IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

Donald S. Dobkin,	)	
	)	
Plaintiff,	)	
	)	**No. LACV071377**
vs.	)	
	)	**RULING**
The University of Iowa, by and through its College of Law,	)	
	)	
Defendant.	)	

On this 1st day of August, 2011, the Motion for Summary Judgment filed by Defendant and Resistance thereto filed by Plaintiff came before the undersigned. The Court finds a hearing on the Motion is unnecessary. Having considered the file, relevant case law, and written arguments of counsel, the Court hereby enters the following ruling:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed a Petition at Law on November 17, 2009. Plaintiff states that on August 20, 2008, Defendant advertised for applicants for the position of Law School Professors in the Association of American Law School's bulletin. Plaintiff cites the following language from the advertisement:

> "Goal is to find outstanding scholars and teachers who can bring new perspectives to extend the law school's traditional strengths and intellectual breadth….We are interested in all persons of high academic achievement and promise, and wish to enhance the diversity of our faculty by including among our candidates persons of all races, cultural backgrounds, genders, creeds, ages, as well as members of other groups that traditionally have been under-represented in the legal profession….We are particularly interested in hiring people with interests in administrative law, business law, criminal law, immigration, intellectual property, international law, law and economics, property, regulated industries, taxation or torts."

Plaintiff applied for the position, and requested placement in the position of immigration and administrative law faculty. Plaintiff states that on January 28, 2009, he emailed Defendant to determine the status of his job application. Plaintiff further states that on January 29, 2009, Defendant, through Eric Andersen, the chair of the faculty appointments committee, responded to Plaintiff's email, indicating that although Plaintiff had an "impressive academic and professional record," Plaintiff had not received a faculty position. Plaintiff claims to be highly qualified in the areas of immigration and administrative law, and has stated a claim under the Iowa Civil Rights Act alleging disparate treatment and disparate impact.

Defendant has answered, denying the allegations of the Petition that are adverse to it, and setting forth several affirmative defenses to Plaintiff's claims.

Trial of this matter currently is set for August 22, 2011.

Defendant filed the pending Motion for Summary Judgment on June 17, 2011. Defendant argues that Plaintiff cannot demonstrate disparate treatment because he cannot establish that he was qualified to be a Professor of Law at the University of Iowa, or that he was not hired because of his age. Defendant also argues that Plaintiff cannot demonstrate a claim under the doctrine of adverse impact because Plaintiff has presented a claim for a onetime event and not a disparate impact claim, and because Defendant has clearly demonstrated that Plaintiff did not rate well in the hiring process due to his overall background, not because of his age.

Plaintiff resists the Motion. Plaintiff argues there is a question of fact as to whether Plaintiff has demonstrated his prima facie case of age discrimination. In support of this argument, Plaintiff contends he was qualified for the position, and he can show circumstantial evidence that the employment action occurred because of his age. Plaintiff also argues that he can show on several different levels that the changing reasons offered by Defendant for Plaintiff's non-selection were a pretext for age discrimination. Finally, Plaintiff argues he has evidence of adverse impact in that Defendant has a facially neutral employment practice that has a foreseeable and statistically significant adverse impact on applicants over the age of 40; Defendant has not provided a reason for its actions; and there is a comparably effective alternative practice, i.e., hiring applicants with actual experience.

Defendant has not filed a reply to Plaintiff's Resistance.

CONCLUSIONS OF LAW

"Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." Kolarik v. Cory Intern. Corp., 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa Rule of Civil Procedure 1.981(3)). "Further considerations when reviewing a motion for summary judgment are summarized as follows:

> 'A factual issue is material only if the dispute is over facts that might affect the outcome of the suit. The burden is on the party moving for summary judgment to prove the facts are undisputed. In ruling on a summary judgment motion, the court must look at the facts in a light most favorable to the party resisting the motion. The court must also consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record.'"

Id. (citing Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 677 (Iowa 2004) (quoting Phillips v. Covenant Clinic, 625 N.W.2d 714-717-18 (Iowa 2001)).

"To obtain a grant of summary judgment on some issue in an action, the moving party must affirmatively establish the existence of undisputed facts entitling that party to a particular result under controlling law." McVey v. National Organization Service, Inc., 719 N.W.2d 801, 802 (Iowa 2006). "To affirmatively establish uncontroverted facts that are legally controlling as to the outcome of the case, the moving party may rely on admissions in the pleadings…affidavits, depositions, answers to interrogatories by the nonmoving party, and admissions on file." Id. "Except as it may carry with it express stipulations concerning the

anticipated summary judgment ruling, a statement of uncontroverted facts by the moving party made in compliance with rule 1.981(8) does not constitute a part of the record from which the absence of genuine issues of material fact may be determined." Id. at 803. "The statement required by rule 1.981(8) is intended to be a mere summary of the moving party's factual allegations that must rise or fall on the actual contents of the pleadings, depositions, answers to interrogatories, and admissions on file together with any affidavits." Id. "If those matters do not reveal the absence of genuine factual issues, the motion for summary judgment must be denied." Id.

"When two legitimate, conflicting inferences are present at the time of ruling upon the summary judgment motion, the court should rule in favor of the nonmoving party." Eggiman v. Self-Insured Services Co., 718 N.W.2d 754, 763 (Iowa 2006) (citing Daboll v. Hoden, 222 N.W.2d 727, 733 (Iowa 1974) ("If reasonable minds could draw different inferences and reach different conclusions from the facts, even though undisputed, the issue must be reserved for trial.").

"However, to successfully resist a motion for summary judgment, the resisting party must set forth specific evidentiary facts showing the existence of a genuine issue of material fact." Matter of Estate of Henrich, 389 N.W.2d 78, 80 (Iowa App. 1986). "[The resisting party] cannot rest on the mere allegations or denials of the pleadings." Id.

Claims under the Iowa Civil Rights Act are analyzed in accordance with federal standards. Simonson v. Trinity Regional Health System, 336 F.3d 706, 709 (8th Cir. 2003). With respect to a disparate treatment claim such as that stated by Plaintiff, the Eighth Circuit Court of Appeals has held:

> A plaintiff establishes a prima facie case in a "failure to hire" case when he proves that (1) he is a member of a protected class; (2) he was qualified for the position for which the employer was accepting applications; (3) he was denied the position; and (4) the employer hired someone from outside the protected class. *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 702 (8th Cir.1994).
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> Once the plaintiff establishes his prima facie case, the employer may rebut the prima facie case by articulating one or more legitimate, nondiscriminatory reasons for its decision. *Pope v. ESA Serv., Inc.*, 406 F.3d 1001, 1007 (8th Cir.2005). This burden is not onerous, nor does the explanation need to be demonstrated by a preponderance of the evidence. *Floyd v. Mo. Dept. of Soc. Servs.*, 188 F.3d 932, 936 (8th Cir.1999). If the employer presents a nondiscriminatory reason for its decision, the plaintiff is "left with 'the opportunity to demonstrate that the proffered reason is not the true reason for the employment decision.' " *Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1120 (8th cir.2006) (quoting *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).
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> A plaintiff may establish pretext by showing "that the employer changed its explanation for why it fired the employee ...." *Stallings v. Hussmann Corp.*, 447 F.3d 1041, 1052 (8th Cir.2006). However, we are mindful that "[t]here is a strong inference that discrimination was not a motivating factor if the same person hired and fired the plaintiff within a

> relatively short period of time." *Herr v. Airborne Freight Corp.*, 130 F.3d 359, 362 (8th Cir.1997); *see also Lowe v. J.B. Hunt Transp.*, 963 F.2d 173, 174–75 (8th Cir.1992) (holding in an age discrimination case that "[i]t is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later.").

Arraleh v. County of Ramsey, 461 F.3d 967, 975-76 (8th Cir. 2006).

Having considered the facts in the light most favorable to Plaintiff, the Court concludes there are genuine issues of material fact as to whether Plaintiff has established a prima facie case of age discrimination; whether Defendant had a legitimate, nondiscriminatory reason for deciding not to hire Plaintiff; and whether the reason given for not hiring Plaintiff is pretext on the part of Defendant. Resolution of these issues will be largely dependent on the testimony of Plaintiff and the individuals involved in making the decision regarding hiring, and credibility determinations to be made with respect to this testimony is the function of the trier of fact. Therefore, Defendant's Motion for Summary Judgment should be denied as to Plaintiff's disparate treatment claim.

The United States District Court for the Northern District of Iowa has outlined the elements necessary to prove that a hiring action constitutes unlawful disparate or adverse impact:

> [I]n *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the Court developed the elements of proof for a disparate impact employment discrimination claim in a more elaborate fashion, outlining three phases through which a claim proceeds. Initially, the employee must show that an employment practice has an adverse impact on a protected group in significant disproportion to its impact on employees not within that protected group. *Albemarle Paper Co.*, 422 U.S. at 425, 95 S.Ct. at 2375; *Griggs*, 401 U.S. at 432, 91 S.Ct. at 853.
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> After the employee has established a *prima facie* case, the burden of persuasion shifts to the employer to show the business necessity of the challenged employment practice. *Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375; *Griggs*, 401 U.S. at 432, 91 S.Ct. at 853. If the employer succeeds with its burden at the second stage, the employee must then show there are other reasonable alternatives that would result in a diminished disparate impact. *Albemarle*, 422 U.S. at 425, 95 S.Ct. at 2375.

Jenkins v. Wal-Mart Stores, Inc., 910 F.Supp. 1399, 1423 (N.D.Iowa 1995).

Again viewing the facts in the light most favorable to Plaintiff, the Court concludes there are genuine issues of material fact as to whether the elements necessary for proving adverse impact have been met. Resolution of the adverse impact claim also will be dependent on the testimony of Plaintiff and the individuals involved in making hiring decisions for Defendant, and the credibility determinations to be made regarding this testimony should be left to the trier of fact. The Motion for Summary Judgment should be denied as to the adverse impact claim.

RULING

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment is **DENIED**.

Clerk to notify.

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STEPHEN B. JACKSON, JR., JUDGE
Sixth Judicial District of Iowa