

STATE OF MICHIGAN  
COURT OF APPEALS

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LOLITA BULSON,

Plaintiff-Appellant,

v

TUAR-GRIMBAC, INC.,

Defendant-Appellee.

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UNPUBLISHED

May 7, 2002

No. 227521

Genesee Circuit Court

LC No. 99-065483-CL

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this action alleging ethnic and racial discrimination under the Civil Rights Act, MCL 37.2101 *et seq.* We affirm.

I. Facts and procedure

Plaintiff is a Filipino woman who began working for defendant on July 1, 1996. Defendant's business is to prepare, assemble and distribute printed materials for its customers. Plaintiff worked in the mail department for two areas of defendant's business, the specialty table (also known as the "Buick table")<sup>1</sup> and the production floor. In January 1999, defendant terminated plaintiff's employment. In May 1999, plaintiff filed this lawsuit. The complaint alleged that defendant acted in violation of the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, because plaintiff's termination was the result of either (1) retaliation for prior complaints she had made of discrimination, (2) discrimination based on her ethnic/racial heritage, or (3) discrimination based on her status as a married female. Plaintiff subsequently voluntarily dismissed her claim based on her marital status.

In March 2000, defendant moved for summary disposition under MCR 2.116 (C)(10). Defendant argued, among other things, that even if plaintiff could make out a prima facie case of discrimination, defendant had a legitimate nondiscriminatory reason to terminate plaintiff's employment - - an economic downturn of its business. Defendant submitted evidence showing that Buick sales had dropped from roughly \$202,994 in 1998 to \$1,410 in 1999. Defendant argued that plaintiff could not show that the downturn in its business was a mere pretext for

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<sup>1</sup> General Motors was one of defendant's principal customers.

unlawful employment discrimination. As for plaintiff's claim of retaliation, defendant argued, among other things, that plaintiff could not establish that there was a causal link between activity protected under the CRA and plaintiff's termination.

Plaintiff conceded that defendant had legitimate business reason for a reduction in staff, but claimed that defendant discriminated against her in determining exactly who would be laid off. Plaintiff maintained that there was an issue or fact in regard to whether defendant's stated reasons for laying plaintiff off were pretextual. Plaintiff argued that the evidence established that she was a good worker and that defendant used no objective criteria in determining who would be laid off. She claimed that there was evidence of a pervasive pattern of racial/ethnic discrimination, and that, although she had complained, the situation was not resolved. As it relates to her claim of retaliation, plaintiff relied on the fact that the layoff came three weeks after she last complained of the alleged discriminatory treatment. The trial court granted defendant's motion and this appeal followed.

## II. Analysis

### A. Standard of review

This Court reviews de novo a decision on a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion under MCR 2.116(C)(10), this Court considers the affidavits, pleadings, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Summary disposition should be granted if the affidavits and other documentary evidence show that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*

### B. Plaintiff failed to present evidence that defendant's claimed business reason was a pretext for wrongful discrimination

An employer is prohibited from discriminating against a person with respect to employment, compensation, or a term, condition, or privilege of employment because of race or national origin. MCL 37.2202(1)(a). Absent direct evidence of discrimination, a plaintiff establishes a prima facie case of wrongful discrimination by showing (1) she was a member of a protected class, (2) she was subject to an adverse employment action, (3) she was qualified for the position, and (4) the adverse action was taken under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Once the plaintiff presents a prima facie case of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Hazle*, *supra* at 464. If the employer articulates such reason, to survive a motion for summary disposition the employee must then present evidence to permit a reasonable trier of fact to conclude that discrimination was a motivating factor in the employer's adverse action. *Id.* at 465; *Town*, *supra* at 697.

Were we to assume that plaintiff submitted sufficient evidence to establish a prima facie claim of discrimination, plaintiff's claim nonetheless fails because she has failed to show that

defendant's legitimate, nondiscriminatory reason for her termination was pretext for discrimination. Defendant presented evidence that its decision to terminate plaintiff was based on a legitimate, nondiscriminatory reason - - the economic downturn in its business. Therefore, the burden shifted to plaintiff to present evidence that defendant's reasons were pretextual, i.e., a pretext for unlawful discrimination or retaliation. *Hazle, supra* at 465-466. A plaintiff can establish that a defendant's articulated legitimate, non-discriminatory reason is pretextual in various ways: (1) by showing that the articulated reason had no basis in fact, (2) if the articulated reason has a basis in fact, by showing that it was not the actual factor motivating the decision, or (3) if the articulated reason was a factor motivating the decision, by showing that it was insufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).

Plaintiff does not contest that the economic downturn in defendant's business was the motivating factor behind defendant's reduction of its workforce. Plaintiff contends, however, that the economic downturn was not the actual factor motivating the termination of her employment. Plaintiff maintains that while defendant claimed it utilized objective factors to determine who would be laid off in the reduction of defendant's work force, the process was entirely subjective. Plaintiff argues that there exists an inference of wrongful discrimination because she was laid off while persons with lesser seniority who were paid more than plaintiff were retained.

Significantly, plaintiff cites no authority, and we are aware of none, to support the proposition that use of subjective criteria in making a reduction of an employer's workforce is legally suspect. When reducing a workforce an employer often must terminate qualified and satisfactory employees. A comparison of otherwise qualified employees must necessarily come down to the exercise of an employer's subjective business judgment, which ought not be second-guessed by the courts. *Town, supra* at 704; *Meagher v Wayne State University*, 222 Mich App 700, 712; 565 NW2d 401 (1997). Seniority and rates of pay may be of concern to some employers, but they are not factors that are universally accepted as being absolutely essential to facilitate a reduction of a workforce. Indeed, were we to assume that defendant exercised poor business judgment, plaintiff's claim would fair no better. While the exercise of poor business judgment may work to the long-term economic detriment of the employer, it simply is an area that courts ought not question and from which a claim of employment discrimination cannot emanate. Plaintiff's conclusion that she was as qualified as anyone to retain her position and therefore, the termination of her employment must have been wrongfully motivated, is insufficient as a matter of law to create a genuine and material question on the issue of pretext.<sup>2</sup>

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<sup>2</sup> The case of *Dixon v WW Grainger, Inc*, 168 Mich App 107; 423 NW2d 580 (1987) does not support plaintiff's claim that defendant's economic downturn was a pretext to wrongful employment discrimination. *Dixon* held that an employer's decision to ignore complaints of racial bias would be considered in determining whether plaintiff established a prima facie claim of discrimination. *Id* at 115. The Court in *Dixon* did not consider these complaints of bias as evidence that the employer's nondiscriminatory reason for an adverse employment decision was a pretext to wrongful discrimination. *Id.* at 116-117. Because we analyze this case with the assumption that plaintiff established a prima facie case, *Dixon* does not alter our conclusion.

### C. Plaintiff's claim of retaliation

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, plaintiff must show: (1) that she engaged in a protected activity; (2) that this was known by defendant; (3) that the defendant took an employment action adverse to plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Mitan v Neiman Marcus*, 240 Mich App 679, 681; 613 NW2d 415 (2000).

Here, plaintiff cannot establish a causal connection between her complaints of ethnic harassment and the termination of her employment. Plaintiff argues that defendant's failure to utilize objective criteria to determine who would be laid off, together with the facts that plaintiff was laid off three weeks after making a complaint of ethnic harassment constitutes circumstantial evidence that defendant wrongfully retaliated against plaintiff by terminating her employment. We disagree. Mere temporal proximity between the protected activity and the alleged discriminatory action is insufficient to establish causation, particularly in a reduction in workforce case. Moreover, because defendant was required to exercise business judgment to determine who among its many qualified and productive employees would be laid off, the mere fact that plaintiff was qualified but nonetheless terminated cannot, as a matter of law, constitute circumstantial evidence that defendant retaliated against her for activity protected under the CRA.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad