STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN K. PINCHOCK and MICHAEL L. PINCHOCK,

Plaintiffs-Appellants,

v

GORDON FOOD SERVICE, INC.,

Defendant-Appellee.

UNPUBLISHED
March 10, 1998

No. 200568
Saginaw Circuit Court
LC No. 94-005092 CZ

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff Lillian Pinchock[1] appeals as of right from the order of the circuit court granting summary disposition in favor of defendant Gordon Food Services, Inc. (GFS) pursuant to MCR 2.116(C)(10). Plaintiff argues that she presented sufficient evidence of weight discrimination and sex discrimination to survive defendant's motion for summary disposition. We affirm in part and reverse in part.

Plaintiff was hired by defendant as a sales representative on October 12, 1992. At the time she was hired, plaintiff, who is five-feet, two inches tall, weighed approximately 139 pounds. After six months of training, defendant gave plaintiff a route out of its Saginaw office, which plaintiff began on June 11, 1993. At this time, plaintiff weighed approximately 160 pounds. By August of 1993, plaintiff's weight had increased to 180 pounds; plaintiff attributed this increase to the poor eating habits that she developed from her extensive travel and long hours. Despite her increasing weight gain, however, plaintiff testified that she maintained a professional appearance.

Plaintiff testified at deposition that she first noticed that her weight was an issue in August 1993. According to plaintiff, her area manager, David Prince, told her that she "must not have missed too many breakfasts" because she had "packed on a few pounds" and that she would "look a lot better" if she lost some weight. Plaintiff also testified that Prince suggested that she try Slim Fast. In October of 1993, plaintiff met with Bill Knack, her branch manager, to discuss her goals for the upcoming year. Apparently, defendant offers annual bonus programs for employees that include an employee's personal

goals, such as quitting smoking or attending church. According to plaintiff, Knack suggested that she set a weight-loss goal, and offered her a $500 incentive for losing fifty-four pounds, and decreasing bonus awards for lesser amounts of weight loss. According to Knack, the weight loss incentive was entirely at plaintiff's request and plaintiff specified the amount of weight that she desired to lose.

Plaintiff testified at her deposition that her work performance from June 11, 1993 until November 1, 1993, was rated satisfactory or better. She stated that a few customers on her route increased the percentage of their purchases during this time. She also testified that a number of the accounts on the route had been neglected in previous years and many of the customers were unhappy with defendant's services. According to defendant, however, plaintiff had problems returning her customers' phone calls and calling in her orders before deadlines. Other customers complained that plaintiff seemed "too rushed" to handle certain accounts and that she changed delivery times without warning.

On November 1, 1993, defendant removed one of plaintiff's largest accounts from her route and replaced it with six smaller accounts. Plaintiff alleged that Knack told her that the larger account had been given to another employee, Wayne Warner, because the client's director of food services "would probably do better with a man." Defendant denied, however, that its action was due to plaintiff's gender, but rather that the client had requested a new salesperson. Plaintiff pointed out, however, that another of her accounts was given to a male representative even though the customer had not requested a new salesperson.

Prince testified that he talked with plaintiff in December, 1993, about his concerns regarding her performance, including time management and customer relations. According to Prince, at least six customers made complaints about plaintiff that were significant in the decision to terminate her employment. On or about March 8, 1994, plaintiff received a warning letter concerning her employment performance. The letter did not include plaintiff's weight as a concern. Plaintiff testified, however, that she was given the letter at a meeting and that her weight was "extensively discussed" at the meeting. On April 25, 1994, plaintiff met with Knack and Prince for her mid-year review. According to plaintiff, Knack told her that her work was on the right track, but that she needed to lose weight to meet her bonus objective.

By June 1994, plaintiff's weight had risen to approximately 198 pounds. On June 15, 1994, plaintiff received a message from Knack requesting a meeting. On June 16, 1994, Knack and Prince met with plaintiff and gave her a letter of termination; the letter stated that she was being terminated because she failed to perform her job adequately. Plaintiff testified, however, that Knack told her that she did not portray the image that defendant wanted to project and that her termination was unrelated to her work performance. Knack denied making this statement, but admitted that neither he nor Prince could supply plaintiff with specific reasons for their decision without looking at plaintiff's file.

On November 9, 1994, plaintiff filed suit against defendant alleging violations of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548 (101) *et seq.*, and the Michigan Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq*. Plaintiff specifically argued that defendant had unlawfully terminated her employment because of her weight and

gender. Plaintiff Michael Pinchock also alleged that defendant's action deprived him of consortium in his marital relationship with plaintiff. On April 15, 1996, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10).

On January 6, 1997, the trial court issued its order and opinion granting defendant's motion. With regard to plaintiff's ELCRA claim, the court held that summary disposition was proper under the test for discrimination established by the Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), because plaintiff had not proven that defendant's reasons for firing her (customer complaints) were a mere pretext for discrimination. With regard to plaintiff's HCRA claim, the court found that plaintiff had not established a prima facie case of discrimination under *McDonnell Douglas*, *supra*, because her weight did not substantially limit any major life activity and because defendant did not perceive such a limit. The court also noted that even if plaintiff had established a prima facie case under the HCRA, the claim would still fail because plaintiff did not show that defendant's legitimate nondiscriminatory reason for her discharge was a pretext for discrimination. Plaintiff appealed the trial court's decision to this Court on January 21, 1997.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996). A court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence submitted by the parties. *Royce*, *supra*. The test is whether the record which might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds might differ. *Id.* The motion must not be granted unless the nonmoving party's claim has some deficiency which cannot be overcome. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 284; 393 NW2d 610 (1986).

I

Plaintiff's first argument on appeal is that the trial court erred in granting summary disposition because it repeatedly failed to consider all of the evidence of record in a light most favorable to plaintiff. Plaintiff specifically argues that the court failed to recognize that plaintiff established a prima facie case of discrimination under a disparate treatment theory, and that the court erred in concluding that plaintiff failed to show that defendant's reason for terminating her employment was pretextual. According to plaintiff, the case should have proceeded to trial without the use of the *McDonnell Douglas* burden-shifting analysis because plaintiff presented direct evidence of gender/weight discrimination. We agree.

In analyzing discrimination claims under the ELCRA, Michigan courts have often resorted to federal precedent for guidance. *Meagher v Wayne State Univ*, 222 Mich App 700, 708-710; 565 NW2d 401 (1997). The "prima facie case" analysis cited by plaintiff was established by the Supreme Court in *McDonnell Douglas*, *supra*, for use in analyzing employment discrimination claims under Title VII of the federal Civil Rights Act. As adopted by Michigan courts and applied to claims arising under the ELCRA, this approach requires the court to first determine whether the plaintiff has stated a prima facie case of discrimination.[2] *Meagher*, *supra* at 710-711. If the court concludes that the plaintiff has established a prima facie case, it must then consider whether the defendant has articulated a legitimate, nondiscriminatory reason for its action. *Id.* at 711. If the defendant has done so, the court next

determines whether the plaintiff has proven that the reason offered by the defendant was a mere pretext for discrimination. *Id.* at 711-712.

The *McDonnell Douglas* burden-of-proof approach is tailored for cases involving circumstantial evidence of discrimination. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; ___NW2d___(1997). However, as plaintiff correctly points out, this analysis is inappropriate in cases where the plaintiff presents "direct evidence" of discriminatory animus and where the defendant's decision to terminate the plaintiff's employment could have been based on several factors, legitimate ones as well as legally impermissible ones. See *Harrison, supra* at 609-610 (citing *Kresnak v Muskegon Heights*, 956 F Supp 1327 [WD Mich, 1997]). See also *Trans World Airlines, Inc v Thurston*, 469 US 111, 121; 105 S Ct 613; 83 L Ed 2d 523 (1985). "Direct evidence" is that which, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor" in defendant's decision to terminate plaintiff's employment. *Harrison, supra* at 610 (quoting *Kresnak, supra* at 1335). An example of direct evidence is a racial slur by a decisionmaker; such evidence is "sufficient to get the plaintiff's case to the jury." *Harrison, supra*. As this Court recently held in *Harrison, supra*, the following principles of proof apply in such cases:

> First, as with circumstantial discrimination cases, in a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (or other eligibility) and direct proof that the discriminatory animus was causally related to the decisionmaker's animus. Upon such a presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Harrison, supra* at 612-613.]

In the present case, the trial court correctly found that plaintiff established a prima facie case of intentional discrimination. Evidence in support of the trial court's conclusion includes plaintiff's deposition testimony that Prince and Knack, defendant's employees, directly criticized her weight and made derogatory comments about other overweight individuals. Plaintiff stated that Knack removed one account from her route because the client would "eat a woman alive," and another account because the client "would do better with a man." Furthermore, plaintiff testified that, during the meeting at which she was terminated, Knack told her that defendant's decision was "not performance-related" and that they just didn't feel that plaintiff projected "the image" that defendant wanted to portray "in the Saginaw market." Such testimony, if believed, constitutes "direct evidence" of discrimination.[3]

The trial court also determined, however, that defendant had a legitimate, nondiscriminatory reason for terminating plaintiff's employment. The court thus concluded that plaintiff did not meet her burden of proof as to "part three" of the *McDonnell Douglas* test (pretext), and granted summary disposition accordingly. Since this Court pronounced in *Harrison, supra* at 612, 613, that in a "typical single-plaintiff, mixed-motive employment discrimination" case the federal approach is superior to the *McDonnell Douglas* formula, we conclude that the trial court erred in applying the *McDonnell*

Douglas formula and in granting summary disposition on that basis.[4] Given our conclusion with regard to plaintiff's ELCRA claim, we find it appropriate to remand this case to the trial court for reconsideration of defendant's motion. *See Harrison, supra* at 613-614.[5]

II

Plaintiff's next argument on appeal is that the trial court erred in "failing to give a favorable inference to the plaintiff regarding documents, files, and records of comparable male sales representatives that could not or would not be produced by the defendant though all of the records were kept in the regular course of business." Plaintiff's argument stems from the fact that defendant did not produce the personnel records of Kevin Barko, plaintiff's predecessor, for the period that he worked as the sales representative for the Saginaw route. Plaintiff contends that since defendant failed to produce these records, a presumption arises that if the evidence were produced, it would operate against defendant. We disagree.

When a party deliberately destroys evidence, or fails to produce it, courts generally presume that the evidence would operate against the party who destroyed it or failed to produce it. *Johnson v Secretary of State*, 406 Mich 420, 440; 280 NW2d 9 (1979). In the present case, there is no indication that defendant intentionally destroyed, withheld, or even lost relevant documents from Barko's personnel file. Although plaintiff contends that such records "should exist," defendant maintains that it simply did not retain Barko's performance-related personnel records from his position in the Saginaw office. Barko held that position until June 1993; this case, however, was not brought until November 1994. Plaintiff has not presented any authority for the proposition that defendant was required to retain performance-related personnel records for any specified period of time. Under the circumstances, the trial court was not required to draw an adverse inference against defendant with regard to Barko's personnel records.

III

Plaintiff's next argument is that her weight, "and the defendant's ill conceived perception that the plaintiff's weight made her unprofessional and therefore unable to perform her position for defendant," qualifies as a handicap under the HCRA, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*

Section 202(1)(b) of the HCRA provides that an employer shall not "discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." In order to establish a prima facie case of handicap discrimination, plaintiff must first establish that her weight is a handicap within the meaning of the statute. For purposes of § 202(1)(b), a handicap is defined by the HCRA as:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:

(A) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.

* * *

(ii) A history of a determinable physical or mental characteristic described in subparagraph (i).

(iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [MCL 37.1103(e); MSA 3.550(103)(e).]

In the present case, plaintiff does not assert that her weight affected any of her major life functions. Rather, she claims that her weight is a "handicap" because it is *perceived* as such by defendant. We believe that plaintiff's argument is critically flawed because she failed to first establish that her weight is a handicap. Subparagraph (iii) states that a person is handicapped for purposes of the HCRA if she is "regarded as having a determinable physical or mental characteristic described in subparagraph (i)," i.e., a characteristic that substantially limits one or more major life functions. However, plaintiff does not attempt to establish that her weight is a determinable physical characteristic as described in subparagraph (i). Plaintiff does not allege that her weight condition is the result of any "disease, injury, congenital condition of birth, or functional disorder." Similarly, she does not allege that she was physically unable to perform her job duties or that defendant perceived her weight as making her physically unable to perform her duties. In fact, she testified that her weight did not substantially limit any of the major life activities. Given the circumstances, the trial court properly dismissed plaintiff's HCRA claim.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski

[1] Since plaintiff Michael Pinchock's role in this case arises from the loss of consortium claim in Mrs. Pinchock's complaint, we use the term "plaintiff" in this opinion to refer to Lillian Pinchock only.

[2] To establish a prima facie case, the plaintiff must show (1) that she was a member of a protected class, (2) that she suffered an adverse employment action, (3) that she was qualified for the position, and (4) that others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in the defendant's adverse conduct toward the plaintiff. *Lytle v Malady*, 456 Mich 1, 29; 566 NW2d 582, rehearing granted 456 Mich 1202 (1997).

[3] Plaintiff also testified that she suffered from sex discrimination in that overweight males were allowed to maintain their employment, that she lost several important accounts due to her gender, and that Kevin Barko, plaintiff's predecessor, was allowed to remain an employee despite complaints about his performance.

[4] We note, however, that the *Harrison* decision was released in October, 1997 and that the trial court's opinion and order is dated January, 1997. Thus, the trial court did not have the opportunity to use *Harrison* in formulating its decision. Nonetheless, the decision in *Harrison* currently represents the law in Michigan and will be followed and applied by this Court.

[5] Given this conclusion, we find it unnecessary to resolve plaintiff's other claims relating to this issue.