STATE OF MICHIGAN

COURT OF APPEALS

SALLEY HARRINGTON and PAUL HARRINGTON, Plaintiffs-Appellants, V PARAGON SALES & MARKETING, INC., Defendant-Appellee.	UNPUBLISHED July 16, 2002 No. 230585 Wayne Circuit Court LC No. 99-914143-NZ

Before: Hood, P.J., and Saad and E. M. Thomas,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition for defendant pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In this employment discrimination case, plaintiffs claim that defendant discharged Sally Harrington[1] on the basis of sex, or more specifically, because of her pregnancy, in violation of the Civil Rights Act, MCL 37.2101 *et seq*. Defendant is a sales representative business and answering service, consisting of owner Dennis McCollom, an office manager, and occasional contract sales workers. Plaintiff began her employment as office manager in April 1998. McCollom described her as initially a good worker "when she was there," but said that her absenteeism was a problem from her second day on the job. By the following October, McCollom was also becoming increasingly dissatisfied with plaintiff's work and the following month he reprimanded her for her attendance and poor job performance.

On the afternoon of Friday, January 22, 1999, plaintiff telephoned McCollom and told him that she was pregnant and her doctor had ordered "bed rest". She returned the following Monday, but left early with a doctor's note ordering bed rest; she then explained that she was in the process of miscarrying. On January 27, she called in and McCollom told her that her

[1] For ease of reference, plaintiff will be used in lieu of Sally Harrington.

* Circuit judge, sitting on the Court of Appeals by assignment.

employment was terminated because she had missed too much work and had too many problems getting her job done completely.

On appeal, plaintiff argues that the trial court erred in granting summary disposition for defendant because she presented sufficient evidence to establish a prima facie case of pregnancy discrimination. This Court's review of a decision regarding a motion for summary disposition is de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). On this record, we find no error.

MCL 37.2202(1)(a) prohibits an employer from discriminating against employees because of their sex. Pregnancy discrimination is included within meaning of "sex" for purposes of the Civil Rights Act. *Dep't of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 436; 431 NW2d 65 (1988). Claims of intentional sex discrimination are analyzed under the prima facie test articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999). Under *McDonnell Douglas*, a plaintiff may establish a prima facie case of discrimination by demonstrating that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was subjected to the adverse action under circumstances giving rise to an inference of discrimination. *Wilcoxon, supra* at 361; *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001).

Once a plaintiff establishes a prima facie case of discrimination, the employer has the burden of giving a legitimate nondiscriminatory reason for its employment decision. *Hazle, supra* at 464. If the employer does so, the presumption is rebutted and in order to survive a motion for summary disposition, the plaintiff must show that the evidence is sufficient to permit a reasonable trier of fact to conclude that the reason given by the employer is pretextual and that plaintiff's sex made a difference in the adverse employment decision. *Id.*

Applying this analysis, we find that, even if plaintiff established a prima facie case of discrimination, she failed to establish that the reasons defendant articulated for terminating her employment were pretextual. Defendant presented evidence that plaintiff's attendance was critical because she was the only person in the office when McCollom was visiting clients and because she was responsible for taking phone calls for the answering service. Defendant also presented evidence that plaintiff's absenteeism had become a problem almost immediately after she started the job. Indeed, her continued employment in August 1998 was conditioned on her improved attendance.

Also, defendant testified that he told plaintiff about her poor job performance months before she informed McCollom that she was pregnant. There was also evidence that answering service clients were complaining about calls going unanswered and that sales to at least two clients were delayed because plaintiff failed to properly track them. In short, defendant presented ample evidence that legitimate nondiscriminatory reasons for plaintiff's discharge had surfaced months before her pregnancy.

Based on defendant's evidence, any presumption of discrimination under *McDonnell Douglas* dropped away and plaintiff had to show that, construed in her favor, the evidence was sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor behind the decision to terminate her employment. *Hazle, supra* at 465. She has failed to

make that showing. In this regard, plaintiff points out that her absences were approved, and she notes the suspicious nature of the timing of the termination. Plaintiff is correct that McCollom admitted that he did not insist that plaintiff come to work when she called in sick. Nevertheless, the record is devoid of any evidence that plaintiff's pregnancy made a difference in her termination or that McCollom was in any way predisposed to discriminate against pregnant women. To the contrary, there is substantial evidence that defendant terminated plaintiff because her attendance and job performance were unsatisfactory.

Affirmed.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Edward M. Thomas