

STATE OF MICHIGAN  
COURT OF APPEALS

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MARY M. SCHADE,

Plaintiff-Appellee,

v

CITY OF DETROIT,

Defendant-Appellant,

and

DETROIT POLICE DEPARTMENT,  
LT. ELMORE SIMONS, and LT. STACY  
BRACKENS,

Defendants.

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UNPUBLISHED

July 28, 2000

No. 209210

Wayne Circuit Court

LC No. 95-532487-NZ

Before: Griffin, P.J., and Holbrook, Jr. and J.B. Sullivan\*, JJ.

PER CURIAM.

In this sex discrimination action, defendant City of Detroit appeals as of right from a jury verdict awarding plaintiff \$50,000. We affirm.

Defendant first claims that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We disagree. MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim on which relief can be granted. *Radke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). The court accepts as true all well-pleaded facts along with any reasonable inferences or conclusions which may fairly be drawn therefrom, and grants summary disposition only if the allegations fail to state a legal claim. *Id*; *Hill v Adler's Food Town, Inc*, 180 Mich App 495, 498; 447 NW2d 797 (1989). While MCR 2.116(C)(8) tests the legal sufficiency of the pleadings, MCR 2.116(C)(10) tests the factual basis underlying the claim, and permits summary disposition when, except as to the amount of damages, there is no genuine issue as to any

\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

material fact and the moving party is entitled to judgment as a matter of law. *Radke, supra*, at 374. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Id.*

Plaintiff's complaint initially alleged, *inter alia*, race and gender discrimination in violation of Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Specifically, plaintiff, who joined the Detroit Police Department in 1974 and held the rank of lieutenant at the time the complaint was filed in 1995, alleged that she was subjected to insubordination and threats from an inferior officer and to indifference by her superiors who failed to process her misconduct report as to that inferior officer, and that she was eventually "broomed out" of the Inspection Section on the grounds that there were too many lieutenants in that section, only to be replaced by an African-American male lieutenant, all in violation of MCL 37.2202; MSA 3.548(202). Plaintiff's amended complaint additionally alleged that the insubordination of the inferior officer and the failure of her superiors to pursue her misconduct report against that inferior officer subjected her to a "hostile work environment," apparently in violation of MCL 37.2103(i)(iii); MSA 3.548(103)(i)(iii).

MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), the statute cited by plaintiff in her complaint, provides in pertinent part:

(1) An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race, . . . [or] sex . . .

To establish a *prima facie* case of discrimination under this statutory provision, a plaintiff must prove by a preponderance of the evidence that (1) she was a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; but (4) the adverse employment action occurred under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Once a plaintiff has sufficiently established a *prima facie* case, a presumption of discrimination arises to which the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.*, at 173. Disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. *Id.*, at 175. A discrimination claim can be based on either a disparate treatment or a disparate impact theory. *Id.*, at 177, n 26.

When a plaintiff presents direct, as opposed to circumstantial, evidence of discriminatory animus, the *McDonnell Douglas* presumption and burden-shifting framework is inapplicable. *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 806-807; 584 NW2d 589 (1998), vacated but reinstated by conflict panel, 233 Mich App 560; 593 NW2d 699 (1999). Direct evidence has been defined in this context as evidence that, if believed, requires the conclusion that unlawful

discrimination was at least a motivating factor. *Id.*, at 807. Direct proof of discriminatory animus ordinarily precludes a grant of summary disposition, and includes, e.g., racial slurs and comments about a person's age, gender or weight made by decision makers. *Id.*, at 807-811.

The Civil Rights Act also provides that sexual discrimination includes sexual harassment, referred to as either "quid pro quo" (not at issue in this case), or "hostile work environment." The latter is set forth in MCL 37.2103(i)(iii); MSA 3.548(103)(i)(iii) as follows:

(i) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

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(iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile, or offensive employment . . . environment.

Our Supreme Court has stated that there are five elements necessary to establish a prima facie case of discrimination based on a hostile work environment: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of her protected status; (3) the employee was subjected to unwelcome conduct or communication involving her protected status; (4) the unwelcome conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile or offensive work environment; and (5) respondeat superior. *Quinto v Cross & Peters*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), citing *Radke, supra*, at 382-383. While the challenged conduct typically involves explicit proposals of sexual activity, the "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Koester v City of Novi*, 458 Mich 1, 15; 580 NW2d 835 (1998), quoting *Oncale v Sundowner Offshore Services, Inc.*, 523 US 75; 118 S Ct 998, 1002; 140 L Ed 2d 201 (1998). A trier of fact may find sexual harassment when "the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*

Defendant's motion for summary disposition was initially argued on November 15, 1996, at which time plaintiff's counsel stated that this "is a totality of circumstances case [in which plaintiff] was subjected to a hostile, intimidating, offensive work environment in violation of [the Police Department's] own policy." Then, at a hearing on January 17, 1997, the court found that there was "certainly a cause of action based on the pleadings . . . [a]gainst the City of Detroit on an Elliott-Larsen violation." After dismissing the individual defendants from the case, the court stated that "[p]art of this sexual harassment had to do with the exposure to apparently an overwhelmingly massive person who was hostile toward [plaintiff]." Without elaboration, the court denied summary disposition stating, "I think there are genuine issues of fact. [Plaintiff] has come forward with enough evidence to establish a prima facie case of sex discrimination under Elliott-Larsen." The court added that "[plaintiff] presented circumstantial evidence that [plaintiff's transfer] was pretextual," and concluded, "It is the City of Detroit that is responsible for the police department's actions and the allegedly sexually hostile environment . . ."

We conclude that the trial court did not err in finding that plaintiff's pleadings stated a claim for intentional (in this case, disparate treatment) discrimination under MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). She is a female, a member of a protected class, and there was no dispute that she was qualified for her position. Nonetheless, she alleged she was "broomed out" of the Inspection Section and replaced by an African-American male lieutenant. Pursuant to *Lytle, supra*, plaintiff has stated a claim for relief. Moreover, plaintiff has arguably also stated a claim for relief under MCL 37.2103(i)(iii); MSA 3.548(103)(i)(iii), the "hostile work environment" provision, especially since *Koester, supra*, has clarified that the harassment need not be motivated by sexual desire, but can be based on a general hostility to women in the workplace. In this case, plaintiff alleged that she was physically threatened by Police Officer Leroy Stafford who was grossly insubordinate to her, that she submitted a misconduct report to her superiors (both male) who failed to investigate her claim or to discipline Stafford, the sum of which subjected her to a hostile, intimidating work environment, that she was "constructively removed" and replaced by an African-American male, and respondeat superior. Since the factual allegations are taken as true, along with any inferences or conclusions which may fairly be drawn from the facts alleged, *Hill, supra*, the trial court did not err in finding that plaintiff stated a claim for a "hostile work environment" violation. See, *Borsuk v Wheeler*, 133 Mich App 403, 413; 349 NW2d 522 (1984) (Concurrence by Kelly, J.) (in pleadings, Michigan is primarily concerned with notice).

Similarly, the trial court did not err in finding that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate. In support of her claim, plaintiff presented a letter written by then-retired Police Officer Howard Daugherty who allegedly warned plaintiff's superiors that Officer Stafford wanted to "punch out" plaintiff's lights but that the superiors did nothing about it, and also stated, "Even though [plaintiff] and I never really saw eye to eye, . . . [there was] indisputable male chauvinism exhibited towards her from time to time by her superiors in the Inspection Section." Plaintiff also offered her own deposition testimony that Lt. Simons (one of her superiors) made remarks to her about "women belonging in the home, women shouldn't be here at work, women are the problem of the world," and also told her when she returned after a leave of absence that she was not wanted at work. Plaintiff also testified in her deposition that it was made very clear that she was the one who would be transferred when there was a reorganization in 1994, that a male lieutenant with less seniority was being kept, and that she was replaced by an African-American male two weeks after her transfer. Additionally, in her answers to interrogatories, plaintiff stated that her two superiors, both African-American males, failed to warn her of the potential for harm by Officer Stafford; that the whole incident harmed her chances to be appointed Inspector; and that Stafford continues to harass and intimidate plaintiff because he was not disciplined for the initial incident. Because plaintiff brought forth direct evidence of discriminatory animus (comments to her about women in the workplace, the letter from the retired officer stating that plaintiff was subject to male chauvinism), summary disposition was inappropriate. *Lamoria, supra*.

Next, defendant contends that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict.<sup>1</sup> We disagree. Specifically, defendant claims that plaintiff

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<sup>1</sup> The only claim that went to trial was plaintiff's sex discrimination claim.

failed to present evidence that it was predisposed to discriminate against women and acted upon that predisposition, and that plaintiff failed to present evidence that she was treated differently than similarly situated male employees. However, the “predisposition” and “similarly situated” tests set forth by defendant are but two of multiple ways to establish a case of discrimination, and are not required in every case. Intentional discrimination may be established under ordinary principles of proof by any direct or indirect evidence relevant to the issue, or may be proved with the assistance of judicially created presumptions or inferences. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). The tests that defendant claims plaintiff was required to satisfy are only two examples of such judicially created presumptions. See *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997). They are not the only ways to establish a prima facie case of discrimination, and are not required in every case. It has been held that, to establish a prima facie case of discrimination, a plaintiff need only present sufficient evidence on the “ultimate question” of whether sex was a determining factor in an adverse employment decision. See *Matras, supra* at 684. In the case at bar, an evaluation of the evidence in light of those tests would be improper because plaintiff did not argue, and the jury was not instructed on, either of those theories at trial. Therefore, because plaintiff was not required to present the evidence that defendant contends is lacking, we find that the trial court did not err in denying defendant’s motions.

Defendant also claims that the trial court failed to instruct the jury that plaintiff was required to show that it was predisposed to discriminate against women and that it acted on that predisposition in the case at bar. We again disagree. The trial court gave the standard jury instructions on disparate treatment employment discrimination. SJ12d 105.01 - 105.04. When requested, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2). The determination whether an instruction is proper is based on the circumstances of the case and is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). We find no abuse of discretion in the trial court’s reading of the standard jury instruction. As previously indicated, a “predisposition” theory is but one of different ways to pursue a discrimination claim and, as the trial court correctly observed, predisposition is not an absolute element of every case. Therefore, defendant’s proposed instruction would not have been an accurate statement of the law. Further, the standard jury instructions adequately informed the jury of the ultimate decision that must be made, and both this Court and our Supreme Court have held that the standard instructions correctly state the law. *Matras, supra* at 682; *Wilson v General Motors Corp*, 183 Mich App 21, 34; 454 NW2d 405 (1990).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Joseph B. Sullivan