed to present any evidence establishing that her expert's testimony would provide "recognized scientific, technical or other specialized knowledge," as is required under MRE 702. Rather, the expert simply reiterated plaintiff's reasoning for why she was more qualified for the position than Overall. For this reason alone, the trial court properly excluded his testimony.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens