

**IN THE COURT OF APPEALS OF IOWA**

No. 8-081 / 07-0932

Filed May 14, 2008

**LARRY MANNING,**  
Plaintiff-Appellant,

**vs.**

**WELLS FARGO FINANCIAL, INC.,**  
**WELLS FARGO HOME MORTGAGE, INC.,**  
a Division of **WELLS FARGO BANK, N.A.,**  
and **WELLS FARGO & CO.,**  
Defendants-Appellees.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,  
Judge.

The plaintiff appeals from the district court order granting summary  
judgment in favor of the defendants on his age discrimination claim. **REVERSED**  
**AND REMANDED.**

Michael J. Carroll of Babich, Goldman, Cashatt & Renzo, P.C., Des  
Moines, for appellant.

Michael A. Giudicessi and Angela Morales of Faegre & Benson, L.L.P.,  
Des Moines, for appellees.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

**EISENHAUER, J.**

The plaintiff, Larry Manning, appeals from the district court order granting summary judgment in favor of the defendants on his age discrimination claim. He contends summary judgment is not appropriate because there is a genuine issue of material fact in dispute as to whether the defendants' proffered reasons for his adverse employment action are pretextual. We agree and therefore reverse and remand.

*I. Background Facts and Proceedings.* Manning was employed as Vice President of Compliance Services for Wells Fargo in the spring of 2004 when the company underwent a reorganization of the Compliance Services Department. This restructuring merged the department with the Enterprise Risk Management Group. As part of this restructuring, Manning was invited to apply for the position of Senior Vice President of Compliance Services, a position he believed to be the same as the position he held. Following an interview process, a younger candidate was selected for the position. Manning was then offered a new Compliance Manager 3 position, which would allow him to retain his status as a vice president and officer in the company, at the same base compensation with bonus opportunity. When Manning did not accept the position, it was considered a voluntary termination of his employment.

On April 29, 2005, Manning filed a petition alleging he had been discriminated against because of his age, naming Wells Fargo and several of its executives as defendants. On February 9, 2007, the defendants filed a motion for summary judgment. Manning dismissed his claims against the individual defendants.

On March 27, 2007, the district court entered summary judgment in favor of Wells Fargo, finding Manning had failed to prove he had suffered an adverse employment action as well as any pretextual reason for such action. Following a motion pursuant to Iowa Rule of Civil Procedure 1.904, the court amended its ruling to conclude there was a genuine issue of material fact as to whether an adverse employment action had occurred with respect to Wells Fargo's failure to hire or promote Manning to the Senior Vice President of Compliance Services position. However, the court found the undisputed facts failed to prove a pretextual reason for Wells Fargo's failure to hire or promote him.

**II. Scope and Standard of Review.** We review rulings on motions for summary judgment for errors at law. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001). The record before the district court is reviewed to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Id.* We review the facts in the light most favorable to the party resisting the motion. *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). The resisting party has the burden of showing a material issue of fact is in dispute. *Id.*

**III. Analysis.** Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3). A factual issue is material only if the dispute is over facts that might affect the outcome of the suit, given the applicable law. *Lewis v. State ex rel. Miler*, 646 N.W.2d 121, 124 (Iowa Ct. App. 2002). The party moving for summary judgment has the burden of proving the facts are undisputed. *Id.*

In ruling on a motion for summary judgment, the court must view the facts in the light most favorable to the resisting party. *Id.* Furthermore, every legitimate inference that can be reasonably deduced from the evidence should be afforded the resisting party. *Id.* An inference is legitimate if it is “rational, reasonable, and otherwise permissible under the governing substantive law.” *Id.* (citing *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). An inference is not legitimate if it is based upon speculation or conjecture. *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.*

In order to prove age discrimination, Manning must first establish a prima facie case of discrimination: that he was a member of a protected class (over forty years of age), performed his work satisfactorily, and had adverse action taken against him. See *Vaughn v. Must, Inc.*, 542 N.W.2d 533, 538 (Iowa 1996). Wells Fargo must then articulate a legitimate nondiscriminatory reason for the action. See *id.* Although the defendant need not establish this by a preponderance of the evidence, it must clearly set forth some legitimate nondiscriminatory basis for its action. See *id.* If Wells Fargo satisfies its burden of asserting a legitimate explanation, the burden then shifts to Manning to prove the asserted reason is merely pretext and that the discriminatory motive played a substantial part in the actions taken. See *id.*

In ruling on the motion for summary judgment, the district court found there was insufficient evidence to create a genuine fact issue of pretext and discrimination. We disagree. Viewing the evidence in a light most favorable to Manning, we conclude there is sufficient evidence to create a fact issue as to

whether Wells Fargo's reasons for failing to hire Manning were pretextual and that a discriminatory motive existed. During the interview process, the Senior Vice President of Human Resources asked Manning when he planned on retiring. Although this evidence could be innocuous, it constitutes some evidence that could give rise to an inference of discriminatory motivation for the adverse employment action. *Machinchick v. P.B. Power, Inc.*, 398 N.W.2d 345, 353-54 (5th Cir. 2005). Coupled with the fact Manning was asked during the interview process how long he planned to stay with the company and the candidate hired for the position was described as "a young guy with a lot of runway ahead of him," we conclude Manning has made the minimum showing to create a fact issue as to whether Wells Fargo's offered reason for failing to hire Manning was pretextual. Accordingly, we reverse the court's summary judgment ruling and remand.

**REVERSED AND REMANDED.**