STATE OF MICHIGAN

COURT OF APPEALS

SHARRON P. MAPLES,

Plaintiff-Appellant,

v

KINDERCARE LEARNING CENTERS, INC. and ROSEMARY BARTEL,

Defendants-Appellees.

UNPUBLISHED
January 12, 1999

No. 203184
Ingham Circuit Court
LC No. 96-082320-CL

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

In this age discrimination case, plaintiff appeals as of right from the order granting defendants' motion for summary disposition under MCR 2.116(C)(10). We reverse and remand.

Plaintiff argues that she presented sufficient evidence of age discrimination to create a genuine issue of material fact for trial, and, therefore, that the trial court erred in granting summary disposition to defendants. We agree.

This Court reviews de novo a trial court's decision to grant summary disposition under MCR 2.116(C)(10). *Ruff v Isaac*, 226 Mich App 1, 4; 573 NW2d 55 (1997). We must review the "affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties" in the light most favorable to the nonmoving party and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996).

Initially, we disagree with plaintiff's contention that she presented direct evidence of age discrimination such that she need not establish a prima facie case under the shifting burden analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Harrison v Olde Financial Corp*, 225 Mich App 601, 609-610; 572 NW2d 679 (1997). The alleged remarks plaintiff complains of, if believed, would not **require** the conclusion that unlawful discrimination was at least one factor in defendants' adverse employment actions. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621; 576 NW2d 712 (1998). Accordingly,

plaintiff was obligated to establish a prima facie case under the familiar burden-shifting approach established in *McDonnell Douglas*. *Harrison, supra*.

Applying the *McDonnell Douglas* analysis, the trial court concluded that plaintiff presented sufficient evidence to establish a prima facie case of age discrimination. It further concluded that defendants articulated a legitimate, nondiscriminatory reason for plaintiff's termination, namely, her failure to comply with a number of the requirements of the action plan. We agree with those aspects of the trial court's decision. Accordingly, in order to survive defendants' motion for summary disposition, plaintiff had the ultimate burden of submitting "admissible evidence to prove that the employer's nondiscriminatory reason was not the true reason for the discharge and that the plaintiff's age was a motivating factor in the employer's decision." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697; 568 NW2d 64 (1997); see also *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176; 579 NW2d 906 (1998). Thus, plaintiff was required to present evidence that defendants' explanation was a pretext for discrimination. *Town*, *supra*.

We have thoroughly reviewed the record presented to the trial court and conclude that plaintiff has presented sufficient circumstantial and indirect evidence to create a genuine issue of material fact concerning whether age was a motivating factor in her termination. Defendants presented evidence that they had indicated to plaintiff in her two performance reviews that labor costs and enrollment needed improvement, and that, in the last few months of her tenure at KinderCare, they had discussed with her several problems in billing and tuition. Notwithstanding, plaintiff's 1993 and 1994 performance reviews indicate that she consistently met her job requirements and that her overall performance was satisfactory. The apparent inconsistency between her earlier performance evaluations and the action plan, when coupled with other evidence in this record, persuade us that plaintiff has created a question of fact regarding discriminatory animus.

Most important to our analysis are three statements allegedly made by defendant Bartel to plaintiff which suggest that age may have been a motivating factor in plaintiff's termination. Plaintiff testified in her deposition that defendant Bartel made the following remark to plaintiff after plaintiff was told that a more difficult action plan would be put in place if plaintiff successfully complied with the first one: "The old Kinder-Care is gone, the . . . new and young Kinder-Care is in." Plaintiff also testified that when she asked defendant Bartel about the possibility of working in a teaching position, Bartel remarked, "I didn't think you would have the energy to take a [teaching] position." Finally, plaintiff testified that defendant Bartel, referring to another employee at defendant KinderCare's Okemos center, Bonnie Underwood, stated that Underwood "needs to go away because she's getting – She's getting too old and crabby." Although each of these comments by defendant Bartel, the decision-maker, may be viewed as communicating something other than age discrimination, when considered together, we are persuaded that a genuine issue of a material fact has at least been raised by plaintiff.

In sum, the evidence presented by plaintiff, viewed in a light most favorable to her, creates a genuine issue of material fact precluding summary disposition.

Reversed and remanded.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.