STATE OF MICHIGAN

COURT OF APPEALS

PATSY BORUM,

Plaintiff-Appellant/Cross-Appellee,

v

GRAND TRUNK WESTERN RAILROAD and DONALD GAGEN,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
February 5, 1999

No. 204332
Wayne Circuit Court
LC No. 96-604040 NZ

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of both defendants on plaintiff's claims alleging race and sex discrimination, and unlawful retaliation under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.549(101) *et seq*. Defendants cross appeal, arguing that the trial court abused its discretion by not striking plaintiff's affidavit. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff is an African-American woman who has been employed by defendant Grand Trunk Western Railroad since 1974. Her product manager position was eliminated during a 1994 departmental reorganization. Because of her prior union seniority, plaintiff was able to "bump" into a union clerical position, although she earns one-third less than she did as a product manager. Plaintiff alleges that she was terminated from her management position because of her race and gender, and also in retaliation for filing a complaint with the EEOC in 1983. She further alleges that defendant's subsequent refusal to re-promote her into a management position was the result of race and sex discrimination and also retaliation for filing the 1983 EEOC complaint and a later 1995 EEOC complaint.

I

Plaintiff argues that the trial court erred in granting summary disposition to defendants regarding her discrimination and retaliation claims. This Court reviews de novo a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When conducting a

review of a grant of summary disposition under MCR 2.116(C)(10), the court considers the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

To establish a prima facie case of employment discrimination, in the absence of direct evidence of discrimination, a plaintiff must establish that (1) she was a member of a protected class, (2) she was subject to 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. *Town Hall v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). A plaintiff must establish a prima facie case by a preponderance of the evidence. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172; 579 NW2d 906 (1998).

We find that plaintiff established a prima facie case of discrimination. The first two requirements of a prima facie case are undisputed. As an African-American woman, plaintiff is a member of two distinct classes protected under the act. Moreover, she suffered at least two adverse employment actions: her removal from management when the product manager position was eliminated in 1994, and the subsequent refusal to promote her into another management position or a better clerical position. Plaintiff also demonstrated that she was qualified for the position from which she was removed. She consistently received performance ratings of average or above average through March 1993, and defendant Grand Trunk promoted her to a director position in July 1993. "An employee is qualified if he [or she] was performing his [or her] job at a level that met the employer's legitimate expectations." *Town Hall*, *supra* at 699. Plaintiff also presented evidence that she was treated differently during the 1994 downsizing than similarly-situated individuals who were neither African-Americans nor women. Giving the benefit of any reasonable doubt about this evidence to plaintiff as the nonmovant, we find that the evidence is sufficient to create an inference that discrimination may have been a determining factor in plaintiff not receiving a reassignment to another management position when the product manager positions were eliminated.

Once a plaintiff has established a prima facie case, "a presumption of discrimination arises. The burden then shifts to the defendant to articulate a 'legitimate, non-discriminatory reason' for plaintiff's termination to overcome and dispose of this presumption." *Lytle*, *supra* at 173, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Defendants met this burden by presenting evidence that Grand Trunk's corporate parent required the elimination of one thousand jobs over a three-year period. There was an additional goal of eliminating management levels. "A layoff in the context of an overall workforce reduction provides a nondiscriminatory explanation for the plaintiff's discharge." *Town Hall*, *supra* at 702.

When the employer presents a legitimate, nondiscriminatory reason for the challenged action, the presumption stated in the prima facie case of discrimination is "no longer relevant" because the prima facie case made by the plaintiff has been rebutted. *St. Mary's Honor Center v Hicks*, 509 US 502, 510; 113 S Ct 2742, 2749; 125 L Ed 2d 407 (1993). The burden of proof then shifts back to the plaintiff to establish "by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." *Lytle*, *supra* at 174. In the context of a motion for summary disposition, "a plaintiff

must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.* at 176.

We conclude that the evidence supports a rational inference that defendants' motives in removing plaintiff from management were discriminatory or retaliatory, and summary disposition of plaintiff's discrimination action was therefore improper. Defendants' proffered explanation of overall staff reduction and the elimination of management levels does not explain why the other two non-retiring product managers, both white males, were offered reassignments to other management positions while plaintiff was terminated. It is asserted that defendant Gagen "made the employment decision" during the reorganization, and plaintiff has presented some evidence of Gagen's hostility towards her. "'Where [plaintiff presents] either direct or circumstantial evidence from which a fact-finder could rationally conclude that the employer's stated reason is a pretext for discrimination, summary judgment normally should be denied.'" *Town Hall*, *supra* at 698, quoting Lindemann & Grossman, Employment Discrimination Law (3d ed), pp 26-27, fn 12.

To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show: "(1) that [the plaintiff] engaged in a protected activity; (2) that this was known by the 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), citing *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989). We find that plaintiff has failed to establish a causal connection between her 1983 EEOC complaint and the 1994 adverse employment action. The protected activity was too remote in time, and plaintiff had been promoted three times since the complaint.

Plaintiff also contends that defendants' failure to promote her after the 1994 reorganization was either discrimination or retaliation for her 1983 and March 1995 EEOC complaints. Plaintiff presented evidence that she applied for at least eight open management positions and five clerical positions. Among the management positions were openings for Customer Service Team Manager and Temporary Customer Service Team Manager, which was a position plaintiff was offered during the 1993 reorganization. The vacant positions both went to white males. Moreover, no interviews were conducted for the Customer Service Team Manager position, although defendant's usual policy was to conduct interviews with all qualified internal candidates for posted positions. Plaintiff was interviewed for the Temporary Customer Service Team Manager position, and the hiring manager admitted that he knew about plaintiff's EEOC complaint.

Plaintiff has established a prima facie case of discrimination and retaliation for her 1995 EEOC complaint regarding defendants' refusal to promote her, which was not successfully rebutted by defendants. Although the evidence of a causal connection between plaintiff's second EEOC complaint and the failure to promote her after she lost her management position is not conclusive, where "the evidence is conflicting with regard to an element of plaintiff's prima facie case, summary disposition is improper." *DeFlaviis*, *supra* at 442.

Because we conclude that the trial court erred in granting summary disposition to defendants, we reverse the trial court's order and remand for further proceedings.

II

Plaintiff also contends that the trial court abused its discretion by imposing a ten-page limit on the briefs supporting and opposing summary disposition, striking text in the appendices, and dispensing with oral argument. We disagree. "Construction of a court rule is a question of law that this Court reviews de novo for error." *Bruwer v Oaks (On Remand)*, 218 Mich App 392, 397; 554 NW2d 345 (1996). MCR 2.119(A)(2) prohibits briefs that exceed twenty double-spaced pages, except as permitted by the trial court. The rule does not prevent the trial court from requiring shorter briefs. In any event, plaintiff does not identify any factual issue that she was unable to present because of the ten-page limit. The trial court did not abuse its discretion in setting a stricter page limit for all parties.

Next, plaintiff argues that the trial court abused its discretion in striking "all text appended to the appendices." Although MCR 2.116(G)(5) requires the trial court to consider the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties when ruling on a motion for summary disposition brought under MCR 2.116(C)(10), all parties in the present action submitted material in their appendices that constituted factual narrative rather than documentary evidence. Thus, striking this narrative material was not an abuse of the trial court's discretion to admit or exclude evidence. *Sackett v Atyeo*, 217 Mich App 676, 683; 552 NW2d 536 (1996).

Plaintiff also argues that the court abused its discretion in dispensing with oral argument. However, under MCR 2.119(E)(3), the trial court has discretion to refuse to hear oral argument on motions. Here, the trial court did not abuse its discretion in dispensing with oral argument.

Plaintiff further asserts that these actions deprived her of her right to procedural due process. However, plaintiff presents no authority to support this argument, and we thus consider it abandoned. A party may not announce a position and leave it to this Court to support that position with authority. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). Finally, plaintiff's argument that the trial court impermissibly shifted the burden of proof to her has no merit, inasmuch as the court did not strike the factual material contained in defendants' documentary exhibits.

III

In their cross-appeal, defendants argue that the trial court erred by not striking plaintiff's affidavit where it failed to comply with MCR 2.119(B) and MRE 103(a)(1).

We disagree with defendants' contention that plaintiff's affidavit is not "rationally based" on her perceptions of what occurred during her employment with Grand Trunk, particularly the events of the reorganization of the customer service department. See *Hughes v Park Place*, 180 Mich App 213, 225; 446 NW2d 885 (1989). Moreover, many of the challenged assertions constitute admissible opinion testimony. "It is not erroneous for a lay witness to express an opinion regarding discrimination in an employment setting so long as the opinion complies with the requirements of MRE 701." *Wilson*

v General Motors Corp, 183 Mich App 21, 35; 454 NW2d 405 (1990). We also note that some of the statements challenged as hearsay were not "offered in evidence to prove the truth of the matter asserted," MRE 801(c), and thus are not hearsay and were properly admitted. See *Talley v Bravo Pitino Restaurant Ltd*, 61 F3d 1241, 1249-1250 (CA 6, 1995).

Although the affidavit does contain some inadmissible statements, defendants have failed to demonstrate any prejudice from the admission of the statements. Absent a showing of prejudice resulting from noncompliance with the court rules, any error is harmless. *Baker v DEC International*, 218 Mich App 248, 261-262; 553 NW2d 615 (1996), rev'd in part on other grounds 458 Mich 247 (1998).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot