STATE OF MICHIGAN

COURT OF APPEALS

MARGARET TERRY, Plaintiff-Appellant,	UNPUBLISHED December 20, 2005
v	No. 263339 Macomb Circuit Court
DAIMLERCHRYSLER CORPORATION, Defendant-Appellee.	LC No. 04-003222-NO

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of her employment discrimination case. We affirm.

Plaintiff was terminated from her employment after being absent from work for five days without calling her employer. Despite a significant history of poor job performance, plaintiff's union filed a grievance on her behalf and plaintiff was reinstated under certain written conditions. One such condition was that she would abide by the Standards of Conduct, which included exerting normal effort on the job. On the first day of her return to work, plaintiff apparently did not perform efficiently and created a production backlog. The next day, she was terminated for poor workmanship that violated the agreed to Standards of Conduct. She subsequently filed a complaint alleging violations of the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*., specifically, discrimination based on her "race, color, age, sex, height, weight, [and] familial status." Following defendant's motion for summary disposition, the trial court dismissed the case after concluding that there was no genuine issue of material fact that plaintiff was terminated because of deficient job performance. See MCR 2.116(C)(10). Plaintiff appeals the dismissal.

Under the CRA, MCL 37.2101 *et seq*., employers are prohibited from discharging an employee because of the individual's "religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1)(a). A plaintiff asserting such a discrimination claim must produce either direct or indirect evidence of bias. *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). If direct evidence is presented, i.e., evidence that if believed requires the conclusion that discrimination was at least a motivating factor, the case proceeds as any other civil matter. *Id*. at 462. If the plaintiff relies on circumstantial evidence to support her case, the plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski v Blue*

Cross & Blue Shield of Michigan, 469 Mich 124, 133-134; 666 NW2d 186 (2003). That approach allows the plaintiff to establish a 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 134, quoting *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 540; 620 NW2d 836 (2001). Then, the burden shifts to the employer to state a legitimate nondiscriminatory reason for the adverse employment action and, if so stated, the burden shifts back to the plaintiff to show that the employer's reasons are merely a pretext for discrimination. *Sniecinski*, *supra*.

Here, plaintiff alleged that she was discriminated against by several of defendant's agents, including Dawn Middleton, Bart Capers, Mandy Pellozzi, James Hayes, Dr. Neiderhauser, and Dr. Brown. However, plaintiff admitted at her deposition that her only contact with Middleton was that Middleton was the person in the Human Resources Department who signed the letters in May 2002 and October 2002 advising plaintiff that her seniority was terminated. Plaintiff testified that she had no communications with Middleton that would suggest Middleton was discriminating against her. With regard to Pellozzi, plaintiff testified that Pellozzi was her supervisor for only one day, on October 23, 2002, and that Pellozzi never did or said anything discriminatory. Likewise, plaintiff testified that James Hayes, Bart Capers, Dr. Nedierhauser and Dr. Brown never said or did anything to her that would indicate they were discriminating against her because of religion, race, color, national origin, age, sex, weight, or marital status.

Plaintiff testified that her "height" discrimination claim was based on the fact that she thought she was too short for the job to which she was assigned. Plaintiff, however, admitted that her management told her they thought she could do the job. Therefore, this is not a case where plaintiff is complaining that she was treated differently because of her height. Rather, it seems to be a case where she was being treated the same as everybody else when she in fact wanted special treatment. In sum, there is simply no direct evidence of discrimination against plaintiff.

Because plaintiff failed to present direct evidence of discrimination, we must determine whether she has nonetheless established a prima facie case of discrimination through circumstantial evidence. To do so, first plaintiff must prove by a preponderance of the evidence that she was a member of a protected class, that she was terminated, that she was qualified for the position she was terminated from, and that she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). It is undisputed that plaintiff was a member of a protected class and was terminated from a position for which she was qualified. However, plaintiff has failed to show that she was terminated under circumstances giving rise to an inference of discrimination. Further, even if plaintiff had presented such evidence, defendant provided an abundance of evidence supporting its claim that plaintiff was terminated for her deficient job performance and for failing to follow well-established and agreed upon rules of employment. Plaintiff did not present evidence that challenged defendant's nondiscriminatory reason for her termination. See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Thus, plaintiff failed to establish a prima facie case of discrimination and her CRA claim was properly dismissed.

Plaintiff alternatively alleged "hostile work environment" and "constructive discharge" claims which also fail. To establish a prima facie case of discrimination based on a hostile work

environment, one element that a plaintiff must show is that she was subjected to communication or conduct because of her protected status. See *Radtke v Everett*, 442 Mich 368, 382; 501 NW2d 155 (1993). For the reasons stated above, plaintiff failed to set forth any evidence that she was subjected to a communication or conduct on the basis of her race, color, gender, age, height, weight or familial status. Thus, summary disposition of this claim was proper as a matter of law. See MCR 2.116(C)(10). Plaintiff's constructive discharge claim also fails as a matter of law. Essential to proving constructive discharge is that the employee resigned; here, plaintiff was terminated. See *Chambers v Trettco, Inc*, 463 Mich 297, 317-318; 614 NW2d 910 (2000); *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994).

Finally, without citation to authority and in a cursory manner, plaintiff asserts that she had a constitutional right to a trial by jury. However, because plaintiff, as the party opposing the motion for summary disposition, failed to present documentary evidence establishing the existence of a material factual dispute, defendant's motion was properly granted pursuant to MCR 2.116(C)(10). See *Quinto*, *supra*.

Plaintiff also argues that Judge Chrzanowski should be disqualified from presiding over the case. This claim is unpreserved for review. "To preserve for appellate review the issue of a denial of a motion for disqualification of a trial court judge, a party must request referral to the chief judge of the trial court after the trial court judge's denial of the party's motion." MCR 2.003(C)(3)(a); see, also, *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). Because plaintiff failed to file a motion to disqualify Judge Chrzanowski, plaintiff has not preserved this issue for review. Nevertheless, even considered on its merit, relief is not warranted. Plaintiff's argument is premised on the trial court's reference to her as an "African-American Female." Plaintiff's own amended complaint refers to herself as an "African-American female." In any event, this reference is insufficient to establish bias or prejudice against plaintiff. See MCR 2.003(B)(1).

Affirmed. Defendant is entitled to tax reasonable costs. See MCR 7.219(A).

/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper
/s/ Pat M. Donofrio