STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN L. MONCK,

Plaintiff-Appellant,

v

CABLEVISION OF MICHIGAN, INC., d/b/a CABLEVISION,

Defendant-Appellee.

UNPUBLISHED
June 22, 1999

No. 206230
Kalamazoo Circuit Court
LC No. 963880 NZ

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Plaintiff filed suit against defendant, her former employer, alleging that it discharged her from her position as its human resources manager in its Kalamazoo division because of her sex and age in violation of the Elliot Larsen Civil Rights Act ("ELCRA"), MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I

Did the trial court properly granted defendant's motion for summary disposition? To answer this question, we review the trial court's decision de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the claim. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). To avoid summary disposition, the nonmoving party must submit admissible evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of the claim presented. *Id*. Giving the nonmoving party every reasonable benefit of the doubt, the trial court must then determine whether the record leaves open an issue about which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

The ELCRA prohibits an employer from discharging an employee because of either gender or age. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). Our Court has detailed the nature of the proofs under the ELCRA:

> First, the [employee] has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the [employee] is successful in proving a prima facie case, the burden shifts to the [employer] to articulate some legitimate, nondiscriminatory reason for [the discharge]. Third, if the [employer] meets this burden, the [employee] then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the [employer] was merely a pretext [for discrimination]. [*Featherly, supra*, 358 (citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981).]

See also *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173-174; 573 NW2d 906 (1998).

Summary disposition in favor of the employer is proper whenever the employee fails to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact to support either: (1) a prima facie case of unlawful discrimination; or (2) that the reason the employer offered for the discharge was a mere pretext for discrimination. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 563-564; 462 NW2d 578 (1990).

Sex Discrimination

Plaintiff first claims that the trial court erred when it concluded that she failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact to support a prima facie case of gender discrimination. An employee may establish a prima facie case of gender discrimination by proving either intentional discrimination or disparate treatment. *Meagher v Wayne State University*, 222 Mich App 700, 708-709; 565 NW2d 401 (1997). To establish a prima facie case of discriminatory discharge under an intentional discrimination theory, the employee must show that (1) she is a member of a protected class, (2) her employer discharged her, (3) the person responsible for the decision to discharge her was predisposed to discriminate against members of her class, and (4) the person responsible for the decision to discharge her actually acted on that predisposition in rendering his decision. *Id*., 709. To establish a prima facie case of discriminatory discharge under a disparate treatment theory, the employee must show (1) that she is a member of a protected class and (2) that her employer treated her differently than it treated persons outside of the plaintiff's class for the same or similar conduct. *Id*.

In her complaint, plaintiff initially pleaded under an intentional discrimination theory: "[d]efendant, by its agents, representatives, and employees, was predisposed to discriminate on the basis of sex and acted in accordance with that predisposition" when it discharged plaintiff. Despite the contention, plaintiff presented no evidence to support her theory. While plaintiff did testify that someone named Larry Drake had already fired one female human resources manager in defendant's Cleveland division, this fact alone hardly demonstrates a predisposition to discriminate against women. Furthermore, plaintiff presented no evidence that Drake played a role in the decision to discharge her

from her position as defendant's human resources manager in defendant's Kalamazoo division. Most importantly, plaintiff presented absolutely no evidence that any of the three individuals who did play a role in the decision to discharge her was in any way predisposed to discriminate against women. Consequently, we conclude that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of a prima facie case of intentional discrimination.

At the hearing on defendant's motion, plaintiff attempted to add a disparate treatment claim to her arsenal:

> *Q. [The Court]* Counsel, . . . you're losing me here. [W]hat's the gender claim?
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> * * *
>
> *A. [Plaintiff's Counsel]* [Plaintiff] was treated differently than a male supervisor was at the time she was terminated. Mr. Bartholomew was reassigned. He was in a similar supervisory position than she was. He was reassigned, based on complaints from employees about his job performance, whereas [plaintiff] was terminated. . . . That along with . . . [d]efendant['s] . . . history of terminating female employees . . . [is the gender claim].

Disparate treatment analysis, however, requires the employee to present evidence that the individual with whom she seeks to compare her treatment was similarly situated[1], in that all relevant aspects of the respective employment situations were nearly identical. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 668 NW2d 64 (1997). We find the record devoid of any evidence from which it is possible to conclude that Bartholomew was similarly situated to plaintiff. Plaintiff presented no evidence that he possessed the same or similar job history or performed the same or similar supervisory functions. To the contrary, plaintiff presented evidence that while she was a member of defendant's management team, Bartholomew was a member of its engineering staff. Plaintiff clearly failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of a prima facie case of disparate treatment.

In sum, we hold that the trial court did not err when it concluded that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of a prima facie case of gender discrimination.

Plaintiff next claims that the trial court erred when it concluded that defendant articulated a legitimate, nondiscriminatory reason for plaintiff's discharge. Once an employee submits evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of a prima facie case of age discrimination, the burden shifts to the employer "to *articulate* a legitimate, nondiscriminatory reason for [the discharge]." *Featherly*, *supra*, 358 (emphasis added). It is only the burden of production, and not the burden of persuasion, that shifts to the employer. *Meagher*, *supra*, 711. Accordingly, the employer need only set forth, through admissible evidence, an explanation for the discharge which is legally sufficient to justify judgment for defendant. *Lytle*, *supra*, 174.

Defendant presented evidence that it discharged plaintiff after a group of its employees lodged a series of complaints with plaintiff's superiors about her inability to interact with them in a positive or professional manner. Defendant also presented evidence that employee complaints about plaintiff's conduct had been ongoing for at least two years before it discharged her. Thus, we find that defendant presented evidence from which a jury could conclude that there existed an alternative explanation for plaintiff's discharge. Although plaintiff contends that defendant's evidence is deficient because it failed to specify who had complained about what and when, she failed to cite any authority to support her position. Accordingly, we hold that the trial court did not err when it concluded that defendant articulated a legitimate nondiscriminatory reason for plaintiff's discharge.

Age Discrimination

Plaintiff finally claims that the trial court erred when it concluded that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact in support of her claim that the reason defendant offered for her discharge was a pretext for age discrimination. Plaintiff maintains that the reason defendant offered for her discharge was a pretext for age discrimination because it presented no credible evidence to the contrary. According to plaintiff, although defendant claimed that it discharged plaintiff for poor job performance, it presented no evidence to support this claim. Plaintiff contends that the "only evidence of such concerns [even] having been 'aired' was the so-called petition," which defendant never bothered to investigate.

Plaintiff's argument misapprehends both the record and the law. Defendant presented evidence that it discharged plaintiff because a group of its employees lodged a series of complaints about her treatment of them. Indeed, defendant introduced evidence of a long history of complaints by employees against plaintiff that she treated them rudely and unprofessionally. Once an employer presents some evidence that it discharged an employee for a legitimate, nondiscriminatory reason, *the burden shifts back to that employee to submit evidence* sufficient to demonstrate the existence of a genuine issue of material fact in support of a claim that the legitimate reason was a pretext for discrimination. *Town*, *supra*, 695-697.

An employee may demonstrate pretext, as in a prima facie case of disparate treatment, through evidence of how the employer treated similarly situated employees outside the protected class. *Lytle*, *supra*, 177. Alternatively, an employee may demonstrate pretext by showing that the reason the employer offered for the discharge: (1) had no real basis in fact, (2) did not actually play a role in the decision to discharge the employee, or (3) was insufficient to justify the decision to discharge the employee. *Meagher*, *supra*, 712; *Dubey*, *supra*, 565-566. Even under this alternative route, however, the employee must still submit evidence that unlawful discrimination was the employer's true motive in making the decision to discharge her. *Town*, *supra*, 696.

Plaintiff argues that the reason defendant offered for her discharge was a pretext for age discrimination because James Wightman twice evaluated plaintiff at above-average to exceptional in virtually every aspect of her performance. In addition, defendant increased plaintiff's salary in each of the two years before it discharged her, despite Wightman's discretion to offer lower increases. Defendant does not deny that plaintiff skillfully performed many aspects of her job. Defendant does not

claim, however, that it discharged plaintiff because she was unable to skillfully perform her job in any of its aspects. Rather, it maintains that it discharged her because of her mistreatment of her fellow employees.

It is undisputed that a group of defendant's employees repeatedly complained to plaintiff's superiors about her treatment of them. Although plaintiff denied the substance of the employees' complaints, she presented no evidence that they did not complain. It is also undisputed that plaintiff's last three supervisors warned plaintiff to improve her relationship with defendant's employees. That Wightman twice rated plaintiff above-average on virtually every aspect of her performance and that defendant twice increased plaintiff's salary in no way demonstrates an issue of fact as to whether defendant discharged her because she was unable to get along with some of its employees. Stated somewhat differently, an evaluation of good performance in one area, particularly in the technical aspects of a job, is in no way inconsistent with the observation of poor performance in another, particularly in the area of interpersonal relationships. Were we to hold otherwise, we would discourage employers from candid evaluations of employees with good technical skills, but poor people skills, for fear of being unable to discharge them at some later date.

Plaintiff insists that after years of employment, she did not think that she did anything that warranted termination of her job. Her belief, however, is not in issue. Nor is the issue whether defendant discharged plaintiff for a "bad" reason; instead, the issue is whether defendant discharged her for a discriminatory reason. Plaintiff simply presented no evidence that demonstrates an issue of fact that employee complaints about her conduct were insufficient to justify the decision to discharge her, particularly when considered in light of the fact that defendant discharged 33-year-old Johnson for the same exact complaints.

Plaintiff also argues that the reason defendant offered for her discharge was a pretext for age discrimination because defendant failed to follow its own policy of providing employees with a written warning before summarily discharging them. We find that plaintiff failed to submit any evidence that such a policy even exists. Moreover, we conclude that plaintiff ignores defendant's unrebutted evidence that plaintiff's last three supervisors advised her to improve her relationship with defendant's employees. On January 6, 1992, Kate Adams warned: "[plaintiff's] lack of judgment in handling employee relations matters has undermined the credibility of . . . management and damaged employee morale" and "[plaintiff's] inability to work effectively with other staff members . . . is limited due to . . . her poor judgment in dealing with employee issues." Similarly, on November 5, 1993, Tony Ruopoli cautioned: "[plaintiff] needs to be more in tune with employee concerns [and] . . . seek ways to gain additional credibility within employee networks."

On December 2, 1994, Wightman admonished: "[plaintiff] needs to continue her efforts in gaining employee confidence, . . . identifying problem situations before they become larger issues [and] look for . . . opportunities to develop positive experiences with employees." Again, on December 8, 1995, Wightman counseled: "[plaintiff needs to] place an even greater emphasis on employee issues than [she has] . . . in the past[, particularly in the realm] of employee accessibility." That plaintiff disagreed with the assessments of her performance is irrelevant. Also that defendant discharged plaintiff without specifically cautioning her that it was prepared to discharge her if she failed to heed her

supervisor's warnings is also irrelevant, absent evidence that defendant so cautioned similarly situated younger employees. We find that plaintiff presented no such evidence.

Plaintiff next argues that the reason defendant offered for her discharge was a pretext for age discrimination because defendant offered plaintiff a severance package in exchange for her promise to give up any claims of discrimination she may have had against defendant. To support her argument, plaintiff relies on *Suggs v Servicemaster Education Food Management*, 72 F3d 1228 (CA 6, 1996). We find the facts of *Suggs*, however, entirely distinguishable from the facts of the instant case. In *Suggs*, the plaintiff proved that she "was given ten days of severance pay *to which she would not have been entitled* if she had been discharged for failing to perform her duties adequately." *Id.*, 1233. Thus, the severance package served as an affirmation that her performance was adequate. Here, plaintiff acknowledged that defendant routinely offered severance agreements to discharged employees simply because it wanted to part company with finality, and avoid litigation. Plaintiff presented no evidence that she would not have been entitled to severance pay if she had failed to adequately perform her job. Plaintiff presented no evidence that the proposed severance package represented anything more than a boilerplate agreement designed to resolve any outstanding issues between the employer and employee at the time of the employee's separation.

In sum, we hold that the trial court did not err when it concluded that plaintiff failed to submit evidence sufficient to demonstrate the existence of a genuine issue of material fact to support her claim that the reason defendant offered for her discharge was a pretext for age discrimination.

II

Plaintiff also claims that the trial court abused its discretion when it denied plaintiff's motion to extend the time permitted for discovery. We review a trial court's decision on such matters for abuse of discretion. *Nuriel v YWCA*, 186 Mich App 141, 146; 463 NW2d 206 (1990). In making the determination, the trial court should consider whether granting an "extension . . . will facilitate rather than impede litigation." *McDonald Ford Sales, Inc v Ford Motor Co*, 165 Mich App 321, 330; 418 NW2d 716 (1987). Also, the court should consider (1) the timing of the request, (2) any possible prejudice to the parties, and (3) the duration of the litigation. *Id.*

On February 27, 1997, the trial court entered a pretrial scheduling order requiring both plaintiff and defendant to complete any desired discovery no later than June 12, 1997. On June 9, 1997, plaintiff requested that the trial court extend the discovery deadline to July 24, 1997. Although plaintiff argues that the trial court's decision to deny her request deprived her of the opportunity to depose defendant's potential witnesses, we find that plaintiff did not request any discovery until May 29, 1997, when she scheduled fifteen depositions to be conducted on June 9, 1997, through June 12, 1997. It was only after plaintiff subsequently canceled all but two of those depositions that she first requested an extension. Any prejudice plaintiff suffered was solely a consequence of her own conduct.

Moreover, although plaintiff maintains that the extension to July 24, 1997, would have neither delayed the proceedings nor prejudiced defendant, the scheduling order required defendant to file any dispositive motion no later than August 1, 1997. As defendant points out, a party needs more than

seven days between the close of discovery and any proposed summary disposition cutoff date. Plaintiff simply failed to show that an extension would have facilitated, rather than impeded, litigation. Accordingly, we find no abuse of discretion.

Affirmed.

/s/ Jane M. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] *Lytle, supra*, 178 n 28.