

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH BURKHARDT,

Plaintiff-Appellant,

v

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

January 22, 1999

No. 197988

Wayne Circuit Court

LC No. 94-434092 NZ

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

We concur with the result reached by our colleague in his concurring/dissenting opinion except for his conclusion that the trial court did not err in directing a verdict in favor of defendant on plaintiff's unlawful retaliation claim. We reverse the trial court's decision to direct a verdict in favor of defendant on plaintiff's claim of unlawful retaliation and remand this case for a new trial on that claim.

In order to avoid a directed verdict, the nonmoving party must present evidence sufficient for the trial court to find that a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). In deciding whether to grant a motion for a directed verdict, the trial court must view the evidence and all legitimate inferences arising from the evidence in favor of the nonmoving party. *Id.* A motion for a directed verdict should be granted only when no factual question exists upon which reasonable minds could differ. *Alar v Mercy Hosp*, 208 Mich App 518, 524; 529 NW2d 318 (1995). We review a trial court's decision to grant a directed verdict de novo. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

To establish a claim of unlawful retaliation under § 701 of the Michigan Civil Rights Act (CRA), MCL 37.2701; MSA 3.548(701), a plaintiff must show (1) that she engaged in a protected activity; (2) that this was known to defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). Section 701 of the CRA clearly tracks § 704(a) of federal Title VII and should be construed in the same manner. *Id.* at 440.

Our colleague presumes, without deciding, that plaintiff presented sufficient evidence to establish that she engaged in a protected activity. We conclude, however, that plaintiff did in fact present sufficient evidence for the jury to conclude that she engaged in an activity protected under the CRA. Plaintiff testified that soon after she assumed the duties of manager of the Facilities Utilization Review Department (FUR), certain African-American members of the department's support staff informed her that department supervisors were treating them unfairly because of their race. Plaintiff further testified that as a result of these complaints, she informed the department supervisors that she would not tolerate any kind of discrimination within the department.

Section 701 of the CRA prohibits retaliation or discrimination against a person "because the person has opposed a violation of this act." The "opposition clause" has been interpreted to protect employees who protest discrimination both formally and informally, including those who complain to high management, write critical letters to customers, protest against discrimination by industry and society in general, and express support of coworkers who have filed formal charges. See *Sumner v United States Postal Serv.*, 899 F2d 203, 209 (CA 2, 1990) [analyzing §704(a) of Title VII]. Further, the conduct of an employee cannot be opposed to a violation of the CRA unless it refers to some action of the employer that the employee reasonably believes is unlawful. See *EEOC v Crown Zellerbach Corp.*, 720 F2d 1008, 1013 (CA 9, 1983) [analyzing § 704(a) of Title VII]. We conclude that plaintiff's act of instructing department supervisors that discrimination would not be tolerated, when done in the wake of complaints regarding racial discrimination, was based on a reasonable belief that defendant was engaging in an unlawful employment practice and, therefore, qualified as a protected activity under § 701 of the CRA.

Our colleague, however, would disagree with our conclusion that plaintiff engaged in a protected activity. According to the concurring/dissenting opinion, an organizational employee should not be subjected to liability for employment discrimination under the CRA based on the discriminatory animus harbored by an employee who is subordinate to the aggrieved employee at the time of the alleged discrimination. We might agree with our colleague had plaintiff claimed to have been injured by the discriminatory animus of her subordinates. However, in our view, this is not the claim that is made in this case. Rather, plaintiff has claimed that defendant unlawfully retaliated against her because she opposed her subordinates' discriminatory conduct. The record reveals that plaintiff instructed her subordinates that they were not to discriminate against black employees. In response, these subordinates complained to plaintiff's supervisor that plaintiff was dividing the office racially and favoring black employees, whereupon plaintiff's supervisor removed plaintiff from her position. Viewing the evidence in a light most favorable to plaintiff, the discriminatory animus underlying defendant's decision to terminate plaintiff from her position lies with plaintiff's supervisor and not with her subordinates.

The evidence also reveals that defendant knew that plaintiff had instructed the department supervisors that discrimination would not be tolerated, and that defendant took an employment action adverse to plaintiff. Therefore, what remains to be decided is whether plaintiff presented sufficient evidence of the existence of a causal connection between the protected activity and the adverse employment action so that a directed verdict should not have been granted. Viewing the evidence in a

light most favorable to plaintiff, and permitting every reasonable inference in her favor, we find that plaintiff presented sufficient evidence of causation to withstand a motion for a directed verdict.

According to plaintiff's proofs, for each of the years 1985 through 1992, her job performance was evaluated by defendant as commendable, except for one intervening year when she received a dual rating of well-qualified and outstanding. Further, plaintiff presented evidence that following the complaints of the department supervisors respecting her management style, defendant's human resources department conducted an investigation and concluded that the charges against plaintiff were not supported and that she should be reinstated to her position as manager of the FUR.

Although plaintiff presented no direct evidence to show that defendant's motive for terminating her from her position was anything other than based upon plaintiff's job performance, such direct evidence is often impossible to come by given the difficulties inherent in establishing the motivation for a particular decision. Therefore, circumstantial evidence is oftentimes the only evidence available to show that a defendant was motivated by a desire to retaliate. See *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 396-398; 493 Mich 441 (1992). Accordingly, the evidence concerning plaintiff's positive job evaluations in the years preceding defendant's sudden decision to terminate her from her position, coupled with the evidence respecting defendant's human resources department's conclusion that plaintiff should be reinstated, raises the legitimate inference that defendant's decision to terminate plaintiff from her position was not motivated by concerns relating to her job performance but, instead, arose from plaintiff's active opposition to a perceived violation of the CRA. Whether plaintiff would have prevailed on this claim is a question that should not have been taken away from the jury.

Accordingly, we remand for a new trial on plaintiff's claim of unlawful retaliation. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ William B. Murphy