STATE OF MICHIGAN

COURT OF APPEALS

JAN C. TITSWORTH, Plaintiff-Appellant,	UNPUBLISHED August 5, 2014
v	No. 314243 Saginaw Circuit Court
SHIAWASSEE SPORTS CENTER, INC., Defendant-Appellee.	LC No. 12-015147-CD

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

PER CURIAM.

Plaintiff filed suit under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*., alleging that her employer, defendant Shiawassee Sports Center, Inc., discriminated against her by not promoting or rehiring her because of her age. Defendant filed for summary disposition, which the trial court granted on December 21, 2012. Plaintiff appeals as of right. We affirm.

In 2005, defendant hired plaintiff to work full-time in "motor clothes" sales and customer service. At the time, Steve Alger was defendant's general merchandise manager. Before his retirement in 2009, he attempted to assist the owner and general manager, Roy Lewis, in selecting Alger's replacement. Plaintiff testified in her deposition that Alger encouraged her to apply and told her she was a strong candidate and qualified for the position. Alger testified that he narrowed the list of candidates to five he thought were qualified. Of the five finalists, two were 28 to 30 years old, one was in his mid-forties, and two, including plaintiff and another employee, were in their fifties. According to Alger, during this process, he considered the candidates' experience but not their age. He turned over their files to Lewis. According to Alger, when he handed the files to Lewis, Lewis looked at the names on each file and returned to Alger the files of plaintiff and the other older employee applicant; Lewis stated that he was not interested in them but did not explain why. Evidently Lewis knew these two, as well as another applicant, but not necessarily the other two candidates. Ultimately, Lewis did not choose any in the group, but instead hired Tracy Haywood, who was 41 years old, from a broadened group of candidates. Alger maintained that he did not know how Lewis made the decision and that Lewis never mentioned anything about the candidates' ages in regard to the hiring process.

Following this event, plaintiff was laid off in the winter of 2009. Plaintiff contended that, just as she had in 2008, she volunteered to be laid off for the winter because she was more financially secure than the other employees. Plaintiff maintained that she was supposed to return

to work in March 2010. However, when she contacted Haywood in April 2010, she was told that she was not going to be rehired at that time, because business was slow. While plaintiff continued on layoff status, other women—aged 19, 21, 24, and 25—were hired. Plaintiff allegedly discovered this fact when she went to lunch with store employees in October 2011. In November 2011, Haywood recommended that plaintiff be rehired. Plaintiff was subsequently hired to work part-time.

Plaintiff argues that the trial court erred when it granted summary disposition to defendant. When deciding a motion for summary disposition pursuant to 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. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Wayne County Retirement Sys v Wayne County*, 301 Mich App 1, 25; 836 NW2d 279 (2013), lv granted on other grounds 495 Mich 983 (2014) (internal citation and quotation marks omitted).

Under the Elliott-Larsen Civil Rights Act, an employer cannot discriminate against an employee because of age. MCL 37.2202. When only circumstantial evidence of discrimination exists, the *McDonnell-Douglas*[1] burden-shifting approach allows the plaintiff to establish a rebuttable prima facie case of unlawful discrimination. *Sniecinski v Blue Cross & Blue Shield*, 469 Mich 124, 133-134; 666 NW 2d 186 (2003). To establish a prima facie case, a plaintiff must satisfy four elements, which are tailored to the facts and circumstances of each case. *Id*. at 134, n 7. In the instant case, plaintiff had to present evidence that: (1) she belonged to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the employer promoted a younger applicant under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 134. To satisfy the fourth element, a plaintiff is not required to present evidence of "relative qualifications" to establish a prima facie case of discrimination, although evidence of such qualifications can serve to satisfy the fourth element. *Hazle v Ford Motor Co*, 464 Mich 456, 468-469; 628 NW2d 515 (2001). "[A] plaintiff must offer evidence showing something more than an isolated decision to reject a [protected] applicant. . . . As a matter of law, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates. 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 most qualified for the position." *Id*. at 471. If a plaintiff establishes a prima facie case of discrimination, causation between the discriminatory animus and the adverse employment decision is presumed. *Sniecinski*, 469 Mich at 134-135. The defendant then has a burden to rebut that presumption by articulating a legitimate, nondiscriminatory reason for its decision. *Id*. at 135. If the defendant provides a legitimate reason, the burden shifts back to the plaintiff to show that the reason was a mere pretext for discrimination. *Id*. at 134.

Reviewing the evidence presented, we find that plaintiff did not present a genuine issue

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

of material fact regarding whether defendant failed to promote her on the basis of her age. Under the *McDonnell-Douglas* approach, defendant concedes that plaintiff satisfied the first three elements: she belonged to a protected class;[2] she suffered an adverse employment action by not being promoted; and she was qualified for the position. However, defendant also argues, correctly, that plaintiff did not satisfy the fourth element because she did not present evidence showing that the circumstances in which the promotion occurred gave rise to an inference of unlawful discrimination.

Tracy Haywood was fifteen years younger than plaintiff at the time Haywood was hired; however, no evidence suggests that defendant chose to hire Haywood rather than promote plaintiff because of plaintiff's age. Haywood and plaintiff were similarly qualified for the position. Haywood had twelve years of experience in retail management, including three years managing retail-clothing stores, whereas plaintiff had eleven years of experience managing a retail store and five years of experience in sales with defendant. While plaintiff believes Haywood was less qualified than she because her experience was not as pertinent to the job, Haywood's experience was relatively similar, and plaintiff acknowledged that Haywood had performed better than plaintiff had expected. Thus, no inference of discrimination can be drawn from the candidates' qualifications.

Neither can such an inference be drawn from the hiring process. Steve Alger clearly did not discriminate against plaintiff because of her age while selecting candidates for Roy Lewis's review; in fact, Alger encouraged plaintiff to apply for the promotion and included her file among the five finalists he considered to be qualified. When Alger presented the five files to Lewis, Lewis looked at the names on each file, kept three files for candidates in their twenties, thirties, and forties, and handed back two files for plaintiff and a second employee, who were in their fifties. However, Lewis looked only at the names on the files, and no evidence suggests he knew all the candidates or their ages. He knew these two women, as well as another applicant, but not necessarily the other two candidates who, to his knowledge, could have also been in their fifties. During the second round, Lewis again refused to consider plaintiff and the second employee. With no more evidence than these two isolated decisions to reject plaintiff's application, the conclusion that Lewis refused to promote plaintiff because of her age is mere speculation and, therefore, insufficient to establish an inference of unlawful discrimination. Indeed, when asked why she believes age was a factor in choosing Haywood, other than the fact that Haywood is younger, plaintiff admitted, "I don't have facts. I only have feelings about it." Plaintiff did not establish a prima facie case of discrimination; thus, she presented no genuine issue of material fact and summary disposition regarding this claim of discrimination was appropriate.

Nor did plaintiff establish a genuine issue of material fact regarding whether defendant

[2] Defendant notes that Tracy Haywood was 41 years old and, therefore, also belongs to the same protected class, but this fact is not necessarily relevant; we note that defendant is 15 years older than Haywood. See *O'Connor v Consol Coin Caterers Corp*, 517 US 308, 312-13; 116 S Ct 1307; 134 L Ed 2d 433 (1996).

failed to rehire her on the basis of her age. Defendant concedes that plaintiff presented sufficient evidence to establish a prima facie of unlawful discrimination. However, defendant argues that it provided a legitimate, nondiscriminatory reason for not rehiring plaintiff. We agree. In addition, plaintiff did not present sufficient evidence to create a question of fact regarding whether the proffered reason was pretextual.

Defendant argues that it delayed in rehiring plaintiff not because of age but because of her work performance.[3] The record supports this argument. Paul Lipovsky, defendant's former general manager, testified that plaintiff was not rehired after being laid off in 2009 because of performance issues. Lipovsky said plaintiff lacked a desire to work, performed more poorly than other staff, was not the "most aggressive" salesperson, and took a lot of time off. He testified that he instructed Haywood to hire more aggressive workers. Haywood said plaintiff was a "fair employee" who was not the weakest but was "certainly not the best." She stated that plaintiff "doesn't take it upon herself to go above and beyond and do things on her own." Alger, while he did indeed include plaintiff in suggested pools of people for promotion, acknowledged that plaintiff was not a self-starter and that she "waited to be given [tasks]." Finally, and significantly, defendant did eventually recall plaintiff to work.[4] Plaintiff has simply failed to present evidence that the failure to rehire was pretextual or "unworthy of belief," see *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 443; 622 NW2d 337 (2000) (internal citations and quotation marks omitted), and we find no basis on which to reverse the trial court's decision.

Given our resolution of this case, we need not address the issue of laches as discussed by the parties.

Affirmed.

/s/ Pat M. Donofrio
/s/ Henry William Saad
/s/ Patrick M. Meter

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[3] As noted by the trial court, plaintiff's emphasis on the lack of experience of the persons hired before plaintiff's rehire is misplaced; it was not plaintiff's *experience* but her *performance* that was at issue.

[4] Plaintiff contends that because she was indeed recalled, the purported reason for the initial failure to rehire must have been pretextual. However, the evidence tended to show that plaintiff was a "fair" employee; accordingly, it is entirely reasonable that defendant found it appropriate to decline to rehire her initially, when she compared unfavorably against other candidates, but to rehire her later when it needed another employee.