STATE OF MICHIGAN

COURT OF APPEALS

PERLA D. NAVARRO,

Plaintiff-Appellant,

v

HUTZEL HOSPITAL and ROSALYN HALL,

Defendants-Appellees.

UNPUBLISHED
February 24, 2004

No. 242052
Wayne Circuit Court
LC No. 00-220302-NH

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

MURPHY, J. (*separate opinion*).

In this civil rights action brought pursuant to the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq.*, plaintiff appeals as of right from a judgment granting summary disposition in favor of defendants under MCR 2.116(C)(10).[1] I would affirm in part, and reverse and remand in part.

In this case, plaintiff, a Filipino nurse previously employed at defendant hospital, alleges that she was discriminated against on the basis of her nationality, and because she voiced her complaints about defendant's discrimination. Plaintiff alleges national origin discrimination, retaliatory discharge, and hostile work environment, all in contravention of the CRA, as well as a claim for wrongful discharge and breach of contract. In essence, plaintiff contends that defendant delayed training her as a charge nurse for a period of time because she was a Filipino, and that, after she filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), she was subjected to stricter and unfair scrutiny in her work, which resulted in her

[1] Initially, I opine that summary disposition in favor of defendant Hall should be affirmed, albeit for reasons different than those espoused by the trial court. The only claims properly considered on appeal concern the CRA. This Court, in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002), ruled that "the CRA provides solely for employer liability, and a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights." Defendant Hall was plaintiff's supervisor; therefore, she cannot be held individually liable for violations of the CRA. Thus, for purposes of the remainder of this opinion, I shall refer solely to a single "defendant," that being defendant hospital, unless otherwise indicated.

termination. The delay in training serves as the basis for her national origin claim, and the facts surrounding the stricter scrutiny and her termination serve as the basis for her retaliatory discharge, hostile work environment, and wrongful discharge claims. The trial court granted summary disposition in favor of defendant on these counts.

On appeal, this Court reviews the trial court's grant or denial of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* In deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in a light most favorable to the nonmoving party and determine whether a genuine issue of material fact exists to warrant a trial. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). Summary disposition is proper when, except with regard to the amount of damages, there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

Plaintiff argues that the trial court erred in granting summary disposition in favor of defendant on her claim of discrimination under the CRA. I agree. Plaintiff sought to establish that defendant discriminated against her by denying her an equal opportunity to train as a charge nurse; plaintiff tried to prove this using indirect evidence.[2]

A plaintiff may establish that she was unlawfully discriminated against through indirect evidence by way of the burden shifting framework of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001) "The *McDonnell Douglas* approach allows a plaintiff 'to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.'" *Id.* at 462 (emphasis in original), quoting *Debrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-538; 620 NW2d 836 (2001). In *Hazle, supra* at 463, our Supreme Court explained:

> Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (1) she

---

[2] In her complaint, at various points, plaintiff alleged that she was denied training, that she was denied adequate training, and that she was denied an equal opportunity to train. There is no genuine issue, however, that plaintiff was in fact trained; plaintiff admits as much in her deposition. Moreover, plaintiff believed that her training was "valuable." Based on her training, plaintiff was able to serve as charge nurse in her department. Summary disposition on these theories was appropriate. But it is clear that, in referring to an opportunity to train, plaintiff was taking issue in the delay in her training. This theory mirrors her claims raised in her complaint to the EEOC. The trial court missed this distinction between plaintiff's various theories. In rendering its ruling from the bench, the trial court apparently believed that plaintiff's claim was only that she was either not trained, or not trained adequately, and not that she was not trained in a timely manner. However, by arguing that she was denied an equal training opportunity, it is clear that plaintiff is arguing that she was not trained in a timely manner.

> belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.

"The *McDonnell Douglas* prima facie case does not describe the plaintiff's burden of production, but merely establishes a rebuttable presumption." *Id.* at 464. The *Hazle* Court further stated:

> [O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. . . . If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away.
>
> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was pretext for [unlawful] discrimination." [*Id.* at 464-466 (citations omitted).]

Here, plaintiff is a member of a protected class, as she is of Filipino descent and the CRA prohibits discrimination on the basis of national origin. MCL 37.2202(1)(a). Defendant does not contest whether plaintiff established the first element of the *McDonnell Douglas* test. The second element of the test requires that plaintiff establish that she sustained an adverse employment action. In order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities, and (2) there must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective belief with respect to the desirability of one position over another is not controlling. *Wilcoxen v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999). Plaintiff contends that the adverse employment action she endured is that she was denied "an equal training opportunity" which would allow her to become a charge nurse. By this, plaintiff explains, she was not trained in a timely manner, where there was approximately a two-year period in which her requests to be trained as a charge nurse went unheeded. The documentary evidence indicates that a charge nurse directs the actions of other nurses on the floor, and that a charge nurse receives additional compensation for the added responsibility. Thus, plaintiff made a prima facie showing of an adverse employment action, where there was evidence that she was denied, during a two-year period, training as a charge nurse.

The remaining two elements of a prima facie case require that plaintiff demonstrate that she was qualified for the training, and that the training was denied in a way that gives rise to an inference of unlawful discrimination. *Hazle, supra* at 463, Here, there is no dispute between the parties that plaintiff was qualified to train as a charge nurse. Therefore, the question becomes

whether she was denied the opportunity to timely train as a charge nurse under circumstances giving rise to an inference of unlawful discrimination. I conclude that plaintiff submitted sufficient documentary evidence showing an inference of unlawful discrimination.

A review of plaintiff's affidavit, her deposition testimony, and other documentary evidence indicates that when she was transferred to the Progressive Care Nursery Unit ("PCN") in 1995, two other nurses transferred with her, one a Caucasian and one a Filipino. The Caucasian nurse was soon given the opportunity to train and become a charge nurse, the two Filipino nurses, including plaintiff, were not. Plaintiff made numerous requests to her supervisors, asking to be trained as a charge nurse without avail until initial but futile efforts to train plaintiff were made in the late summer of 1997. The documentary evidence indicates that defendant scheduled plaintiff for charge-nurse orientation on busy days where staff was short, which lead to the charge nurse being unable to train plaintiff. When conditions were such that there was time to train a nurse to become a charge nurse, plaintiff was not scheduled for orientation, and instead additional Caucasian nurses, some with less seniority, were trained to be charge nurses. Plaintiff states in her affidavit:

> Of all the registered nurses that were in the PCN unit, at the times relevant hereto, only two (2) names had been left off of the Charge Nurse training duties list (i.e., Aida Olegario and Affiant – both Filipino).[3]

Additionally, plaintiff testified in her deposition that she and Olegario were given nursing assignments that were more difficult than those given to other nurses on the floor. Only after plaintiff filed her complaint with the EEOC[4] in October of 1997 did defendant actually begin training plaintiff as a charge nurse.

Defendant repeatedly maintains in its appellate brief that, due to a high patient census from 1994 to 1996, charge nurse orientation ceased. Defendant fails to cite any documentary evidence supporting this proposition, and plaintiff's documentary evidence directly conflicts with the argument.[5] Moreover, defendant's argument fails to address the status of training during the first ten months of 1997. Defendant fails to cite any documentary evidence that would conflict with plaintiff's claim that Caucasian nurses were trained as charge nurses during the period of time that plaintiff sought to be so trained. Further, defendant does not argue that

---

[3] The documentary evidence and plaintiff's argument implicitly indicate that Olegario sought to be trained as a charge nurse. Defendant does not present any argument or evidence to the contrary.

[4] The EEOC found, after investigation, a violation of plaintiff's civil rights.

[5] The lower court record contains an affidavit by Teresa Moore, which was submitted by defendant, and which indicates that Moore had been a permanent charge nurse in the PCN at the hospital. The affidavit provides that, in 1994, the hospital terminated a permanent charge nurse system in the PCN. However, the affidavit goes on to provide that the former permanent charge nurses then oriented other nurses as charge nurses. There is no indication that charge nurse training ceased, in fact the affidavit suggests the contrary.

the delay in training plaintiff was due to her lack of qualifications or inability to learn or perform the functions of a charge nurse. Defendant has failed to articulate, through the presentation of documentary evidence, a legitimate, nondiscriminatory reason why plaintiff was not trained as a charge nurse during the time she requested such training, where other Caucasian nurses were given training.

Plaintiff submitted sufficient documentary evidence giving rise to an inference of unlawful discrimination, i.e., Caucasian nurses were timely trained as charge nurses and not plaintiff, nor another Filipino nurse, despite plaintiff's requests for training and her unchallenged qualifications to train and be a charge nurse, and Filipino nurses were given more difficult nursing assignments. Because this evidence was not properly rebutted by defendants, the trial court erred in granting summary disposition on plaintiff's CRA discrimination claim. Moreover, assuming that defendant's argument regarding a moratorium on training was supported by evidence, I find that an issue of fact would remain as to whether it was a mere pretext in light of the conflicting evidence submitted by plaintiff. Additionally, with respect to this claim and for purposes of MCR 2.116(C)(10), defendant was required to submit documentary evidence in support of its motion, pursuant to MCR 2.116(G)(3)(b), showing that there was no prima facie case of discrimination or that there was a legitimate nondiscriminatory reason for the delay in training plaintiff as a charge nurse. Defendant's failure to do so relieved plaintiff from her obligation to submit evidence establishing a material factual issue. See *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

Plaintiff next argues that the trial court erred when it dismissed plaintiff's retaliatory discharge claim brought under MCL 37.2701(a). I agree. In *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997), this Court stated that "[t]o establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he 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." (Citations omitted). Plaintiff alleged that, in response to her filing a complaint with the EEOC, she was subjected to "harassment and retaliation" in the form of increased disciplinary measures and finally termination.

Here, defendant only takes issue with the fourth requirement, that there is a causal connection between plaintiff's complaint to the EEOC, and plaintiff's discipline, which ultimately included her termination. I conclude that plaintiff has established a factual issue regarding a causal connection through the presentation of documentary evidence.

Defendant argues that plaintiff had a history of being reprimanded and disciplined before the EEOC complaint, and that the reprimands after the filing of the complaint and the termination were based on legitimate nondiscriminatory reasons pursuant to hospital policy, including absenteeism, tardiness, and multiple acts detrimental to the well-being of patients in plaintiff's care.

I first observe that, although plaintiff commenced working for defendant hospital as a nurse in 1986, she was never disciplined for acts detrimental to the well-being of patients until after the EEOC complaint in October 1997, and the acts for which she was disciplined occurred shortly thereafter and in a fairly short time frame. Thus, after eleven years of nursing without an

indication that she was possibly incompetent to work as a nurse, her nursing skills suddenly became questionable. That aside, plaintiff submitted documentary evidence (her affidavit and deposition testimony) forcefully challenging the factual basis for the disciplinary actions concerning acts detrimental to the well-being of patients, calling into question the disciplinary actions and whether plaintiff actually endangered the well-being of patients, thus creating a factual issue regarding the legitimacy of defendant's disciplinary measures. Although tardiness and alleged falsification of time records may have been the events that triggered plaintiff's termination, she would not have been in the posture to be terminated without the discipline regarding the acts detrimental to the well-being of patients.[6] Plaintiff also maintained that coworkers stopped associating with her after the EEOC complaint, and that she was strictly scrutinized. I further note that there was documentary evidence, in the form of depositions by other nurses in the PCN, suggesting that tardiness by other nurses did not always result in reprimands. Plaintiff provided sufficient evidence to create triable issues on whether there was a causal connection between her termination and the complaint to the EEOC. There was a genuine issue of fact regarding whether defendant's assertion, which was supported by documentary evidence, that plaintiff was terminated for tardiness, absenteeism, and acts detrimental to the well-being of patients, was merely a pretext for a retaliatory discharge. Plaintiff's cause of action should not have been summarily dismissed, and the trial court erred in so doing. Further supporting my conclusion on the retaliatory discharge claim is my discussion infra regarding plaintiff's hostile work environment claim.

Plaintiff takes issue with the trial court's order granting summary disposition in defendant's favor on her claim for harassment and hostile work environment. Plaintiff alleged that she endured a hostile work environment, in that, based on her national origin and the complaint to the EEOC, she was subjected to a stricter set of guidelines and disciplinary action.

After filing the complaint, plaintiff was called to an "emergency staff meeting" led by defendant Hall. According to plaintiff, Hall informed the staff that one of the nurses in the unit had filed false allegations against her, and that Hall wanted "very much to hurt her." Hall then instructed the staff that, "this is just between me and her and human resources" and that she was "keeping it to [herself]." Plaintiff claims that as a result of this comment, she became very

---

[6] Judge Bandstra opines that plaintiff failed to create a genuine issue of material fact with respect to the retaliatory discharge claim because "plaintiff had been written up regularly and consistently since she was hired, both before and after she filed the complaint[, and f]urther, plaintiff does not dispute that most of the write-ups were justified." However, this reasoning fails to take into account the fact that the write-ups following the EEOC complaint regarded acts detrimental to the well-being of patients, which are of a more serious nature, and which had never been alleged previously. Moreover, plaintiff vociferously challenges those write-ups as unjustified. Additionally, without those particular write-ups occurring, plaintiff would not have been in the position to be terminated. This fact is specifically recognized by Judge Bandstra, where he acknowledges that "plaintiff was placed on disciplinary probation on November 10, 1998, for an 'act detrimental to [the] well-being' of a patient and was informed that this meant that 'any further rule violation (major or minor) may result in dismissal over the next year.'"

scared. Plaintiff asserts that she complained about this to defendant's human rights representative, as well as the hospital's human resources representative.

The lower court file includes a letter from a district director of the EEOC which concludes that, after reviewing plaintiff's allegations, "there is reasonable cause to believe that a violation [referring to the delay in training] has occurred." An accompanying letter proposed various ways to settle plaintiff's complaint. In response to the EEOC's recommendations, defendant offered several concessions. In doing so, defendant hospital accepted that Hall's comments at the meeting were "not appropriate," and apologized for "any personal discomfort they may have caused Ms. Navarro."

Plaintiff argues that summary disposition on her hostile work environment claim was improper, as defendant's acknowledgment that Hall's comments were inappropriate creates a genuine issue of material fact as to whether plaintiff was subjected to harassment on the basis of her claim. In *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 629; 576 NW2d 712 (1998), this Court, citing *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 115 (1993), and *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), stated that:

> In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior.

I find that there was sufficient evidence presented to create an issue of fact regarding whether plaintiff was subjected to intimidating, hostile, and unwelcome conduct and communication on the basis of her protected status, i.e., national origin and as an individual who lodged an EEOC complaint, such that summary disposition was improper. Defendant contends that plaintiff failed to offer any evidence relating to the severity of the alleged conduct. "To survive summary disposition, plaintiff had to present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances [the alleged conduct] was sufficiently severe or pervasive to create a hostile work environment." *Quinto, supra* at 369. Taking into consideration the hostile comments made by Hall, and, as discussed above, the disassociation by coworkers and the numerous disciplinary measures taken by defendants, which are subject to dispute as being legitimate, there was minimally a question of fact with respect to whether plaintiff established a claim of a hostile work environment. Therefore, the trial court erred in summarily dismissing the claim.[7]

---

[7] Judge Bandstra's opinion, again, fails to recognize that, in addition to Hall's hostile statements, plaintiff vigorously disputes the relevant disciplinary action concerning the alleged acts (continued…)

Finally, plaintiff alleges that the trial court improperly dismissed her claim for wrongful termination and breach of contract. The lower court record reveals that, upon defendant's original motion for summary disposition, plaintiff conceded the "non-viability" of this claim by stating that "[t]he language in [defendant's] policy manual indicates that plaintiff was an at-will employee and thus does not have a viable breach of contract claim."[8] "A party cannot stipulate a matter and then argue on appeal that the resultant action was error." *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001), citing *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). This argument has no merit.

I would affirm in part, and reverse and remand in part.

/s/ William B. Murphy

(…continued)

detrimental to the well-being of patients and fails to recognize evidence of disassociation by coworkers. Considering the totality of the circumstances, an issue of fact exists whether plaintiff was subjected to a hostile work environment.

[8] In response to defendant's renewed motion for summary disposition, plaintiff made a very short argument in her brief concerning why the count in the complaint entitled "breach of contract & wrongful discharge" should survive, but she did not explain the basis of any "just cause" contract nor negate the previous concession that there was no viable claim. The count was predicated on a claim that defendant's policy manual required just cause for termination. The trial court did not address the count at oral argument, and plaintiff did not challenge the court's failure to rule. Therefore, I conclude that plaintiff has waived this issue on appeal.