

STATE OF MICHIGAN
COURT OF APPEALS

LOLITA BULSON,

Plaintiff-Appellant,

v

TUAR-GRIMBAC, INC.,

Defendant-Appellee.

UNPUBLISHED

May 7, 2002

No. 227521

Genesee Circuit Court

LC No. 99-065483-CL

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

NEFF, J. (*dissenting*).

I respectfully dissent and would reverse.

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). To establish a prima facie case of employment discrimination absent direct evidence of discrimination, a plaintiff must present evidence that (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.

Here, plaintiff submitted sufficient evidence to establish a prima facie case of discrimination, so the burden shifted to defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Defendant presented evidence that its decision to terminate plaintiff was based on a legitimate, nondiscriminatory reason, namely, 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. *Hazle, supra* at 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).

Here, while I conclude that plaintiff failed to establish that defendant's articulated business decision had no basis in fact, or that the reason was insufficient to justify defendant's decision, I also conclude that plaintiff presented sufficient evidence which, viewed most favorably to plaintiff, could permit a jury to find that the stated reason was not the actual factor motivating defendant's decision. Specifically, plaintiff presented evidence that she repeatedly complained about ethnic name-calling that she endured from her coworkers, yet management did nothing to resolve the situation. Evidence showing toleration of racial slurs by management may suggest a predisposition to discriminate. *Dixon v WW Grainger, Inc*, 168 Mich App 107, 115; 423 NW2d 580 (1987). The submitted evidence indicates that, instead of resolving the situation, plaintiff was fired shortly after her last formal complaint. There was also evidence that defendant ignored objective considerations that favored plaintiff (such as seniority and pay rates¹) in determining which employees to lay off. Because the evidence established a genuine issue of material fact regarding whether defendant's stated reason for terminating plaintiff was pretextual, the trial court erred in granting defendant summary disposition of plaintiff's claim for discrimination.

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). "Regardless of the vagueness of the charge or the lack of formal invocation of the protection of the [Civil Rights Act], if an employer's decision to terminate or otherwise adversely effect [sic] an employee is a result of that employee raising the spectre of a discrimination complaint, retaliation prohibited by the act occurs." *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 396; 493 NW2d 441 (1992).

Here, plaintiff established a prima facie case of retaliatory discharge. Defendant concedes that the first three elements were satisfied. With regard to the fourth element, given the evidence that nothing was done in response to plaintiff's complaints of discrimination, and that plaintiff was a competent worker who was discharged without consideration of objective factors that favored her retention, a jury could conclude that plaintiff was laid off in retaliation of her prior complaints. Also relevant, although not dispositive, is that plaintiff was fired shortly after making her last formal complaint. The proximity in time between a protected activity and an adverse employment action, in conjunction with other supporting evidence, may give rise to an

¹ The fact that plaintiff was paid less than other retained employees would be a factor favoring her, given defendant's claim that layoffs were necessitated for economic reasons.

inference of a causal connection. *Moon v Transport Drivers, Inc*, 836 F2d 226, 229 (CA 6, 1987).

The *McDonnell Douglas*² burden-shifting paradigm applicable in disparate treatment discrimination cases is also applicable to retaliation claims. *Hoffman v Sebro Plastics, Inc*, 108 F Supp 2d 757, 776 (ED Mich, 2000). Here, as with the discrimination claim, while defendant articulated a legitimate, non-discriminatory reason for laying plaintiff off, plaintiff offered sufficient evidence to establish an issue of fact regarding whether defendant's proffered reason was a pretext to retaliate against her. Accordingly, the trial court erred in granting defendant summary disposition of plaintiff's claim of unlawful retaliation.

I would reverse and remand for further proceedings consistent with this opinion.

/s/ Janet T. Neff

² *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).