

STATE OF MICHIGAN  
COURT OF APPEALS

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COLLEEN HALEY,

Plaintiff-Appellee,

v

UNITED FOOD & COMMERCIAL WORKERS  
UNION, LOCAL 876,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2004

No. 249068  
Wayne Circuit Court  
LC No. 01-127204-CZ

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying its motion for summary disposition in this disparate impact discrimination action. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was discharged from her position as an assistant bookkeeper at a Farmer Jack Supermarket after improper void transactions were executed under her secret management override number. Defendant, the union that represented plaintiff, was unable to resolve plaintiff's grievance, and its executive board declined to take the matter to arbitration. Plaintiff brought this action under the Civil Rights Act, MCL 37.2204(d), asserting that defendant failed to adequately represent her in the grievance process because of her race. Plaintiff relied on a disparate impact theory of discrimination. Defendant moved for summary disposition under MCR 2.116(C)(10), which was denied by the trial court. We granted leave to appeal.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

To establish a prima facie case of disparate impact discrimination under the Civil Rights Act, a plaintiff must show that she was a member of a protected class and that a facially neutral employment practice burdened a protected class of persons more harshly than others. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997).

The use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual. *Dixon v W W Grainger, Inc*, 168 Mich App 107, 118; 423 NW2d 580 (1988). Appropriate statistical data showing an employer's pattern of conduct toward a protected class can, if unrebutted, create an inference that a defendant discriminated against individual members of a class. *Barnes v Gencorp, Inc*, 896 F2d 1457, 1466 (CA 6, 1990). The statistical evidence must show a significant disparity and eliminate the most common nondiscriminatory explanations for disparity: the operation of legitimate selection criteria or change. Statistical proof alone cannot determine the more likely cause of the disparate effect. *Id.* To meet her burden of demonstrating that the statistical disparity is more likely than not due to the defendant's bias, a plaintiff must present significant statistics coupled with independent circumstantial evidence of discrimination. *Hopson v DaimlerChrysler*, 306 F3d 427, 437-438 (CA 6, 2002).

The evidence showed that substantially more arbitration requests were filed by white employees and Kroger employees. Although defendant arbitrated more grievances from Kroger employees than from Farmer Jack employees, there is no evidence establishing the racial makeup of each workforce, the number of grievances filed, or the nature of the arbitration requests. Plaintiff presented no evidence that would allow the court to distinguish between valid reasons for decisions not to arbitrate and reasons that would suggest discrimination. Where plaintiff failed to offer any supporting circumstantial evidence of discrimination, the insignificant statistical support for her claim is insufficient to defeat summary disposition. *Maiden, supra*.

Reversed and remanded for entry of judgment for defendant. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski