STATE OF MICHIGAN

COURT OF APPEALS

MARIE L. BAUM,

Plaintiff-Appellant,

v

SPRINGPORT TELEPHONE COMPANY and SANDRA HAMMOND,

Defendants-Appellees.

UNPUBLISHED
April 12, 2002

No. 227098
Jackson Circuit Court
LC No. 99-093511-CL

Before: Cavanagh, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff Marie L. Baum appeals as of right from the trial court's April 21, 2000, order granting summary disposition in favor of defendants Springport Telephone Company and Sandra Hammond. We affirm.

On April 30, 1999, plaintiff initiated the present action by filing a five-count complaint in Jackson Circuit Court alleging discrimination on the basis of marital status in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., defamation, and three varieties of the tort of invasion of privacy. This case arises from defendant Springport Telephone Company's termination of plaintiff's employment as a customer service representative on January 12, 1999. Plaintiff's termination followed her disclosure to her immediate supervisor, officer manager Sandra Hammond, that she was divorcing her husband and was engaged in an extramarital affair with the superintendent of the Springport School District, Richard Ames.

According to plaintiff and Hammond's deposition testimony, plaintiff told Hammond about her decision to consult an attorney about divorcing her husband on December 28, 1998, after Hammond questioned plaintiff about why she was not wearing her wedding ring. Hammond testified that she was disturbed over plaintiff's decision to divorce her husband because plaintiff had two young children, and that she did not approve of plaintiff's conduct in engaging in an extramarital affair with a well-known, highly respected individual like Ames. According to Hammond, she felt sick about plaintiff's situation, and had trouble sleeping because of it. She also testified that she lost respect for plaintiff, and told her husband about plaintiff's affair.

Plaintiff testified that after she told Hammond about her decision to divorce her husband, Hammond encouraged her to tell her coworkers, but also told her that for the sake of her children

she should also try to reconcile with her husband. Plaintiff also testified that Hammond asked her whether she intended to keep her job with the telephone company, where she had worked since 1990, or whether she intended to seek a job with the Springport School District.

William Hammond, Sandra Hammond's husband and the president and general manager of the Springport Telephone Company, was also deposed. He testified that he made the decision to terminate plaintiff's employment after it became known that she had engaged in an extramarital affair with Ames. Specifically, William Hammond testified that it was his opinion that plaintiff, whose duties required her to interact with the public, "could no longer function effectively as a customer service representative." William Hammond went on to note that plaintiff's "actions away from the workplace created a feeling with [the Springport Telephone Company's] customers that they did not want to be waited on by [plaintiff.]" During his deposition testimony, William Hammond conceded that this was an opinion he formed himself, and was not specific to any one individual customer. However, both he and his wife testified that they were approached in the community by individuals who expressed their disgust with plaintiff, and said they would not be waited on by her. The decision to terminate plaintiff's employment was made after Hammond consulted with the telephone company's board of directors as well as an attorney.

Further, both plaintiff and Ames conceded that they received negative feedback from the community in Springport following the disclosure of their affair. For instance, Ames testified during his deposition that the Springport Board of Education received letters questioning Ames' conduct and calling for the withdrawal of the telephone company's scholarship donation to the Springport School District. Moreover, negative letters were written to the editor of the local newspaper, and at the monthly school board meetings several individuals opposed the school board's renewing of Ames' contract, and instead called for his resignation. Similarly, plaintiff testified that "through word of mouth" she received negative comments about her relationship with Ames. Plaintiff also testified that at a school board meeting in June 1999 that she attended she was referred to by attendees as a "cutesy girlfriend." On January 12, 1999, plaintiff was called into the telephone company's boardroom and handed a letter informing her that her employment was terminated. On July 19, 1999, plaintiff's divorce from her husband was finalized.

After plaintiff filed the present action, defendants moved for summary disposition under MCR 2.116(C)(8) and (10) on March 7, 2000. As relevant to the present appeal, defendants argued that plaintiff's marital status discrimination claim was deficient because her marital status did not change while she was employed by the telephone company, and because plaintiff could not present any proof that her discharge was related to her change in marital status. Defendants also argued that plaintiff could not set forth a defamation claim as a matter of law because the statement giving rise to the claim was subjective and could not be proven as false. Further, defendants maintained that plaintiff's intrusion on seclusion invasion of privacy claim must fail because plaintiff could not demonstrate that defendants' inquiries into her private life were objectively unreasonable.

Following an April 7, 2000, hearing, the trial court granted defendants' motion for summary disposition in a nine-page written opinion and judgment entered April 21, 2000. In granting defendants' motion, the trial court reasoned that plaintiff's marital status discrimination claim should be dismissed because mere "[c]ontemplation of divorce is in no manner recognized

as a cause of action under th[e] [CRA]." The trial court also found that the record evidence, viewed in the light most favorable to plaintiff, failed to establish that plaintiff's marital status was related to her discharge. Instead, the trial court concluded that plaintiff was discharged because of her conduct in engaging in an extramarital affair with a "high profile married man."

The trial court also dismissed plaintiff's defamation claim on the ground that the alleged defamatory statement was subjective and incapable of being proven as false. Finally, the trial court found that by asking plaintiff questions about her personal life, defendants' conduct could not be considered "as objectionable to any reasonable person." Plaintiff now appeals as of right.[1]

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A review of the trial court's written judgment reveals that it granted summary disposition of plaintiff's claims under both MCR 2.116(C)(8) and (10).

> A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the basis of the pleadings alone. The purpose of such a motion is to determine whether the plaintiff has stated a claim upon which relief can be granted. The motion should be granted if no factual development could possibly justify recovery. [*Beaudrie v Henderson*, 465 Mich 124, 129-130; 631 NW2d 308 (2001), citing *Spiek, supra* at 337.]

Moreover, in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), our Supreme Court articulated the applicable standard of review for a motion granted under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

On appeal, plaintiff first contends that the trial court improperly granted summary disposition of her marital status discrimination claim where the record reveals that plaintiff's announced intention in December 1998 to divorce her husband was a motivating factor in the telephone company's decision to discharge her. We disagree.

The governing statute in this case, MCL 37. 2202(1)(a), provides in pertinent part:

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

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[1] On appeal, plaintiff does not challenge the trial court's dismissal of counts four and five of the complaint.

> (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, sex, height, weight, or marital status.

As our Supreme Court recognized in *Miller v CA Muer Corp*, 420 Mich 355, 362-363; 362 NW2d 650 (1985):

> Civil rights acts seek to prevent discrimination against a person because of stereotyped impressions about the characteristics of a class to which the person belongs. The Michigan civil rights act is aimed at "the prejudices and biases" borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.
>
> By including marital status as a protected class, the Legislature manifested its intent to prohibit discrimination based on *whether* a person is married. To include the identity, occupation and place of employment of one's spouse within the definition of "marital status" might enlarge the protected class . . . . [Emphasis in original; footnote and citations omitted.]

See also *McCready v Hoffius*, 459 Mich 131, 137, 145; 586 NW2d 723 (1998), vacated in part on other grounds 459 Mich 1235-1236 (1999) (holding that marital status is defined in the context of the absence or presence of marriage); *Ortman v Gordon Food Service, Inc*, 225 Mich App 135, 136-137; 570 NW2d 152 (1997) (holding that employment discrimination occurs where employer's policy differentiates on the basis of whether a person is married, and not to whom).

To sustain a claim of employment discrimination on the basis of marital status, a plaintiff must demonstrate that the defendant's challenged employment action "w[as] based upon whether [the plaintiff] was married." *Noecker v Dep't of Corrections*, 203 Mich App 43, 47; 512 NW2d 44 (1993). In other words, where the employer's actions are not related to the plaintiff's marital status, a plaintiff will not be able to demonstrate discrimination on the basis of marital status in violation of § 202 of the CRA. *Noecker, supra* at 48. To survive a motion for summary disposition, plaintiff must "allege . . . facts establishing that [she] was treated differently on the basis of marital status." *Bommarito v Detroit Golf Club*, 210 Mich App 287, 293; 532 NW2d 923 (1995). A plaintiff will be successful in alleging a claim of employment discrimination on the basis of marital status where the employer "discriminate[s] on the basis of whether a [person] is married or treat[s] [persons] differently on the basis of a stereotypical view of the characteristics of married or single persons." *Id.*

In the present case, plaintiff has not offered any direct evidence of discrimination on the basis of her marital status. See, e.g, *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001). In the employment discrimination context, our Supreme Court has recently defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). Because

plaintiff has not proffered direct evidence of unlawful discrimination, she must rely on the burden-shifting framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) to avoid summary disposition. *Hazle, supra* at 463.

Under *McDonnell Douglas*, a plaintiff must first demonstrate a prima facie case of discrimination. Here, plaintiff was required to present evidence that (1) she belonged to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, (4) but was discharged under circumstances that give rise to an inference of unlawful discrimination. *Hazle, supra* at 463; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998) (Weaver, J.). Where a plaintiff presents evidence satisfying the elements of the prima facie case, the factfinder may infer that the plaintiff was subject to unlawful discrimination. *DeBrow, supra* at 538. Once a prima facie case is set forth, a rebuttable presumption of discrimination arises, and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Hazle, supra* at 464.

> The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. "Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." [*Texas Dep't of Community Affairs v*] *Burdine*, [450 US 248], 256, n 9[; 113 S Ct 2742; 125 L Ed 2d 407 (1981)]; see also *St Mary's Honor Center v Hicks*, 509 US 502, 506-507; 113 S Ct 2742; 125 L Ed 2d 407 (1993). If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away. [*Hazle, supra* at 465 (footnote omitted).]

Once the defendant articulates a legitimate, nondiscriminatory reason[2] for its action, the court must review the record evidence in the light most favorable to the plaintiff to determine if the evidence is "'sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse employment action taken by the employer toward the plaintiff.'" *Id.* at 465, quoting *Lytle, supra* at 176.

Even assuming that plaintiff has set forth a prima facie case to the extent that a rebuttable presumption of discrimination arises, we note that the telephone company has articulated a legitimate, nondiscriminatory reason for its decision to fire plaintiff. In their deposition testimony, both William and Sandra Hammond expressed concern about plaintiff's ability to deal effectively with the public as a customer service representative given the community backlash against her conduct in engaging in an extramarital affair with Ames. Moreover, William Hammond testified that plaintiff was discharged because of the company's concern that plaintiff would be a source of confrontation for customers. Thus, once defendants articulated a legitimate, non-discriminatory reason for plaintiff's discharge, the burden shifted to plaintiff to

[2] In *Hazle, supra* at 464, n 7, our Supreme Court, speaking through Justice Young and citing *Burdine, supra* at 257, cautioned lower courts from questioning the soundness of an employer's decision. "[C]ourts must not second guess whether the employment decision was 'wise, shrewd, prudent, or competent.' *Town v Michigan Bell Telephone Co*, 455 Mich 688, 704; 568 NW2d 64 (1997). Instead, the focus is on whether the decision was 'lawful,' that is, one that is not motivated by a discriminatory animus."

show the existence of evidence sufficient to permit a reasonable trier of fact to conclude that plaintiff's marital status was a motivating factor for her discharge. *Hazle, supra* at 473.

After a thorough review of the record evidence in the light most favorable to plaintiff, we agree with the trial court that plaintiff has failed to create a triable issue for the jury regarding whether her marital status was a motivating factor in the telephone company's decision to discharge her. *Id.* at 474. In this regard, we reject plaintiff's claims in her brief on appeal that the "timing alone" of her announcement of her intention to divorce her husband, without more, creates a triable issue concerning whether her marital status was a motivating factor in the telephone company's decision to discharge her. "Under this position, 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*." *Lytle, supra* at 175 (emphasis supplied). Further, plaintiff's claim that there was nothing to support William Hammond's conclusion that plaintiff would be ill-suited to deal with the public given the community's reaction to her affair with Ames is belied by a review of the record. Indeed, both plaintiff and Ames conceded in their deposition testimony that they had encountered numerous instances of negative reaction from the small community stemming from the affair. Accordingly, we are not persuaded that the trial court erred in granting summary disposition of plaintiff's claim of employment discrimination on the basis of marital status.

Plaintiff next argues that the trial court erred in dismissing plaintiff's defamation claim against defendants. We disagree.

When addressing a defamation claim, a reviewing court is required to undertake an independent examination of the record to ensure against forbidden intrusions into the field of free expression. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). To establish a claim of defamation, a plaintiff must show "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Tomkiewicz v The Detroit News, Inc*, 246 Mich App 662, 666-667; 635 NW2d 36 (2001), citing *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 251; 487 NW2d 205 (1992). With regard to the first element, this Court has recognized that to be actionable, a statement must be provable as false. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 7; 602 NW2d 233 (1999); *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998). The requirement that a statement be provable as false "distinguish[es] between an objectively verifiable event . . . and a subjective assertion . . . ." *Kevorkian, supra* at 6.

In *Ireland, supra* at 617, this Court concluded that the defendant's statements questioning the plaintiff's fitness as a mother, such as that the plaintiff "was not a fit mother," and was "not fit to raise to raise her child and never spent any time with her child," were necessarily subjective and incapable of being proven as false. In the instant case, the statement giving rise to plaintiff's defamation claim occurred in February 1999 when Richard Ames' wife visited defendant Sandra Hammond at the telephone company. According to the record, referring to plaintiff's extramarital affair with Richard Ames, Hammond told Mrs. Ames that "Rich[ard Ames] was not the first and probably would not be the last." We agree with the trial court's well-reasoned

assessment that because this statement was subjective and did not state objectively verifiable facts about plaintiff, it is not actionable. *Kevorkian, supra*; *Ireland, supra*.

Finally, plaintiff argues that the trial court erred in dismissing her invasion of privacy claim alleging an intrusion-into-seclusion. We disagree.

As this Court observed in *Smith v Calvary Christian Church*, 233 Mich App 96, 113; 592 NW2d 713 (1998), rev'd on other grounds 462 Mich 679 (2000):

> Common-law invasion of privacy protects against four types of invasion: (1) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs, (2) public disclosure of embarrassing private facts, (3) publicity that places the plaintiff in a false light, and (4) appropriation of the plaintiff's name or likeness. *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995).

The intrusion-into-seclusion theory of privacy requires the plaintiff to present evidence establishing a genuine issue of material fact regarding the following three elements: (1) the existence of a secret and private subject matter, (2) a right possessed by the plaintiff to keep that subject matter private, and (3) the obtaining of information about that subject matter by the defendant in a manner objectionable to the reasonable person. *Lansing Ass'n of School Administrators v Lansing School District Bd of Ed*, 216 Mich App 79, 87; 549 NW2d 15 (1996), aff'd in part and rev'd in part on other grounds 455 Mich 285 (1997).

In the present case, plaintiff alleged that defendants invaded her privacy by asking her questions about her private life. Although not specifically alleged in the complaint, plaintiff challenged defendants' inquiry into a situation involving her and a coworker, James Howell, in 1995. According to the record, Howell's wife informed Sandra Hammond of a potentially inappropriate relationship between plaintiff and James Howell. Sandra Hammond questioned plaintiff about her relationship with Howell, urging her to "tell all." William and Sandra Hammond testified that they were concerned about a potential sexual harassment lawsuit, and thus cautioned plaintiff to document her interaction with Howell. After a meeting was held between the Hammonds, plaintiff, and Howell in 1996, any inappropriate behavior ceased.

Plaintiff also took issue with Sandra Hammond's inquiries into her private life on December 28, 1998, when she disclosed that she and her husband were divorcing. Granting defendants' motion for summary disposition of this claim, the trial court observed that Hammond and plaintiff were "close friends." The trial court also made the following factual findings and conclusions of law.

> It is clear that the conversations between [plaintiff] and Sandra were those between persons who worked in a close relationship and who discussed personal matters with each other. In . . . terms of Mr. Howell, it became necessary, as far as Sandra and Mr. Hammond were concerned, to make inquiry in order to make sure that at some later time [plaintiff] did not assert a sexual harassment claim. Merely asking a person about their personal life, especially in the matter regarding Mr. Ames, and it being voluntarily responded to, cannot be considered as objectionable to any reasonable person. Thus it is found that there is no genuine issue of material fact and that any reasonable person would not find that

there has been an invasion of [plaintiff's] privacy rights due to the inquiries by Sandra.

We agree with the trial court that genuine factual disputes did not exist with regard to whether William and Sandra Hammond's inquiry into the specifics of the personal relationship between plaintiff and her coworker, Howell, would be considered objectively unreasonable. A review of the record confirms the trial court's conclusion that the Hammonds inquired into plaintiff and Howell's relationship to avoid a potential sexual harassment lawsuit against the telephone company. Further, we share the trial court's view that reasonable minds could not differ regarding whether Sandra Hammond's questioning of plaintiff about her divorce and her relationship with Ames was unreasonable, given that the two were social with each other and shared a friendship. Accordingly, the trial court did not err in dismissing plaintiff's invasion of privacy claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Peter D. O'Connell