IN THE COURT OF APPEALS OF IOWA

No. 6-079 / 95-248

000275

DOUGLAS C. RUTLEDGE and EDWARD L. McELROY,

Plaintiffs-Appellants,

vs.

WINGER CONTRACTING COMPANY, and PLUMBERS AND STEAMFITTERS LOCAL NO. 33 OF DES MOINES, IOWA,

Defendants-Appellees.

FILED
APR 23 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Wapello County, Dan Morrison, Judge.

Plaintiffs appeal the district court's order granting defendants' motion for summary judgment in this age discrimination action. **AFFIRMED.**

Garold F. Heslinga of Heslinga, Heslinga & Dixon, Oskaloosa, for appellants.

Jerome M. Beaver of Kiple, Kiple, Denefe, Beaver & Gardener, Ottumwa, for appellee Winger Contracting Company.

Thomas W. Foley of Nyemaster, Goode, McLaughlin, Voights, West, Hansell & O'Brien, P.C., Des Moines, for appellee Plumbers and Steamfitters Local 33.

Heard by Sackett, P.J., and Cady and Streit, JJ.

SACKETT, P.J.

Plaintiffs-appellants Douglas C. Rutledge and Edward L. McElroy filed an age discrimination action against defendants-appellees Winger Contracting Company, their former employer, and Plumbers and Steamfitters Local No. 33 of Des Moines, Iowa, their union. The case was dismissed on defendants' motion for summary judgment. Plaintiffs appeal the district court's order granting defendants' motion for summary judgment. They contend they presented sufficient facts which, if believed, would support the elements of a prima facie case of age discrimination. We affirm.

Plaintiffs were members of the union for over thirty years. They are both journeymen steamfitters and pipefitters. The union operates a referral service and has a working agreement with Winger Contracting (Winger).

In March 1992, plaintiff McElroy was fifty-six years old and plaintiff Rutledge was fifty-three. The union referred them toWinger. Plaintiff Rutledge had worked for Winger on other occasions when he was forty-eight years old, fifty years old, and fifty-one years old. Plaintiff McElroy had been hired byWinger eleven times on referrals from the union when he was between the ages of forty-nine and fifty-six years old. There is no evidence age was a consideration in giving the men jobs.

Plaintiffs started working for Winger toward the end of March 1992. On April 16, 1992, Winger laid both men off because the construction company did not have the necessary materials. The fact there were not sufficient materials is not disputed. The lay off notice indicated they were eligible to be rehired.

In July 1992, the union's business manager was told Winger would not rehire the men because Winger was dissatisfied with their work and their disruptive nature. The union noted the lay off notice had indicated plaintiffs were eligible for rehire. Winger then agreed plaintiffs would be eligible for rehire when work became available.

Plaintiffs demanded to be rehired immediately. Winger refused. Although subsequent offers of employment were made to plaintiffs, they continued to refuse the offers. It was plaintiffs' position they should have back pay and fringe benefits. Plaintiffs filed a grievance against Winger challenging their lay offs. They did not contend they were subject to age discrimination at this time. The union grievance board ruled Winger did not violate the collective bargaining agreement in laying off plaintiffs. Following a hearing, the grievance board found Winger had not violated any provision of the working agreement in laying off plaintiffs. Winger offered to make plaintiffs re-eligible for rehiring when work was available, but again plaintiffs refused, claiming they wanted immediate re-employment with back pay and fringe benefits.

In April 1993, after receiving a right to sue notice from the Iowa Civil Rights Commission, plaintiffs filed a petition against the union and Winger alleging age discrimination and breach of express and implied employment contracts. The union and Winger each filed motions for summary judgment.

The district court found no genuine issue of material fact existed in regard to plaintiffs' age discrimination claim against the union and granted its motion for summary judgment on this claim. However, the court denied Winger's summary judgment motion on the discrimination claim finding there was a genuine issue of material fact in regard to whether plaintiffs' lay offs were attributable to age or disruptive behavior. The court granted summary judgment for both defendants in regard to the contract claims.

Winger filed an Iowa Rule of Civil Procedure 179(b) motion. The district court modified its previous ruling and granted Winger's summary judgment motion on the discrimination claim finding the issue in this case to be one of whether Winger discriminated against plaintiffs in refusing to rehire them.

Plaintiffs appeal. They argue the district court erred in granting the union's summary judgment motion and Winger's summary judgment motion. Plaintiffs assert the affidavits they filed contained the elements of a prima facie case of age discrimination.

A party claiming a civil rights violation in hiring practices has the initial burden to prove a prima facie case of discrimination by showing that (1) the employee belongs to a protected group; (2) the employee applied for and was qualified for a job for which the employer was seeking applications; (3) the claimant was rejected; and (4) after the rejection, the position remained open and the employer continued to seek applications. *Hamer v. Iowa Civil Rights Comm'n*, 472 N.W.2d 259, 263-64 (Iowa

1991); *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n*, 322 N.W.2d 293, 296 (Iowa 1982). These criteria under the Iowa Civil Rights Act are based on the application of the federal act by the Supreme Court in *McDonnell Douglas Corp. v. Green*. 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 677 (1973).

The test is a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. *Hamer*, 472 N.W.2d at 264. A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *Id.*

The question is whether plaintiffs supplied sufficient specific facts which, if believed, would establish the necessary elements of plaintiffs' case. *See Harsha v. State Sav. Bank*, 346 N.W.2d 791, 800 (Iowa 1984); *see also Gruener v. City of Cedar Falls*, 189 N.W.2d 577, 580 (Iowa 1971). We agree with the trial court they have not.

AFFIRMED.