STATE OF MICHIGAN

COURT OF APPEALS

BARBARA JONES, Plaintiff-Appellant,	UNPUBLISHED May 11, 2001
v	No. 218251 Wayne Circuit Court
WAYNE STATE UNIVERSITY, Defendant-Appellee.	LC No. 93-325083-NO

Before: Bandstra, C.J., and Zahra and Meter, JJ.

PER CURIAM.

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

This case arises from plaintiff's claim that defendant discriminated against her by removing her from a director position in defendant's law school financial aid office and reassigning her to a position in defendant's central financial aid office. Plaintiff alleges that the reassignment was motivated by defendant's administrators' desire to assemble a staff of young, Caucasian men. Plaintiff is a fifty-five-year-old African American woman.

I

On appeal, plaintiff first argues that the trial court erred in dismissing her claims of age, gender and race discrimination. We disagree.

We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court should consider the affidavits, pleadings, depositions, admissions or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 536; 579 NW2d 118 (1998). The party opposing the motion has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The disputed factual issue must be material to the dispositive legal claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). All reasonable inferences are resolved in the

nonmoving party's favor. *Hampton v Waste Mgt of MI, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

The Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., prohibits age, gender and race discrimination in employment decisions, providing:

> (1) An employer shall not do any of the following:
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> (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 religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).]

Absent direct evidence, a plaintiff may establish a prima facie case of discrimination under the CRA by showing:

> (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class. [*Feick v Monroe Co*, 229 Mich App 335, 338; 582 NW2d 207 (1998), citing *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).]

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Id.* at 696-697.

In the present case, plaintiff contends that a statement by defendant's Vice President of Student Affairs, William Markus, is direct evidence defendant discriminated against her based on age. Plaintiff testified below that the director of defendant's Office of Scholarships and Financial Aid (OSFA), Terry Richards,

> created a new management in his office, that they were mostly younger people, mostly inexperienced people, and I didn't fit that mode. That I was more experienced, used to operating independently. I was stuck in a dead end job and because of that [Markus], wanted offer [sic] me an opportunity to do something else. And, he stressed that it was an opportunity.

Direct evidence is evidence that, if believed, requires the conclusion that discriminatory animus was a motivating factor in the employment decision. *Harrison v Olde Financial*, 225 Mich App 601, 609-610; 572 NW2d 679 (1997), quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997). Markus' alleged statement to plaintiff is not evidence of discriminatory animus. Plaintiff's testimony, at most, establishes that Markus observed that the OSFA was

made up of young, inexperienced employees. There is no evidence that Markus stated it was management's goal to have the entire OSFA made up of young people or that management specifically intended to discriminate against older employees. In fact, the above-cited testimony suggests that plaintiff was identified as someone possessing greater qualifications and worthy of opportunity where her skills could be best utilized. Plaintiff's statement that "[Markus] stressed that it was an opportunity" suggests Markus was not forcing her into a detrimental move.

Plaintiff has also failed to introduce sufficient circumstantial evidence to prove her discrimination claims. The parties dispute whether plaintiff was subject to any adverse employment action when she was reassigned to the central OSFA.

> [A]n adverse employment action (1) must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff. [*Meyer v Center Line*, 242 Mich App 560, 569; 619 NW2d 182 (2000), citing *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364, 597 NW2d 250 (1999).]

Plaintiff claims that her new duties in the central OSFA are menial compared to her prior position. According to plaintiff, because her new position does not involve financial aid duties, she could eventually lose tenure. Plaintiff has described her new position as a dead-end job. Importantly, however, plaintiff has not presented any objective evidence that the reassignment had a materially adverse effect on her employment status. Plaintiff's subjective impressions of the reassignment are insufficient to establish a prima facie case of discrimination. *Id.*

Additionally, plaintiff's discriminatory replacement arguments based on gender and race discrimination fail because she was not replaced by a nonmember of the protected class. It is undisputed that plaintiff was replaced by an African American woman. Also, plaintiff has not shown that she was treated differently than similarly situated employees. To show that an employee was similarly situated, the plaintiff must prove that "'all of the relevant aspects' of his employment situation were 'nearly identical' to those of [another employee's] employment situation." *Town, supra* at 699-700. Plaintiff claims that several under-qualified, Caucasian employees were promoted quickly within the OSFA once Richards took over. She cites a series of events that she claims establish a pattern of disfavoring older, African American women. However, plaintiff has not introduced evidence of any employee whose employment situation was nearly identical to her own. Plaintiff was in a unique situation as an assistant director not required to report to the central OSFA. Plaintiff has not shown that any other employee had a similar line of reporting and was treated differently.

Even assuming plaintiff could establish a prima facie case of age, gender or race discrimination, she has failed to present evidence to create an issue of fact as to whether defendant's nondiscriminatory reasons for her reassignment were pretext. Defendant met its burden of presenting a legitimate, nondiscriminatory reason for the alleged adverse employment decisions when it asserted that plaintiff's reassignment was the result of her "difficult" personal nature and audits that suggested defendant's OSFA must be entirely centralized. *Town, supra* at 695-696. Plaintiff argues that defendant's stated reasons for her reassignment were not legitimate, but has not cited any documentary evidence supporting her claim. A party's

speculation and conjecture are insufficient to establish an issue of fact for trial. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

To the extent that plaintiff claims defendant discriminated against her based on a combination of her age, gender and race, that claim also lacks merit. The elements of a mixed motive claim of discrimination include:

> (1) the plaintiff's membership in a protected class, (2) an adverse employment action, (3) the defendant was predisposed to discriminating against members of the plaintiff's protected class, and (4) the defendant actually acted on that predisposition in visiting the adverse employment action on the plaintiff. [*Wilcoxon, supra* at 360-361.]

If the plaintiff meets the initial burden of proving that the illegal conduct was more likely than not a substantial or motivating factor in the defendant's decision, the defendant may show by a preponderance of the evidence that it would have reached the same decision without considering the protected characteristics. *Id*. at 361, quoting *Harrison, supra* at 611.

In the present case, as discussed *supra*, plaintiff has failed to introduce objective evidence that she was subject to an adverse employment action. Moreover, even assuming that plaintiff's evidence shows a pattern of discrimination and that defendant was predisposed to discriminate against older, African American women, plaintiff has not introduced evidence that defendant actually acted on that predisposition in regard to plaintiff. See *Wilcoxon, supra* at 360-361. Plaintiff claims that defendant's administrators' conduct of subjecting her to job evaluations, accusing her of having a poor attitude and reassigning her evidence an intent to discriminate. However, such incidents do not require the conclusion that defendant acted with discriminatory animus. See *id.* at 368. Plaintiff has not introduced evidence to establish that an intent to discriminate was more likely than not a substantial or motivating factor in defendant's decisions. *Id*.

II

Plaintiff next argues that the trial court erred in dismissing her retaliation claim. We disagree.

The CRA prohibits an employer from retaliating against an employee, providing:

> Two or more persons shall not conspire to, or a person shall not:
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> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701(a); MSA 3.548(701)(a).]

To prove a prima face case of retaliation under the CRA, a plaintiff must show:

> 1) that he or she 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. [*Meyer, supra* at 568-569, citing *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

To establish the necessary causation, the plaintiff must show that his participation in protected activity under the CRA was a "significant factor" in the employer's adverse employment action, not just that there was a causal link between the two. *Barrett v Kirtland Community College*, __ Mich App __; __ NW2d __ (Docket No. 217040, issued 4/10/01), slip op p 5, citing *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986).

Plaintiff claims that she was reassigned to the central OSFA as a direct result of her complaints of discrimination. As discussed *supra*, plaintiff has not provided objective evidence that she suffered any adverse employment action. Moreover, plaintiff has not shown a causal connection between any protected activity and the alleged adverse employment action. It is undisputed that defendant's administrators decided to relocate plaintiff to the central OSFA before plaintiff requested a hearing on her discrimination claims or filed a formal discrimination complaint. Consequently, plaintiff's retaliation claim fails as a matter of law.[1]

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter

[1] Plaintiff's final issue on appeal, asserting that the trial court's opinion granting summary disposition for defendant is replete with findings of fact and erroneous conclusions of law, also lacks merit. Whether the trial court was, indeed, confused about the applicable discrimination law and misapplied necessary standards is not dispositive of the present appeal given that we have reviewed this case de novo, *Spiek, supra*, under the correct and applicable standards.