# STATE OF MICHIGAN

# COURT OF APPEALS

DEBORA J. BLAIR,

Plaintiff-Appellant,

v

OAKWOOD HEALTH SYSTEMS and HERITAGE HOSPITAL,

Defendants-Appellees.

UNPUBLISHED
April 13, 2004

No. 244667
Wayne Circuit Court
LC No. 01-134223-CZ

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants summary disposition of plaintiff's sexual discrimination claim under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm.

Although plaintiff argues, in part, that she sufficiently stated a claim for discrimination to withstand summary disposition under MCR 2.116(C)(8), the trial court's decision was not based on subsection (C)(8), which tests the legal sufficiency of a claim based on the pleadings alone. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Rather, the court considered evidence outside the pleadings and granted summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact). Therefore, we limit our review to plaintiff's claim that summary disposition was also not warranted under MCR 2.116(C)(10). *Spiek*, *supra* at 338; *Velmer v Baraga Area Schools*, 430 Mich 385, 389; 424 NW2d 770 (1988).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). We review the trial court's decision de novo as a question of law, but limit our review to the substantively admissible evidence actually presented to the trial court. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002); *Maiden*, *supra* at 120. When the evidence does not establish a genuine issue regarding any material fact for trial, the moving party is entitled to judgment as a matter of law. *Id.* at 120-121.

A plaintiff may use different methods of proof in order to prove that an employer made an adverse employment action under the CRA, MCL 37.2202, on account of the plaintiff's sex. See generally *Meagher v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997). We agree with plaintiff that "sex," as defined in MCL 37.2201(d), includes pregnancy and

childbirth conditions. We conclude, however, that plaintiff failed to meet her burden of presenting substantively admissible evidence to establish a genuine issue of material fact regarding whether defendants made an adverse employment decision because of plaintiff's pregnancy or childbirth condition.

As an initial matter, we decline to consider plaintiff's arguments regarding an alleged adverse employment decision during her pregnancy, specifically, her transfer from Heritage Hospital to an admitting supervisor position at a different hospital facility in February 2000. At the hearing on defendants' motion for summary disposition, plaintiff's attorney acknowledged that plaintiff's discrimination claim was based only on defendants' failure to offer plaintiff a position after her child was born. Therefore, any claim based on an alleged adverse employment action during plaintiff's pregnancy was waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). To hold otherwise would contravene the longstanding rule against a party harboring error as an appellate parachute. *Marshall Lasser, PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Turning to plaintiff's claim that she should have been offered an admitting supervisor position at Oakwood Hospital in Dearborn after giving birth to her child and being cleared by her physician to return to work, we conclude that summary disposition was properly granted to defendants. To the extent that plaintiff relies on the prima facie method of proof based on *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), plaintiff had the initial burden of establishing that she was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and (4) that others similarly situated and outside of the protected class were unaffected by defendants' adverse conduct. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). To create an inference of disparate treatment, a plaintiff must prove that all relevant aspects of his or her employment situation were nearly identical to those of a comparable employee. *Id.* at 699; *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). When a plaintiff sufficiently establishes a prima facie case, a presumption of discrimination arises because it is more likely than not that the defendant's acts, if otherwise unexplained, were based on impermissible factors. *Hazle, supra* at 463.

We are not persuaded that plaintiff met her initial burden of showing a prima facie case giving rise to a presumption of discrimination. Plaintiff did not proffer admissible evidence that the person who was actually hired for the admitting supervisor position at Oakwood Hospital was outside plaintiff's protected class or applied for the position under circumstances similarly situated to plaintiff. Furthermore, even if we were to assume that plaintiff presented a prima facie case, defendants met their burden of articulating a legitimate, nondiscriminatory reason for its employment action, namely, that Ray Joslin, the director of plaintiff's department, had already offered the position to someone else when plaintiff initially expressed her interest in the admitting supervisor position. Hence, to survive summary disposition, it was necessary that plaintiff present evidence that, viewed most favorably to plaintiff, would enable a reasonable trier of fact to conclude that her childbirth status was a motivating factor for the employment decision. *Hazel, supra* at 465.

The evidence presented below indicated that the admitting supervisor position was posted in December 2000. At that time, plaintiff was on a reinstatement list maintained by the Human

Resources Department because of an earlier medical leave that ended in October 2000, but was disabled from work, having been prohibited from working by her physician for the period November 8, 2000, to January 8, 2001. According to the excerpt of plaintiff's deposition that was presented by defendants in support of their motion for summary disposition, plaintiff advised Joslin of her interest in that position in February 2001, but was told by Joslin that he had already extended an offer to someone else.

Plaintiff did not present any evidence showing that Joslin's purported statement had no basis in fact or was otherwise a pretext for discrimination. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). Plaintiff's assertion on appeal that she could attack the credibility of Joslin's statement does not give rise to a genuine issue of material fact. *Maiden, supra* at 120-121. Because plaintiff did not present admissible evidence from which a reasonable trier of fact could conclude that her childbirth status was a motivating factor for Joslin's failure to offer her the admitting supervisor position, the prima facie method of proof does not afford plaintiff any basis for avoiding summary disposition. *Hazel, supra* at 465.

Plaintiff's claim that this case involves direct evidence of employment discrimination also fails to provide any basis for disturbing the trial court's decision. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the adverse employment action. See *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003); *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 632; 576 NW2d 712 (1998). In a direct evidence case involving mixed motives, where an adverse employment decision could have been based on both legitimate and impermissible reasons, a plaintiff must prove that it is more likely than not that discriminatory animus was a substantial or motivating factor. *Sniecinski, supra* at 133. Additionally, regardless whether the prima facie or direct evidence method of proof is used, a plaintiff must present evidence that the discriminatory animus was causally linked to the adverse employment decision. *Id.* at 133-136.

In her brief on appeal, plaintiff gives only cursory treatment to her direct evidence theory. To the extent that plaintiff's claim is based on Joslin's statement in February 2000 that she would probably want to stay home with her baby, plaintiff failed to establish a basis for avoiding summary disposition. When a plaintiff claims that an employer's remark constituted direct evidence of discrimination, a court must examine the employer's remark in the context in which it was made. See *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Whether a challenged remark may be characterized as a mere "stray remark," or may properly be viewed as relevant, direct evidence of discriminatory animus, is examined in light of the following factors:

> (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias? [*Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001).]

Here, the trial court correctly characterized the challenged remark as a "stray remark." According to plaintiff's own deposition testimony, Joslin remarked, while plaintiff was still pregnant, that plaintiff would probably want to stay home with the baby. Although Joslin was the same person involved in the challenged February 2001 employment decision, the remark lacked probative value because it was not made in close proximity to that employment decision. Rather, it was an isolated remark, made approximately a year earlier, while Joslin was assessing plaintiff's immediate and future availability for the full-time admitting supervisor position at Heritage Hospital. Joslin's assessment was made at about the same time that plaintiff's physician wrote the February 3, 2000, "to whom it may concern" letter that stated, "Please extend Debora's restrictions of not more than five days per week and four hours per day an additional four weeks. She is being followed in the office every two weeks for abdominal cramping and fatigue."

Examined in this context, Joslin's remark was, at best, ambiguous as to whether Joslin was expressing his own belief regarding what plaintiff should do after the birth of her baby, or merely speculating on what plaintiff might choose to do, in an effort to assess how long plaintiff might be unavailable for full-time employment. The trial court correctly concluded that the remark was a "stray remark" and was not relevant evidence of discriminatory animus.

Moreover, it is not enough that a plaintiff show discriminatory animus. A plaintiff must establish that the discriminatory animus was causally related to the adverse employment action. *Sniecinski, supra*. Because plaintiff failed to offer admissible evidence that Joslin's decision was because of unlawful discriminatory animus on account of her childbirth status, defendants were entitled to summary disposition under MCR 2.116(C)(10). *Sniecinski, supra* at 136-140; *Hazle, supra* at 465.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Pat M. Donofrio