STATE OF MICHIGAN

COURT OF APPEALS

DALE ELLEN GARY,

Plaintiff-Appellant,

v

SOUTHFIELD PUBLIC SCHOOLS, JUDITH HOFFMEYER and WALTER KOKAL,

Defendant-Appellees.

UNPUBLISHED
December 12, 2000

No. 212895
Oakland Circuit Court
LC No. 96-520936-CZ

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

At all times relevant to this lawsuit, plaintiff was employed as a paraprofessional by defendant Southfield Public Schools. Plaintiff is an African-American woman. In 1993, Southfield laid off approximately fifty paraprofessionals due to budget cuts. Plaintiff was one of those laid off. Following the layoff, plaintiff was placed, at her request, in the district's Severely Emotionally Impaired (SEI) program at Southfield Lathrop High School. In this position, plaintiff worked one-on-one with special needs students.

The SEI program serves severely emotionally impaired students throughout Oakland County. Defendant Kokal is the director of the SEI program, and defendant Hoffmeyer was plaintiff's direct supervisor. The SEI program is funded by Oakland Schools. Plaintiff's placement in the SEI program meant that another paraprofessional with less seniority was bumped from the position. This SEI position was one that was reviewed annually by Oakland Schools to determine if there was a need to continue funding the position in the following school year.

At the end of the 1993-1994 school year, funding for plaintiff's SEI position was eliminated. Plaintiff was then advised that the following three paraprofessional vacancies existed: career education specialist, pre-primary impaired assistant, and locker room assistant. Plaintiff interviewed for the career education specialist, but was not offered the job because she was not found to possess the requisite qualifications. Of the two remaining vacancies, plaintiff chose the locker room assistant position. Thereafter, plaintiff filed her complaint alleging racial

discrimination in the terms and conditions of her employment. Plaintiff's claim of racial discrimination is based on the theory of disparate treatment. Plaintiff points to three instances of alleged discrimination. The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10).

On appeal, plaintiff argues that the trial court erred in granting summary disposition to defendants. We disagree. This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiff cites three alleged instances of discriminatory behavior. First, plaintiff contends that defendants failed to advise her of the undesirable nature of the SEI position and that they purposefully placed her in that position because it was undesirable. Second, plaintiff argues that she was wrongfully denied the career education specialist position. Third, plaintiff maintains that she was discriminated against when she was required to fill a vacancy rather than bump another less senior individual after her SEI position was eliminated.

The Michigan Civil Rights Act (MCRA) prohibits an employer from discriminating against an employee based upon race. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). "In order to establish a prima facie case of '[d]isparate treatment' race discrimination, a plaintiff 'must show that [she] was a member of a protected class entitled to protection under the [MCRA] and that, for the same or similar conduct, [she] was treated differently than one who was a member of a different race.'" *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994), quoting *Schipani v Ford Motor Co*, 102 Mich App 606, 617; 302 NW2d 307 (1981). Defendants do not challenge that plaintiff is a member of a protected class. Once a plaintiff has established a prima facie case of discrimination, it is incumbent upon the defendant to show some legitimate nondiscriminatory reason for the plaintiff's treatment. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999). If the defendant does so, the burden of proof shifts back to the plaintiff to show that the proffered justification is a mere pretext for discrimination. *Id.*

Plaintiff first argues that because the trial court's decision was based on its interpretation of the district collective bargaining agreement, the case is preempted by § 301 of the federal Labor Management Relations Act (LMRA), 29 USC 185(a). Accordingly, plaintiff asserts that the trial court should have either dismissed the case without prejudice so that it could be refiled in federal court, or apply federal labor law principles in ruling on the summary disposition motion. *Betty, supra*. We disagree.

"[I]f the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement," then the claim is preempted by § 301 of LMRA. *Lingle v Norge Div of Magic Chef, Inc*, 486 US 399, 405-406; 108 S Ct 1877; 100 L Ed 2d 410 (1988). Contrary to plaintiff's assertion, however, the trial court's resolution of her lawsuit did not require interpretation of the collective bargaining agreement. Plaintiff's lawsuit is based on nonnegotiable rights that apply to all employees under the MCRA, not on rights established under the collective bargaining agreement. *Betty, supra* at 282. The agreement neither established those rights, nor can it extinguish them. *Ramirez v Fox Television Station, Inc*, 998 F2d 743, 748 (CA 9, 1993). The fact that defendants relied on the collective bargaining agreement when asserting legitimate reasons for their actions does not mean that this lawsuit is preempted. *Betty, supra* at 287-289. The trial court did not attempt to determine if defendants' interpretation of the agreement was correct under federal labor law principles. Rather, the court considered whether defendants' claim that their actions were based on the collective bargaining agreement set forth a nondiscriminatory motive for plaintiff's treatment. *Id.* at 289, n 24. Thus, we conclude that plaintiff's preemption argument is without merit.

We now turn to plaintiff's three cited instances of alleged disparate treatment. With regard to plaintiff's claim centered on her work for the SEI program, we conclude that the trial court did not err in granting defendants summary disposition. Plaintiff asserts that she was given the least desirable position available—the one-on-one position—while the other white paraprofessionals who bumped into the SEI program received more favorable classroom assignments. Plaintiff asserts the position was undesirable because it required her to work in isolation with highly disruptive and troubled children, and because it was subject to annual budget review.

We will assume, as did the trial court, that plaintiff has satisfied her initial burden of demonstrating a prima facie case of discrimination. It was then incumbent upon defendants to articulate a legitimate nondiscriminatory reason for plaintiff's placement. Defendants did so by pointing to the collective bargaining agreement. The agreement provided that in the event of a displacement, the most senior employee would bump the most junior employee. That is exactly what happened, with plaintiff, as the most senior paraprofessional, bumping the most junior member from the SEI program. Plaintiff presents absolutely no evidence that defendants' proffered reason was a mere pretext for discrimination. *Wilcoxon, supra* at 359.

We also believe that summary disposition was properly granted on plaintiff's claim that she was denied an equal opportunity to compete for the career education specialist position. Plaintiff was required to show "'by a preponderance of the evidence that [s]he applied for an available position *for which [s]he was qualified* but was rejected under circumstances giving rise to an inference of unlawful discrimination.'" *Pomranky v Zack Co*, 159 Mich App 338, 343-344; 405 NW2d 881 (1987), quoting *Clark v Uniroyal Corp*, 119 Mich App 820, 824-825; 327 NW2d 372 (1982)(emphasis added). As the trial court observed, plaintiff failed to demonstrate that she was even minimally qualified for the position.[1] When asked why she thought she was qualified,

[1] Plaintiff's argument relies heavily on the allegation that unlike the two other white women who applied for the career education specialist position, she was not informed that under the collective bargaining agreement, she could appeal the finding that she was not qualified for the
(continued…)

plaintiff merely responded, "Why wasn't I?" Further, plaintiff could not set forth a reason why defendants would have denied her the position based on race, and even admitted that she was guessing that they did not want a black employee for the position.[2]

Finally, plaintiff claims that defendants discriminated against her by forcing her to take the vacant position of locker room assistant rather than allowing her to bump another less senior member from another position. However, plaintiff failed to demonstrate how a similarly situated member of the nonprotected class was treated more favorably in this regard. Furthermore, Chekaway testified that the school district interpreted the collective bargaining agreement as setting forth differing procedures for handling small and large layoffs. According to Chekaway, in the event of a single displacement, such as plaintiff's, the displaced individual was required to fill a vacancy before bumping another employee. Plaintiff failed to show that this justification was a mere pretext for discrimination.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald

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position. In support of this allegation, plaintiff points to the rejection letters sent to her and the other two women. It is clear from these letters that unlike the other two women, plaintiff was not advised in her letter that she could attempt to prove her qualifications after being rejected. However, John Chekaway, the school district's director of personnel, testified in his deposition that plaintiff was advised via telephone of these rights. Plaintiff does not challenge this assertion.

[2] Plaintiff also admitted that the individual who was actually hired had more seniority. Thus, even if plaintiff could have proven her qualifications, she would have lost out to the more senior candidate under the collective bargaining agreement.