STATE OF MICHIGAN

COURT OF APPEALS

LIBBY KNOWLTON,

Plaintiff-Appellant,

v

LEVI'S OF KOCHVILLE, INC.,

Defendant-Appellee,

and

LEVI'S OF MIDLAND, INC.,

Defendant.

UNPUBLISHED
June 3, 1997

No. 190677
Saginaw Circuit Court
LC No. 92-047998-DZ

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant Levi's of Kochville, Inc. summary disposition pursuant to MCR 2.116(C)(10). The trial court found no genuine issue of material fact regarding whether this defendant had discriminated against plaintiff on the basis of her weight. We reverse.

Plaintiff, a waitress working at defendant's restaurant, became pregnant and began showing during the fourth month of her pregnancy, or by November 1990. Her hours were reduced starting in November 1990. In January or February of 1991, when plaintiff was six or seven months pregnant, the manager of the restaurant, Donna Levi, told plaintiff to take an early leave, even though plaintiff had a doctor's note stating that she could continue to work. After her maternity leave, plaintiff was told that defendant no longer needed her, although she did work for a few months at Levi's of Midland, a restaurant managed by the same couple as defendant but owned by a separate corporation. It is defendant's position that plaintiff was asked to take an early maternity leave because defendant was afraid plaintiff or her unborn baby would be injured. Plaintiff contends that she was discriminated against because of the weight she had gained due to her pregnancy.

There is no Michigan case law that addresses the issue of weight discrimination. However, the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, prohibits discrimination based on a number of different classifications, including weight, and it is appropriate to examine the considerations given to other classifications when there is no case law on a specific classification. See *Schipani v Ford Motor Co*, 102 Mich App 606, 617; 302 NW2d 307 (1981); *Ross v Beaumont Hospital*, 687 F Supp 1115, 1123-1124 (ED Mich, 1988) (applying the age discrimination analysis utilized by the Michigan Supreme Court in *Matras v Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 [1986], to a weight discrimination action under the Civil Rights Act).

Plaintiff argues that the trial court erred in holding that the she did not present sufficient evidence that could lead a jury to conclude that defendant's proffered reasons for putting plaintiff on leave were a pretext for weight discrimination. We agree. In proving a prima facie claim of intentional discrimination under the Civil Rights Act, plaintiff had to show that weight was one of the reasons or motives for the employment decision. See *Reisman v Wayne State Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991) (discussing the requirements for race discrimination). Once established, a prima facie case creates a rebuttable presumption of discrimination. *Lytle v Malady*, 209 Mich App 179, 186; 530 NW2d 135 (1995). From this point, the burden of production shifts to the defendant to rebut the presumption of discrimination by "articulating (not proving) 'some legitimate, nondiscriminatory reason' for the adverse employment decision against the plaintiff." *Id.* at 186-187 (citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 255 n 8; 101 S Ct 1089; 67 L Ed 2d 107 [1981]).

> If the defendant carries its burden of production, the presumption of discrimination is dispelled, and the factual inquiry proceeds to a new level of specificity. The plaintiff's burdens of production and persuasion merge, requiring her to prove by a preponderance of the evidence not only that the defendant's proffered reasons are a mere pretext, but also that illegal discrimination was more likely the defendant's true motivation in discharging or demoting the plaintiff.
>
> At this juncture, we note that there is a crucial distinction between a plaintiff's prima facie case for purposes of surviving a summary disposition motion and a prima facie case sufficient to persuade a trier of fact at trial with regard to the ultimate question of whether a defendant intentionally discriminated against the plaintiff. While the latter requires a plaintiff to prove her case to the trier of fact by a preponderance of the evidence, the former does not require her to go so far. Neither a trial court nor this Court on appellate review of a summary disposition determination need conduct a minitrial to determine whether the plaintiff has met her burden of presenting a prima facie case by a preponderance of the evidence. Instead, for the plaintiff to survive a summary disposition, she need only tender specific factual evidence that could lead a reasonable jury to conclude that defendant's proffered reasons are a pretext for . . . discrimination. [*Id.* at 187-188 (citations omitted).]

In finding that plaintiff had failed to present evidence to create a factual issue regarding whether defendant's reasons were pretextual, the trial court erroneously focused on defendant's proffered claim

that plaintiff was asked to take a leave of absence out of concern for plaintiff's unborn child. There was no medical evidence to suggest that this was a legitimate concern and plaintiff offered specific testimony by three employees who said that Donna Levi wanted plaintiff to take a leave of absence because of her appearance. One employee alleged that Levi cut back plaintiff's hours as plaintiff became larger due to her pregnancy. One employee alleged that during this same time, Levi told him that "[plaintiff] was getting too fat to work on the floor. She didn't look good for business" and to "cut [plaintiff's] hours back to as few as possible" because of plaintiff's appearance. The third employee alleged that Levi "did not like large women behind the bar." This testimony was sufficiently specific to allow a reasonable jury to conclude that defendant's proffered reasons for its discrimination, the safety of plaintiff and her unborn child, were pretextual. Accordingly, summary disposition should have been denied.

Defendant argues that it could not be liable for discrimination because after plaintiff's pregnancy defendant asked her to return to work. However, the record does not indicate that plaintiff returned to work for defendant but that she worked briefly at an affiliated restaurant. Moreover, the focus of plaintiff's claim is on whether defendant discriminated against her because of her weight when she was forced to take a leave of absence *before* she had her child.

Reversed. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage