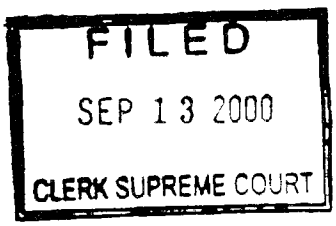
IN THE COURT OF APPEALS OF IOWA

No. 0-297 / 98-1572
Filed September 13, 2000

LEO GREEN,
Plaintiff-Appellant,

vs.

CITY OF DES MOINES,
Defendant-Appellee.



Appeal from the Iowa District Court for Polk County, George W. Bergeson Judge.

Plaintiff appeals the district court ruling granting defendant's motion for summary judgment in his employment discrimination and breach of contract action. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Robert A. Wright, Jr. of Wright and Wright, Des Moines, for appellant.

Thomas W. Foley of Nyemaster, Goode, Voights, West, Hansell & O'Brien, P.C., Des Moines, for appellee.

Considered by Vogel, P.J., and Miller and Hecht, JJ.

VOGEL, P.J.

The plaintiff-appellant, Leo Green, appeals the district court's grant of summary judgment in his employment discrimination and breach of contract action. He claims the court erred in granting defendant-appellee, City of Des Moines's motion for summary judgment because there are disputed material facts, and the fact finder should determine whether (1) he was discriminated against on the basis of his age or race, (2) Des Moines' stated reasons for its conduct were pretextual, and (3) Des Moines breached its severance pay contract.

Background. Leo Green is an African-American male born in 1938. He began working at the Des Moines public housing authority's learning center in 1993. The center was closed in June 1995, and Green's position was eliminated. Green sought and received a position as a social worker with the City of Des Moines. The parties dispute whether this was a temporary placement. In October of 1995, the position of social worker was advertised. Green, and 49 others applied for the position. The city eventually offered the job to a younger, more-qualified Caucasian woman, who was not a current city employee. She declined the offer. The City never filled the position and the position was eliminated. Green was terminated and received $2000 in severance pay. The parties dispute whether he was eligible for $5000 in severance pay. The city offered Green a position as a case manager, but he refused the offer, claiming the supervisor of that department created a hostile work environment for him. Green filed suit, claiming the city violated both state and federal law by

discriminating against him on the basis of his age and race, it breached its collective bargaining agreement by not giving him $5000 in severance pay, not giving him a permanent position as a social worker and paying him accordingly, and not treating him as a permanent employee.[1]

District court proceedings. The City filed a motion for summary judgment. The court granted the motion, dismissing Green's suit in its entirety. The court determined Green failed to establish a prima facie case of race or age discrimination. It found that even if he had made a prima facie case, he did not point to any evidence suggesting the city's explanations for its employment decisions were merely a pretext for discrimination. It determined his contract claims based on the collective bargaining agreement and the severance pay program were meritless. Green filed an unsuccessful combined Iowa Rules of Civil Procedure 179(b) and 242 motion.

Scope of review. Our task on appeal is not to weigh evidence but to determine whether a genuine issue of material fact exists and whether the district court correctly applied the law. *Junkins v. Branstad*, 421 N.W.2d 130, 132 (Iowa 1988). The district court does not weigh the evidence, but rather it considers whether a reasonable jury, when faced with the evidence presented, could return a verdict for the nonmoving party. *Bitner v. Ottumwa Comm. School Dist.*, 549 N.W.2d 295, 300 (Iowa 1996). We are obliged to review the record in the light most favorable to the party resisting summary judgment. *Junkins*, 421 N.W.2d

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[1] 42 U.S.C. 2000e-2 prohibits discrimination based on race. 29 U.S.C. 623 prohibits discrimination based on age. Iowa Code section 216.6 prohibits discrimination based on race or age. Green's suit alleged violation of all three sections.

at 132-33. Our analysis of civil rights cases is guided by federal law. *Wing v. Iowa Lutheran Hosp.*, 426 N.W.2d 175, 179 (Iowa App. 1988). To survive a motion for summary judgment, a plaintiff must establish a prima facie case of discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973).

The resister, however, "may not rest upon the mere allegations or denials of his pleading." Iowa R. Civ. P. 237(e). The supreme court has said:

> The resistance must set forth specific facts which constitute competent evidence showing a *prima facie* claim. By requiring the resister to go beyond generalities, the basic purpose of summary judgment procedure is achieved: to weed out "[p]aper cases and defenses" in order "to make way for litigation which does have something to it."

Thompson v. City of Des Moines, 564 N.W.2d 839, 841 (Iowa 1997) (*quoting Fogel v. Trustees of Iowa College*, 446 N.W.2d 451, 454 (Iowa 1989)).

Appellate claims. On appeal, Green claims the trial court erred in sustaining the city's motion for summary judgment. He argues he established a prima facie case of age and race discrimination. He asserts the city's reduction in the workforce was not properly implemented under its own rules and collective bargaining agreement, and was a pretext for discrimination against him. He argues his evidence shows he was offered the $5000 severance pay, which indicates he was entitled to it. The city claims Green's appeal is untimely because his rule 179(b) motion was improperly taken from a summary judgment ruling, and did not toll the time for filing the notice of appeal. The city previously raised this claim in a motion to dismiss, which the supreme court denied by order filed September 28, 1999.

Discrimination claim. To establish a prima facie case of discrimination, Green must establish he was in a protected group, he applied for and had the qualifications for the job, he suffered an adverse employment action or was discharged, and the position remained open and the employer continued to seek applicants with the plaintiff's qualifications. *McDonnell-Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 677; *see also Wing*, 426 N.W.2d at177 (citing *Iowa State Fairgrounds Security v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 296 (Iowa 1982)). If a prima facie claim is established, allowing the claim to survive a summary judgment challenge, the burden of production falls on the city to demonstrate it took the action for a legitimate, non-discriminatory reason. *McDonnell-Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824, 36 L. Ed. 2d at 678; *Wing*, 426 N.W.2d at 178. The burden of persuasion remains at all times on the plaintiff to prove the city's unlawful intent and its reasons were merely a pretext for discrimination. *Trobaugh v. Hy-Vee Food Stores, Inc.*, 392 N.W.2d 154, 156 (Iowa 1986).

The district court concluded Green failed to establish a prima facie case of age or race discrimination. It acknowledged the various discrepancies between Green's version and the city's version of the facts, but concluded Green "failed to articulate any facts that would raise a proper inference of discrimination." The discrepancies do not raise any issue of material fact. *See Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997) (stating facts are material only if they might affect the outcome). Concerning the various job positions and changes between positions, Green failed to show he was treated differently than

any other employee. He failed to show the vacant social worker position for which he applied ever was filled as it was, in fact, eliminated. Green's mere belief as to the elimination of those positions does not establish a disputed fact. The court concluded Green did not demonstrate he was the subject of an adverse employment action.

The court also concluded, even if Green could establish a prima facie case, nothing in the record "even begins to suggest" the city's explanations for its actions were merely a pretext for discrimination. The one isolated remark by a supervisor about Green's "age and experience" was ambiguous and Green offered no evidence the person who made the remark controlled the selection process for open positions. Green's assertion the city never acted properly according to its own city code in reducing the workforce or eliminating positions relates only to procedural issues and, even if correct, does not raise an inference of discrimination.

Contract claim. Green also raises a contractual claim that the city failed to provide him with $5,000 in severance pay he claims it offered him. The city claims Green was not eligible for the $5,000 severance package because he was not a *permanent* employee after his Department of Housing Services position was eliminated on June 30, 1995. The city asserts his placement in the social worker position was as a *temporary* employee. Green claims he did not discover his position was considered temporary until October 1995 when the social worker position was advertised to be filled. The record contains evidence the city formally notified Green on January 5, 1996 that he was eligible for the new Early

Retirement Incentive Program.[2] The program materials in the record show only *permanent* employees were eligible. A genuine issue of material fact exists concerning Green's employment status – whether he was a *temporary* or *permanent* employee at the time of his termination in March 1996. If he was a temporary employee after June 30, 1995, then he only was eligible for a $2,000 termination package. If he was a permanent employee in January 1996, he should have been eligible for the new $5,000 termination package. We conclude summary judgment was not appropriate on this claim. We therefore reverse the district court's grant of summary judgment on Count IV, Green's breach of contract claim and remand for further proceedings on this claim.

The evidence before the court did not establish a prima facie case of age or race discrimination supported by any disputed or undisputed material fact. Even if it did, Green did not provide evidence the city's actions were pretextual. Summary judgment was appropriate on Green's discrimination claims. Because a genuine issue of material fact exists on Green's breach of contract claim, we reverse the grant of summary judgment on this claim and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN **PART, AND REMANDED.**

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[2] The city had both a severance program and an early retirement incentive program. Both programs were only for *permanent* full-time city employees.