# STATE OF MICHIGAN

# COURT OF APPEALS

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TAMMY SISSON,

Plaintiff-Appellant,

v

DYNAMIC REHABILITATION CENTERS, INC., JEFF WAYNE and MIKE WAYNE,

Defendants-Appellees.

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UNPUBLISHED
March 13, 1998

No. 196582
Wayne Circuit Court
LC No. 95-508284-CZ

Before: Holbrook, Jr., P.J., and White and R.J. Danhof*, JJ.

PER CURIAM.

Plaintiff brought this action alleging that defendant terminated her from her office manager position and demoted her to receptionist because she was pregnant, in violation of the Michigan Civil Rights Act, MCL 37.2202; MSA 3.548(202). The trial court granted defendants' motion for summary disposition. MCR 2.116(C)(10). Plaintiff appeals as of right and we reverse and remand[1]

Defendants' motions were brought under MCR 2.116(C)(8) and (C)(10), and the circuit court granted the motions under MCR 2.116(C)(10). A motion brought under MCR 2.116(C)(10) tests the factual basis underlying a claim or defense, and is properly granted if no issue of material fact exists, except the amount of damages, and the moving party is entitled to judgment as a matter of law. *Ladd v Ford Consumer Finance*, 217 Mich App 119, 124; 550 NW2d 826 (1996). In deciding whether to grant the motion, the trial court is to consider all pleadings, affidavits, depositions, admissions, and other documentary evidence available to it in a light most favorable to the opposing party. *Id*. at 124-125. We review a trial court's decision to grant a motion for summary disposition de novo. *Id*. at 124.

Pregnancy discrimination is included within the meaning of sex discrimination under the Michigan Civil Rights Act. MCL 37.2202; MSA 3.548(202); *Dep't of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 436; 431 NW2d 65 (1988). Section 202 of the Michigan Civil Rights Act is modeled after § 703 of Title VII of the federal Civil Rights Act of 1964, 42 USC 2000e-2. *Brighton Area Schools* at 437. Both Title VII and the Michigan Civil Rights Act

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

recognize two theories of recovery: disparate treatment and disparate impact. *Id*. In this case, plaintiff alleges disparate treatment against her individually on the basis of her pregnancy.

To establish a prima facie case of sex discrimination, a plaintiff must provide evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in defendant's adverse conduct toward the plaintiff." *Lytle v Malady*, 456 Mich 1, 29; 566 NW2d 582 (1997)(opinion of Riley, J). "The burden of establishing a prima facie case of disparate treatment is not onerous." *Texas Dept of Community Affairs v Burdine*, 450 US 248, 253; 101 S Ct 1089; 67 L Ed 2d 207 (1981). To avoid summary disposition when alleging disparate treatment, a plaintiff must establish a genuine issue of material fact regarding whether a prima facie case of discrimination existed. *Donajkowski v Alpena Power Co*, 219 Mich App 441, 449; 556 NW2d 876 (1996).

Here, the only element of plaintiff's cause of action in dispute is whether she had established that defendant had a discriminatory motive in demoting her. Plaintiff was hired by defendant Dynamic Rehabilitation Centers, Inc., in April 1993, as a receptionist. She was given a highly favorable performance evaluation in July 1993, and in February 1994 she was promoted to office manager. Soon after she was promoted, plaintiff discovered that she was pregnant. When she made the announcement at her office, defendant's vice president, Jeff Wayne, commented that plaintiff's maternity leave would have a negative impact on the office. In April 1994, approximately one month after announcing she was pregnant, plaintiff was given a favorable performance evaluation by her supervisor Terry Dibble. The evaluation form listed eleven separate factors to be considered by plaintiff's supervisor. Plaintiff was ranked on eight factors as "excellent," two as "above average," and only one—availability—as "satisfactory." Dibble's written comments next to the "satisfactory" score stated that plaintiff's "attendance has been effected [sic] by family responsibilities, . . . [including] pregnancy." Overall, plaintiff was evaluated as "above average ++."

The record indicates that plaintiff was given increased responsibilities in June 1994 when defendant moved its Dearborn office, where plaintiff had been working, to Redford. According to plaintiff's deposition testimony, she went from supervising two employees in the Dearborn office to supervising seven employees at the new Redford office. In August 1994, Darlene Van Mill became plaintiff's supervisor. Defendants installed a computer software program, Lotus, to track patient appointments, and plaintiff was solely responsible for generating weekly reports which were to be turned in to Van Mill and Jeff Wayne at the Troy office each Monday morning. When plaintiff was unable to meet this deadline because of her other responsibilities on Monday mornings, she and Van Mill came to an agreement that plaintiff would submit the reports by noon. Also, Van Mill had instructed plaintiff to train other employees to do the tasks that were her responsibility, but because of time and staff constraints, plaintiff was unable to train anyone else how to run the computer reports.

In early August, plaintiff was notified by Dibble that she had been selected as a company employee-of-the-month for the previous June. In late August, Van Mill, plaintiff, and the Troy office manager met to discuss ways to make the Troy and Redford offices run compatibly. On September 27, Van Mill informed plaintiff that she was being demoted to receptionist, with no decrease in pay. Van

Mill justified the demotion by citing various problems with plaintiff's management of the Redford office, including her failure to submit the computer reports in a timely manner, her failure to reschedule all patients who canceled or missed their appointments, her failure to properly verify the insurance of patients, and her failure to train another employee to handle plaintiff's responsibilities while she was on maternity leave. Van Mill told plaintiff that the receptionist position would be available when plaintiff returned from her unpaid maternity leave—which was to begin the next day—and that the decision to demote her was "set in stone." Plaintiff subsequently refused the demotion. It is undisputed that Jeff Wayne made the decision to demote plaintiff, after consultation with Van Mill, who then informed plaintiff that she was demoted.

At the time that plaintiff announced that she was pregnant, defendant did not have any maternity or disability leave policy in force. During the following months, plaintiff made numerous inquiries regarding establishment of such a policy. Finally, in August, plaintiff was informed that the maternity leave policy would allow for six weeks of unpaid leave.

Viewing the above evidence in a light most favorable to plaintiff, we conclude that plaintiff met her burden of establishing a prima facie case of sex discrimination. Plaintiff's meteoric descent from star employee to demotion in the short span between early August and late September, during a period when plaintiff was pregnant and preparing for maternity leave, was expressly criticized for her increased absences due to her pregnancy, and was demoted one day before her maternity leave was to begin, raises a strong inference of discriminatory motive by defendants.

Once a plaintiff has established a prima facie case of discrimination, the burden of production shifts to the defendant to articulate legitimate, nondiscriminatory reasons for its actions. *Brighton Area Schools, supra,* 171 Mich App 438. Defendants' attempt to rebut plaintiff's prima facie case of discrimination by arguing that her demotion was justified by poor performance was sufficient to again shift the burden of production to plaintiff to establish that defendants' reasons were pretextual. In support of her argument that defendants' stated justifications for her demotion were a mere pretext for discrimination, plaintiff cites her deposition testimony in which she stated that the issue of the late computer reports had been settled when she and Van Mill agreed that the reports could be submitted later in the day. Defendants had also identified lower patient compliance with physician protocol in the Redford office than the Troy office as a justification for plaintiff's demotion, stating that they assumed the disparity was because plaintiff failed to properly follow up on missed or canceled appointments. Plaintiff testified that she showed Van Mill the notations demonstrating that she had been following up with patients, and defendants have failed to produce the underlying reports to show that the disparity did in fact exist. Defendants also proffered plaintiff's failure to properly verify the insurance of patients as justification for her demotion. Plaintiff testified that only a few such problems occurred and that she had done what her job description required as to these patients. Finally, defendants argue that plaintiff admitted she did not train the part-time receptionist to prepare the computer reports, despite a directive to do so. While plaintiff did admit this, she testified that the problem was caused by a lack of time and staff to complete the training.

In addition, plaintiff testified that she repeatedly mentioned to defendants at the end of August, 1994, after she had submitted her doctor's disability certificate stating that her maternity leave would

begin September 29, 1994, that they needed to get a replacement for her while she was on leave. Plaintiff also testified that several weeks later, defendants began giving her tasks that she had never previously been assigned, including completing time management sheets. Defendants argued below that plaintiff's new responsibilities, as of June 1994 when the move to the larger Redford office occurred, rendered her unable to efficiently use her time or delegate responsibility. However, plaintiff submitted below a memo dated August 3, 1994 stating, as noted above, that she and one other employee had been selected as employee of the month for June 1994. The memo extended congratulations to them "for the excellent work and continued dedication to patient care." In addition, defendants failed to produce the computer reports upon which they largely justified plaintiff's demotion. Moreover, the documentation defendants submitted below in support of this argument consisted of seven memos from Van Mill, six of which were addressed to both plaintiff and her counterpart in the Troy office and were largely informational. These six memos stated either new policies or suggested methods to improve certain procedures, none of which defendants argue plaintiff failed to comply with. The only memorandum that defendants submitted below which stated dissatisfaction with plaintiff's performance was dated September 28, 1994, the date on which Van Mill told plaintiff that when she returned from maternity leave she would be demoted to receptionist. A reasonable fact-finder could conclude, given that defendants' alleged problems with plaintiff's performance were not documented or brought to plaintiff's attention until after she presented her doctor's disability certificate, that the alleged deficiencies in plaintiff's performance were not the true reasons for plaintiff's discharge.

Thus, plaintiff presented evidence from which a reasonable fact-finder could conclude that plaintiff's pregnancy was a determining factor in her discharge from the office manager position and her demotion to receptionist.[2] In cases such as this, issues of motive and credibility are critical and should be decided by the trier of fact. Accordingly, we reverse the trial court's order granting summary disposition to defendants and reinstate plaintiff's cause of action.[3]

Reversed and remanded. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Robert J. Danhof

[1] Plaintiff has not challenged on appeal the dismissal of her sexual harassment claim.

[2] Both parties make allegations of fact not present in the record below. On appeal, defendant challenges certain allegations plaintiff makes as unsupported. We have not relied on any of these challenged allegations in our determination and are satisfied that plaintiff presented sufficient evidence below to survive defendant's motion for summary disposition.

[3] Defendants also argue that plaintiff failed to establish that she was constructively discharged. Plaintiff did not brief the constructive discharge claim on appeal. Plaintiff's complaint alleged that she was "wrongfully, constructively and/or discriminatorily discharged and/or demoted" in violation of ELCRA.

Defendants filed a motion for partial summary disposition of plaintiff's constructive discharge claim and claim for economic damages. In response, plaintiff argued that this is not a constructive discharge case, but rather, plaintiff had been terminated from her position as office manager and was demoted to receptionist. Plaintiff thus waived the constructive discharge claim and the issue is moot.