

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

THOMAS NOWERS,
Plaintiff,

vs.

GAZETTE COMMUNICATIONS,
INC.,
Defendant.

No. C02-147 LRR

**ORDER REGARDING DEFENDANT’S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MOTION TO
DISMISS**

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I. INTRODUCTION

A. Procedural Background

Plaintiff Thomas Nowers (“Nowers”) filed this action against his former employer, Defendant Gazette Communications, Inc. (the “Gazette”) on October 11, 2002. Nowers’ Complaint, as amended, contains three counts. Count I alleges violations of the Age Discrimination in Employment Act (the “ADEA”), 29 U.S.C. § 621 et seq. Count II alleges violations of the Iowa Civil Rights Act (the “ICRA”), Iowa Code Chapter 216. Nowers contends in Counts I and II that he was constructively discharged from his employment with the Gazette on the basis of his age and that because of his age the Gazette failed to hire him for a full-time position as an advertising salesman on the Gazette’s auto team. In Count III, Nowers alleges that the Gazette failed to pay him certain sales commissions in violation of Iowa’s Wage Payment Collection Act, Iowa Code Chapter 91A.

Presently before the Court is a Motion for Partial Summary Judgment and Motion to Dismiss (docket no. 21) filed by the Gazette. The Gazette urges the Court to grant summary judgment on Nowers’ constructive discharge claim on the grounds that: (1) he did not assert a constructive discharge claim in his administrative complaint and thus Nowers’ constructive discharge claim is not properly before this Court; and (2) he was not constructively discharged. The Gazette further urges the Court to grant summary judgment on Nowers’ failure to hire claim on the grounds that Nowers cannot meet his burden of proving he was rejected because of his age. Finally, the Gazette contends that if the Court grants summary judgment on Counts I and II, the Court should refuse to exercise supplemental jurisdiction over Nowers’ state law claim in Count III.

B. Factual Background

1. Material Facts Not in Dispute

Nowers began his employment with the Gazette in 1998 as an advertising salesperson for the Gazette's *Penny Saver* publication. Nowers was 62 years old when the Gazette hired him. Prior to joining the Gazette, Nowers had been a salesperson in many other fields.

In performance evaluations completed in 1998 and 1999 by Nowers' supervisor, Belinda Nelson, Nelson stated that Nowers met and exceeded job expectations. In his six-month evaluation, actually completed after his ninth month of employment, Nelson found that Nowers met and exceeded all requirements. Nelson stated, "he provides excellent customer service to his clients" Nelson was responsible for completing annual performance evaluations. However, Nelson completed performance evaluations of Nowers only in 1998 and 1999. Without explanation, Nelson did not complete any more performance evaluations of Nowers after 1999.

Nowers expressed interest in a job sharing arrangement. Nelson and her supervisor, David Storey, authorized a job sharing position. In April of 2000, Nowers entered into a job sharing arrangement in which he and another Gazette employee, Larry Baker, worked alternate weeks calling on the same set of accounts. Nowers and Baker were considered to be one sales representative within the *Penny Saver* sales force. As a team, Nowers and Baker serviced approximately 217 accounts. Nowers and Baker had an established account base as sales representatives for the *Penny Saver* and developed working relationships with the businesses they contacted. Nowers and Baker were not paid a base salary. Their earnings were based on sales commissions. The commission paid to Nowers and Baker was based on how they did as a team in generating advertising revenue. Nowers and Baker either met every Monday or talked on the phone to discuss projects and contacts. Nowers and Baker worked more than half-time, even though they were not required to do so.

The job duties of a *Penny Saver* sales representative included selling ads and meeting goals. These same job duties applied to the job sharing arrangement. The amount of revenue and percentage of goal generated by a sales representative was very important when

evaluating job performance. During the time period from July to December of 2001, the revenue goal set for Nowers and Baker was higher than the goals set for the rest of the *Penny Saver* sales representatives; the revenue generated by them was higher than the revenue generated by other *Penny Saver* sales representatives; Nowers and Baker fell short of their goal by approximately ten percent; and Nowers' and Baker's earnings were higher than the rest of the *Penny Saver* sales representatives.

On June 19, 2001, Nelson gave to Baker a Written Warning and Action Plan. On June 20, 2001, Nelson gave to Nowers an identical Written Warning and Action Plan. The Written Warning and Action Plan stated that “[d]uring the past 90 days there have been a number of concerns regarding communication between your supervisor, clients and your job share co-worker.” The Written Warning and Action Plan advised Nowers that he would be subject to discipline up to and including termination of employment if six stated objectives were not met.

The first objective of the Action Plan required Nowers to complete daily call report sheets and to turn in the reports no later than Friday of each week. Nowers contends that he had been preparing his call reports in the same manner since he began his employment in 1998, that is, he had been turning in his daily call report sheets on Friday or first thing Monday morning. After receiving the Action Plan, Nowers tried to provide more details in his call reports.

The second objective contained in the Action Plan stated that Nowers was expected to make a minimum of twelve in-person calls per day. According to Nelson, a call to be included in reaching the average of twelve calls per day should include calls on businesses even when no one was available. Nowers contends that when counting his in-person calls per day, he did not include calls made to a business when no one was available. Nowers worked extra days to make the required number of calls.

The third objective required Nowers to provide to Nelson every Friday a schedule

showing which individual would be working the following week. Nowers contends that although Nelson was aware that he and Baker alternated their weeks of work, Nowers and Baker advised Nelson which of them worked which week.

The fourth objective required Nowers to check e-mails on a daily basis and to timely respond to all e-mails. Nowers states that he had a computer that was inoperative at times, preventing him from checking e-mails.

Objective five required Nowers and Baker to review their complete account list and provide a list of specific accounts that each would be handling. Baker discussed this particular objective with Nelson and they agreed that existing accounts could not be divided between Nowers and Baker, but that nonactive accounts could be divided. Nelson received a list of the nonactive accounts that were divided between Nowers and Baker.

The final objective required Nowers and Baker to have a “verbal conversation” each Monday regarding the upcoming week’s contacts and projects. Nowers maintains that from the time they began the job sharing position, he and Baker both worked each Monday morning to compare notes and discuss projects and contacts. If they did not meet in person, they discussed their projects and contacts over the phone.

The Written Warning and Action Plan did not identify Nowers’ revenue as a concern of Nelson’s. Nelson acknowledged that if she had a problem with Nowers’ revenue production, she would have included it in the Action Plan.

In mid-September of 2001, Nelson prepared a draft termination notice that described various deficiencies in Nowers’ performance. Nelson never gave this termination notice to Nowers. On September 14, 2001, Nelson met with Nowers to address her concerns about Nowers’ performance. Nowers understood this meeting to be another warning from his supervisor. Nowers does not criticize the way Nelson treated him prior to June of 2001, when Nelson gave him the Written Warning and Action Plan.

Beginning in 1999 and continuing through 2002, the Gazette implemented a

restructuring of its various sales positions. Instead of having separate sales forces for the *Penny Saver* and the Gazette's other publications, the Gazette combined all print advertising sales employees into teams that sold advertising for all of the publications. Nowers believed that the Gazette's restructuring of its sales force was a good idea.

At a staff meeting on October 15, 2001, the Gazette informed its sales representatives that the Gazette was moving forward with the team reorganization. The Gazette advised its sales staff there would be a team position for every sales representative. Teams consisted of sales representatives, a customer service person, and a designer who all worked for a common group of accounts. Within the team, each sales representative was given a list of accounts, consisting of both active and inactive accounts. An "inactive account" was a business that had not placed advertising with any Gazette publication for twelve months. If a business placed one ad with one Gazette product or publication in a twelve month period, that account became an "active" account. All of the sales representatives, other than Nowers and Baker, were assigned or promoted to positions on the various teams. When a sales representative was assigned or promoted to a team where they would not service accounts previously assigned, the sales representative was given a different list of established accounts. When assigning or promoting a sales representative to the various teams, one of the Gazette's goals was to put the sales representative in a position comparable to what he or she previously had held and to keep relationships with accounts as constant as possible.

By October 10, 2001, the Gazette had already decided to terminate Nowers' and Baker's job sharing positions. In an e-mail dated October 10, 2001, Nelson discussed the elimination of Nowers' and Baker's job sharing positions, payment of certain benefits available upon termination of employment, as well as the option of the Gazette paying severance.

Shortly after the staff meeting on October 15, 2001, Nowers and Baker had a

separate meeting with Nelson and her supervisor, Storey. At this meeting, Nelson and Storey told Nowers and Baker that the new ad teams would not include part-time or job sharing positions and that if they wanted their ESOP and 401(K) benefits within the next year, they would have to resign before January 1, 2002. Storey also told Nowers and Baker about new publications the Gazette was going to start.

On October 22, 2001, Nowers informed Nelson that he was very interested in working full-time and being on a sales team. On that same day, Nelson advised Storey, Bode, and Mary Collins in Human Resources of Nowers' interest. After informing Nelson that he wanted to work full-time on a team, Nowers was advised that the Gazette had no position for him, other than a part-time position on special projects. As of that date, details of such a position had not yet been established. The decision to assign Nowers to the special projects position was not affected in any way by the performance problems identified by Nelson.

After being advised that the special projects sales position was their only option, Nowers and Baker requested additional information about how the job would work, including requesting a written description of the job. Although the position was orally described to Nowers, the written job description for the position was not finalized and provided to Nowers until the end of November of 2001. Bode met with Nowers on two occasions to discuss the special projects sales position. The written job description prepared by Bode, dated November 28, 2001, describes one of the purposes of the special projects sales position as "to generate new business from non-traditional areas." It was Nowers' understanding that he would not call on any accounts with which he had previously worked; however, none of the written job descriptions contain a prohibition barring Nowers from calling on any account with which he had ever previously worked. In the special projects sales position, Nowers was limited to making cold calls only on inactive accounts. If a business agreed to advertise one time, the account was deemed active and then was assigned

to a media consultant on one of the teams. Nowers would then be prohibited from contacting that account again. Nelson insisted that Nowers make a decision by December 7, 2001 as to whether he would accept the special projects sales position.

Businesses have advertising budgets, whereby they have a limited amount of money they will spend on ads. In the special projects sales position, Nowers would be competing with other sales representatives for those advertising dollars, as they also were contacting inactive accounts.

After a meeting between Nelson, Bode, and Nowers on November 9, 2001, Nelson prepared a memo which stated, "15% commission on approx. \$180,000 available for new business." Bode provided that figure, which is not supported by any data. There is no history to support this figure. Bode admitted that any number could have been used.

Rather than accepting the special projects sales position and continuing his employment with the Gazette, Nowers chose to leave his employment with the Gazette. Nowers did not accept the position because he believed that he could not earn regular income in the position. Nowers resigned from his employment with the Gazette on January 4, 2002. The special projects sales position never has been filled. The Gazette had informed Nowers about a full-time position at the KCRG radio station. Nowers contacted Tom Hurns about a position at KCRG, but he never received a call back from Hurns about a sales position there.

On December 24, 2001, a sales representative advised Storey that she was resigning from the auto team. Nowers heard about this and although he was uncertain if there was an opening, he completed the job interest form regarding this position on the auto team. The job interest form stated that it should be turned in to the Human Resources Department and indicated that the form would not be valid unless signed by a representative of that Department. Nowers alleges he was unaware that the form was to be returned to the Human Resources Department. Nowers gave the form to Nelson on January 4, 2002.

Nelson forwarded the job interest form to Bode because he was the person responsible for filling the position. There was nothing about how the form was completed, or the fact that it had not gone through human resources, that affected Bode's decision not to contact Nowers. Bode testified that he eliminated Nowers from consideration for the position because of Nowers' prior performance problems and the significance to the company of the auto team sales position. Bode did not know the number of accounts Nowers serviced or the number of accounts about which Nelson expressed concern compared to the total accounts. Bode also did not know how much revenue Nowers generated as a sales representative, although Bode admitted that it would have been helpful to know this. Bode never received any documents regarding Nowers' job performance problems. Bode testified that he spoke with Nelson shortly after January 2, 2002 about Nowers' job performance issues, but Bode did not talk to Nowers about Nelson's concerns. Bode also testified that he had prior discussions with Storey about Nowers' performance. Nowers did not follow-up on his application for the full-time auto team sales position. Another applicant was chosen for the auto team position. The successful applicant, Rachel Morey-Geissinger, had worked on automotive advertising accounts for another newspaper, had multimedia and on-line experience and had also sold advertising for the yellow pages. She was 26 years old at the time she was selected for the position. The Gazette states that Morey-Geissinger was selected because of her auto experience, her multimedia experience and because she impressed the Gazette's representatives during her interview as being a problem solver who would communicate well with customers.

Nowers obtained employment at *Iowa Outlook*, which was a publication already in existence. After Nowers started this job, the Gazette contacted *Iowa Outlook* and threatened a lawsuit based on the non-compete agreement between the Gazette and Nowers. Nowers waited until after the non-compete time elapsed before exploring other marketing or advertising positions. Nowers admits, however, that there were various kinds of jobs,

all consistent with his prior work experience, that he could have performed without violating the non-compete agreement.

On February 4, 2002, Nowers filed an administrative civil rights complaint which included allegations that he had received “unequal treatment” on the basis of both his age and sex. Nowers stated in his civil rights complaint that the last act of alleged discrimination had occurred on November 26, 2001, over a month before he ended his employment with the Gazette. Nowers also stated that “We were told the teams would start to be in place and our accounts reassigned in early 2002. I resigned as of 4 January 2002 to accept another position.”

2. Material Facts in Dispute

Nowers and the Gazette disagree as to the duties of the special projects sales position. Nowers contends that in this position he would service only four publications, all of which were new publications: House to Home, a business to business magazine, a new mover’s guide, and possibly an entertainment guide. Of these four publications, only one was in existence as of May of 2003 – House to Home. The Gazette contends that Nowers also would have been able to sell advertising for the Gazette’s regular, existing products as well. The Gazette maintains that the four publications were given only as examples of the types of special projects on which Nowers would be working.

The parties also disagree as to whether Nowers had the potential to earn as much money in the special projects sales position as he had earned in the job sharing arrangement. Bode testified inconsistently in this regard:

QUESTION: Did you yourself have any concern that Mr. Nowers would not make anywhere near what he had been earning with the special projects sales job?

ANSWER: I had that concern.

QUESTION: And did you do anything in response to that concern?

ANSWER: Again I created a position that I thought would give a potential to generate as much or more income with this position than he had with the previous position.

(Bode Deposition at 94-95). Nowers interprets this testimony to mean that Bode was concerned that Nowers would not make anywhere near what he had been earning as a *Penny Saver* sales representative if he accepted the special projects sales position. The Gazette argues this testimony should be interpreted to mean that Nowers would be able to earn as much or more money in the special projects sales position as he had earned in his previous sales position.

The Gazette further disputes Baker's statement that Nelson admitted to him that it would be difficult to make any kind of money in the special projects sales position. The Gazette also disputes Nowers' contention that he did not accept the special projects sales position on the grounds that: (1) he would be prohibited from calling on accounts who had advertised within the last twelve months; (2) he would be prohibited from calling on accounts with whom he previously had done business; (3) he would be prohibited from building any kind of relationship with a customer; and (4) the date of publication of the projects was uncertain. The Gazette asserts that these concerns are not valid and that none of the written job descriptions of the special projects sales position contain any such prohibitions. Nowers disputes the Gazette's assertion that Nowers had no experience with automobile advertising.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the record, viewed in the light most favorable to the nonmoving party, shows there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Carter v. Ford Motor Co.*, 121 F.3d 1146, 1148 (8th Cir. 1997) (citing *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996)). An issue of material fact is genuine if it has a real basis in the

record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). A fact is material when it is a fact that “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In considering a motion for summary judgment, a court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus.*, 475 U.S. at 587. Further, the court must give the nonmoving party the benefit of all reasonable inferences that can be drawn from the facts. *Id.*

Procedurally, the moving party bears “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 394 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Once the moving party, has successfully carried its burden under Rule 56(c), the nonmoving party has an affirmative burden to go beyond the pleadings and by depositions, affidavits or otherwise, designate “specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. The nonmoving party must offer proof “such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248.

The United States Court of Appeals for the Eighth Circuit has cautioned that “summary judgment should seldom be used in employment-discrimination cases.” *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc’y*, 931 F.2d 1239, 1244 (8th Cir. 1991)). Summary judgment is appropriate in employment discrimination cases only in “those rare instances where there is no dispute of fact and where there exists only one conclusion.” *Johnson*, 931 F.2d at 1244. To put it another way, “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the non-movant.” *Crawford*, 37 F.3d at 1341.

III. DISCUSSION

A. Motion for Partial Summary Judgment

In considering Nower's age discrimination claims, the Court will make no distinction between claims based on federal law and comparable claims based on state law. This is appropriate because the Iowa Supreme Court has recognized that federal precedent is applicable to discrimination claims under the ICRA, Iowa Code chapter 216. See *Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999). Iowa courts, therefore, traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Com'n*, 334 N.W.2d 598, 601 (Iowa 1983). Furthermore, Nowers does not offer any separate legal arguments relating to the ICRA; therefore, the Court shall analyze together his ADEA and ICRA age discrimination claims.

1. Whether Nowers Asserted a Constructive Discharge Claim in His Administrative Complaint

The Gazette contends that Nowers' constructive discharge claim is not properly before the Court because Nowers failed to exhaust his administrative remedies. In order to initiate a claim in federal court under the ADEA, a party must first exhaust the administrative remedies as to his claims of discrimination by timely filing a charge of discrimination with the EEOC. See *Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 676 (8th Cir. 1995). Administrative remedies are deemed exhausted as to all incidents of discrimination which "grow out of" or are "like or reasonably related" to the allegations of the administrative charge. *Id.* (citing *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1154 (8th Cir. 1989)).

In support of its contention that Nowers failed to assert a constructive discharge claim in his administrative complaint, the Gazette points to the fact that in his administrative complaint, Nowers claimed he was subject to unequal treatment. Nowers

stated, “We felt that this was not a legitimate job offer and told them we were not interested.” Nowers further stated in the administrative complaint that he felt he was discriminated against because of his age and that he “resigned” in January of 2002 to “accept another position.”

Nowers’ administrative complaint makes no explicit claim that he was constructively discharged. Therefore, the issue is whether a constructive discharge claim is like or reasonably related to a charge of age discrimination and unequal treatment in employment such that Nowers has properly exhausted his administrative remedies. Nowers stated in his administrative complaint that he felt was discriminated against because of his age and he resigned to accept another position. Nowers further stated in his civil rights complaint that the last act of alleged discrimination had occurred on November 26, 2001, over a month before he ended his employment with the Gazette. The Court finds that the administrative complaint failed to put the Gazette on notice that Nowers was claiming he was subject to constructive discharge. *See Roxas v. Presentation College*, 90 F.3d 310, 318 n. 5 (8th Cir. 1996) (finding that constructive discharge claim was not “like or reasonably related to” claim of denial of sabbatical that was raised in EEOC complaint). The Court therefore holds that Nowers’ constructive discharge claim is not reasonably related to his claim of age discrimination. The Court thus grants summary judgment in favor of the Gazette on Nowers’ claim of constructive discharge.

2. Constructive Discharge

Even if the Court had found that Nowers’ claim of constructive discharge reasonably could have been expected to grow out of his original claim of age discrimination, the Court would still grant summary judgment in favor of the Gazette because the evidence in this case does not support a claim of constructive discharge. Constructive discharge occurs when an employer deliberately renders the employee’s working conditions so intolerable that

the employee is forced to quit. *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000). Intolerability of conditions is judged by an objective standard, and thus requires a showing that a reasonable person in the employee's situation would find the conditions intolerable. *Hukkanen v. International Union of Operating Eng'rs*, 3 F.3d 281, 284 (8th Cir. 1993). In order to constitute constructive discharge, the employer's actions must have been intended to force the employee to quit. *Id.* A plaintiff may satisfy this intent requirement by showing that his resignation "was a reasonably foreseeable consequence of [his] employer's discriminatory actions." *Id.* at 285. "If an employee quits because []he reasonably believes there is no chance of fair treatment, there has been a constructive discharge. An employee must, however, grant [his] employer a reasonable opportunity to correct the intolerable condition before []he terminates [his] employment." *Henderson*, 217 F.3d at 617 (citations omitted).

The Gazette argues that, as a matter of law, Nowers did not face working conditions that were so intolerable and unreasonable as to have given Nowers no choice but to resign. The Gazette further argues that Nowers jumped to the conclusion that the special projects sales position was not legitimate or feasible and Nowers resigned without giving the Gazette a chance to address the situation.

The Court finds that Nowers has not presented evidence sufficient for a reasonable jury to conclude that the Gazette rendered his working conditions so intolerable as to cause his resignation and that the Gazette intended or reasonably foresaw this result. Moreover, the evidence does not support a finding that a reasonable, objective person would have felt compelled to resign. In addition, Nowers' constructive discharge claim must fail because Nowers failed to give the Gazette a reasonable opportunity to remedy the problems he perceived. Therefore, the Court grants summary judgment in favor of the Gazette on Nowers' claim of constructive discharge.

3. Age Discrimination

The Gazette argues that Nowers' age discrimination claim fails as a matter of law because, even assuming that Nowers can establish a prima facie case of age discrimination, Nowers has not presented any evidence that the Gazette's selection of another employee for the full-time sales team position had anything to do with Nowers' age.

The ADEA makes it "unlawful for an employer . . . to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The ADEA protects only those individuals who are at least 40 years old. 29 U.S.C. § 631. To establish a claim of age discrimination, a plaintiff may present direct evidence of such discrimination or he may prove his claim through circumstantial evidence. See *Mayer v. Nextel West Corp.*, 318 F.3d 803, 806 (8th Cir. 2003). Where a plaintiff presents direct evidence that age played a motivating part in the defendant's employment decision, the defendant must then convince the trier of fact that, more likely than not, it would have made the same decision absent consideration of the plaintiff's age. See *EEOC v. Liberal R-II Sch. Dist.*, 314 F.3d 920, 922 (8th Cir. 2002) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). Where the plaintiff presents only circumstantial evidence of discrimination, the familiar burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-04 (1973), applies.

Because Nowers has not offered direct evidence of discrimination, the Court shall analyze his claim using "the *McDonnell Douglas* three-stage order of proof and presumptions." *Hindman v. Transkrit Corp.*, 145 F.3d 986, 990 (8th Cir. 1998). The *McDonald Douglas* framework requires the plaintiff to establish a prima facie case of age discrimination, at which point the defendant must come forward with a legitimate nondiscriminatory reason for its conduct. *Mathes v. Furniture Brands Int'l., Inc.*, 266 F.3d

884, 887 (8th Cir. 2001). It then becomes the plaintiff's burden to demonstrate that the nondiscriminatory reason offered by the employer was really a pretext for discrimination. *Id.*

For purposes of the instant Motion for Summary Judgment, the Gazette assumes that Nowers can establish the elements of a prima facie case of age discrimination: (1) he is a member of a protected class; (2) he was qualified for the position for which he applied; (3) he suffered an adverse employment action because he was not hired for the position for which he applied despite being sufficiently qualified; and (4) the job for which he applied was filled by a person "sufficiently younger to permit an inference of age discrimination." *Simonson v. Trinity Reg. Health Sys.*, 336 F.3d 706, 710 (8th Cir. 2003). To satisfy its burden of production, the Gazette has offered evidence of a legitimate, nondiscriminatory basis for its hiring decision. *See Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 919 (8th Cir. 2000). The Gazette contends that its selection of Morey-Geissinger for the auto team sales position was based on her auto experience, her multimedia experience and because she impressed the Gazette's representatives during her interview as being a problem solver who would communicate well with customers. Additionally, Bode testified that he eliminated Nowers from consideration for the auto team sales position because of Nowers' prior performance problems and the significance to the company of the auto team sales position.

Because the Gazette has satisfied its burden of production in setting forth a legitimate, nondiscriminatory basis for its hiring decision, Nowers must then present evidence sufficient to raise a genuine question of material fact as to whether the Gazette's reason was pretextual and to create a reasonable inference that age was a determinative factor in the adverse employment decision. *See Keathley v. Ameritech Corp.*, 187 F.3d 915, 919 (8th Cir. 1999). The Court finds that Nowers has put forth no evidence whatsoever that

raises a reasonable inference that the Gazette's reason for its hiring decision was pretextual and that age was a determinative factor in rejecting Nowers for the auto team sales position. The Gazette offered a legitimate business consideration to justify the use of subjective criteria of which candidate would communicate best with customers. The use of this subjective consideration in this case does not give rise to an inference of discrimination because Nowers was unable to cast doubt on the justifications offered by the Gazette. "[I]t is not the role of this court to sit as a super-personnel department to second guess the wisdom of a business's personnel decisions." *Evers v. Alliant Techsys., Inc.*, 241 F.3d 948, 957 (8th Cir.2001) (internal quotation marks omitted). Moreover, the Gazette's hiring of Nowers at age 62, when he was well within the age group protected by the ADEA, suggests that the Gazette was not influenced by ageism in rejecting him for a sales position four years later. *See Lowe v. J.B. Hunt Transp., Inc.*, 963 F.2d 173, 175 (8th Cir. 1992) ("It is simply incredible, in light of the weakness of plaintiff's evidence otherwise, that the company officials who hired him at age fifty-one had suddenly developed an aversion to older people less than two years later."). Accordingly, the Gazette is entitled to summary judgment on Nowers' age discrimination claim.

B. Motion to Dismiss

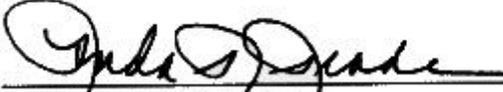
In its Motion to Dismiss, the Gazette argues that if the Court grants summary judgment in its favor on Counts I and II of Nowers' Complaint, the Court should decline to exercise supplemental jurisdiction over Nowers' state law claim in Count III. In light of the Court's grant of summary judgment on Counts I and II in favor of the Gazette, the Court declines to exercise supplemental jurisdiction over Nowers' remaining state law claim in Count III.

IV. CONCLUSION

IT IS THEREFORE ORDERED that:

1. Defendant's Motion for Partial Summary Judgment and Motion to Dismiss (docket no. 21) is GRANTED.
2. All court costs are assessed against Plaintiff.
3. Counts I and II of Plaintiff's Complaint are DISMISSED with prejudice.
4. Count III of Plaintiff's Complaint is DISMISSED without prejudice.
5. The trial in this matter and the Final Pretrial Conference set for February 4, 2004 before Magistrate Judge Jarvey are canceled because these rulings fully resolve the case.

IT IS SO ORDERED this 8th day of January, 2004.


LINDA R. READE
JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA