STATE OF MICHIGAN

COURT OF APPEALS

BEATRICE CALAWAY,

Plaintiff-Appellant,

v

MEIJER, INC.,

Defendant-Appellee.

UNPUBLISHED
February 4, 2000

No. 217874
Macomb Circuit Court
LC No. 96-000373 CZ

Before: Cavanagh, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that the trial court erred in granting summary disposition on her claim that she was discharged for exercising her rights under the Worker's Disability Compensation Act ("WDCA"), MCL 418.101 *et seq*.; MSA 17.237(101) *et seq*. We disagree.

This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the court considers affidavits, pleadings, depositions, admissions, and documentary evidence, in the light most favorable to the nonmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

MCL 418.301(11); MSA 17.237(301)(11), the "antiretaliation provision" of the WDCA provides:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

To establish a prima facie case of retaliatory discharge under the WDCA, plaintiff must prove that (1) she engaged in protected activity, (2) defendant knew of the protected activity, (3) defendant took an employment action adverse to plaintiff, and (4) there was a causal connection between the protected activity and the adverse employment action. See *Polk v Yellow Freight System, Inc*, 876 F2d 527, 530-531 (CA 6, 1989).

We assume for the sake of argument that plaintiff proffered sufficient evidence to establish a prima facie case of retaliation. We hold, however, that summary disposition was proper in light of plaintiff's failure to establish that defendant's articulated legitimate, non-discriminatory reason for discharging her was pretextual. See *Polk*, 876 F2d at 531. A plaintiff can establish pretext by showing (1) that the employer's articulated reasons had no basis in fact, (2) that if there is a factual basis for the employer's reasons, the reasons were not the actual factors motivating the employer's decision, or (3) the if the reasons were factors, they were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Plaintiff testified at deposition that she had given a coworker prescription medication on two occasions, that she knew it was wrong to do so, and that she was interviewed and terminated (rather than suspended) immediately after defendant's personnel became aware of these actions. Defendant's store manager testified that plaintiff's pursuit of worker's compensation benefits was not a factor in defendant's employment actions, and plaintiff presented no evidence to refute his testimony. It is also undisputed that, following the investigation of this incident, defendant called plaintiff and offered her the chance to return to work. We conclude under these circumstances that plaintiff presented insufficient evidence from which a reasonable jury could infer that defendant's articulated legitimate reason either had no basis in fact, or was not the real reason motivating its actions, or was insufficient to justify defendant's decision. Summary disposition was thus properly granted.

Plaintiff also argues that the trial court erred in granting summary disposition pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Again, we disagree.

It is not clear from plaintiff's brief on appeal exactly why plaintiff claims the trial court erred in dismissing her hostile environment claim.[1] However, it appears that plaintiff is claiming that summary disposition is improper because this is an employment discrimination case, and that discrimination cases involve the inherently factual determination of the employer's motivation. Our Supreme Court has made it clear, however, that employment discrimination cases may be dismissed on summary disposition where, as in the present case, the plaintiff relies on conclusory allegations and fails to proffer "specific facts" showing a genuine issue of fact. *Quinto*, *supra* at 362-363; see, generally, *Celotex Corp v Catrett*, 477 US 317, 327; 106 S Ct 2548; 91 L Ed 2d 265 (1986) (rejecting the practice of forcing employers to prove that the employee *cannot* create an issue of material fact, and requiring employees to produce evidence to create a material factual dispute concerning every element they must prove at trial); *Anderson v Liberty Lobby, Inc*, 477 US 242; 106 S Ct 2505; 91 L Ed 2d 202 (1986) (rejecting the argument that employees could avoid summary judgment simply by establishing doubts about the veracity of the employer's proffered explanation for the adverse employment decision); *Matsushita Elec Indus Co v Zenith Radio Corp*, 475 US 574; 106 S Ct 1348; 89 L Ed 2d 538

(1986) (employees cannot survive summary disposition simply by making conclusory claims that they were discriminated against).

Nevertheless, plaintiff supports her hostile environment claim with allegations that defendant wrongfully accused her of stealing from the store and subjected her to unwarranted questioning and surveillance. However, after a through review of the record, we hold that plaintiff failed to present evidence to establish, as she must, that the allegedly unwelcome conduct was "based on" her age. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Because plaintiff offered no evidence that age was a factor in these incidents and because she testified at deposition that she had no evidence that her age was a factor in any of the defendant's conduct, we hold that the trial court properly dismissed plaintiff's hostile work environment claim pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Helene N. White
/s/ Michael J. Talbot

[1] There appears to be some confusion concerning the nature of plaintiff's claim under the Civil Rights Act. We read plaintiff's complaint, as well as her arguments in response to defendant's motion for summary disposition, as a claim that her employer subjected her to an age-based hostile environment. The trial court appears to have granted summary disposition on the basis that plaintiff failed to sustain her burden of producing sufficient documentary evidence to create a material issue of fact on the issue whether she was discharged on the basis of her age. To the extent plaintiff is claiming that she was terminated on the basis of her age, we agree with the trial court's analysis that plaintiff failed to show, by a preponderance of admissible direct or circumstantial evidence, that defendant's legitimate nondiscriminatory explanation was pretextual or that age-based animus motivated the alleged discharge. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-174; 579 NW2d 906 (1998).