STATE OF MICHIGAN

COURT OF APPEALS

SHEABRA L. SIMPSON, Ph.D.,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS, JAN EPP, and HAMPTON E. WALKER, JR.,

Defendants-Appellees.

UNPUBLISHED
May 27, 2008

No. 275554
Wayne Circuit Court
LC No. 04-438895-CD

Before: Saad, C.J., and Borrello and Gleicher, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that the trial court properly dismissed plaintiff's claims of discriminatory allocation of resources and work assignments. However, I respectively disagree that the trial court properly dismissed plaintiff's race and gender discrimination claims.

Defendants sought summary disposition of plaintiff's Civil Rights Act (CRA)[1] claims pursuant to MCR 2.116(C)(8), which provides that the court may grant summary dismissal if "[t]he opposing party has failed to state a claim on which relief can be granted." When deciding a motion brought under subrule (C)(8), this Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under subrule (C)(8) tests the legal sufficiency of the complaint based solely on the pleadings. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277; 681 NW2d 342 (2004).[2] A party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Summary disposition on the basis of subrule (C)(8) should be granted only when the claim "is so clearly unenforceable as a matter of law that no

[1] MCL 37.2101 *et seq*.

[2] In contrast, a motion brought under MCR 2.116(C)(10) tests the *factual* sufficiency of the complaint." *Maiden*, *supra* at 120 (emphasis supplied).

factual development could possibly justify a right of recovery." *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

Because defendants' motion sought relief solely under subrule (C)(8), the central question presented is whether plaintiff's second amended complaint sufficiently pleaded a cause of action under the CRA. A complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend . . . ." MCR 2.111(B)(1). "[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position." *Stanke v State Farm Mut Automobile Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993), citing 1 Martin, Dean & Webster, Michigan Court Rules Practice, p 186. Our Supreme Court has characterized MCR 2.111(B)(1) as consistent with a "notice pleading environment." *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 700 n 17; 684 NW2d 711 (2004).

Plaintiff's second amended complaint spans 26 pages and sets forth approximately 115 factual allegations. In my view, the complaint unquestionably provides defendants with adequate notice of plaintiff's race and sex discrimination claims.

The CRA prohibits race and sex discrimination with respect to employment, compensation, or a term, condition or privilege of employment. MCL 37.2202(1)(a), (c). "[T]he essence of a sex discrimination civil rights suit is that similarly situated people have been treated differently because of their sex." *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993). A race discrimination in employment claim brought under the CRA shares the same basic attributes: discriminatory treatment in an employment setting because of a plaintiff's race. MCL 37.2202(1)(a). To state a claim of sex or race discrimination arising from employment, a plaintiff need only allege she belonged to a class entitled to protection under the CRA, and received disparate treatment because of her membership in the protected class. See *Heath v Alma Plastics Co*, 121 Mich App 137, 141; 328 NW2d 598 (1982). The issue presented here is not whether plaintiff ultimately will prevail on her allegation that race and sex discrimination motivated adverse employment actions, including her termination, but whether she is entitled to conduct discovery and ultimately offer evidence in support of her claims.

Plaintiff's second amended complaint alleged that she is an African-American female, and in ¶¶ 26 through 28 and 32, averred that she qualified for the position of a psychologist with the Michigan Department of Corrections (MDOC). Her complaint further alleged that in 2003, plaintiff suffered adverse employment actions and was terminated from her psychologist position at the Mound Correctional Facility because of her race and sex. Plaintiff cited the following nonexhaustive list of facts supportive of her claim that unlawful discrimination precipitated her termination: (1) she was fired for acts dating back over the previous five years, while Caucasian and male employees "were never subjected to discipline for acts dating back more than 90 days"; (2) she was denied family medical leave while similarly situated Caucasian and male employees received family medical leave; (3) she was investigated in an improper manner never used to investigate the background of Caucasian employees; (4) Caucasian and male employees were not disciplined in the same manner; and (5) "Caucasian and male (psychologists) were not fired, reprimanded or referred for investigation … as was Plaintiff, even though they committed more serious acts than those alleged to have been committed by Plaintiff." The examples listed in the

complaint included that "Mr. Samaroo, a Caucasian male psychologist, and other Caucasian male psychologists, who had not earned Doctorate Degrees represented themselves to patients as a doctor, despite the fact that they had not earned a doctorate's degree." In my view, these allegations sufficed to reasonably inform defendants of the nature of plaintiff's discrimination claims, which is all that MCR 2.111(B)(1) requires. *Iron Co v Sundberg Carlson & Assoc's, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997).

According to the majority, "the trial court properly concluded that plaintiff failed to sufficiently allege a prima facie case of race and gender discrimination because she did not allege that she was treated differently than persons of a different class for the same or similar conduct." In support of this conclusion, the majority cites *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). In my view, the majority confuses the standard of review that applies in the instant case, which is restricted to the pleadings, with the standard that applies in a subrule (C)(10) case, such as *Wilcoxon*, which tests the sufficiency of the plaintiff's *proofs*. The majority additionally fails to distinguish between pleading basic elements of a discrimination claim and establishing a prima facie case of discrimination.

In *Swierkiewicz v Sorema NA*, 534 US 506, 510; 122 S Ct 992; 152 L Ed 2d 1 (2002), the United States Supreme Court observed that "[t]he prima facie case under *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973),] . . . is an evidentiary standard, not a pleading requirement." Thus, "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case," as described in *McDonnell Douglas Corp*, *supra*.[3] *Swierkiewicz*, *supra* at 511. The Supreme Court noted in *Swierkiewicz* that "the precise requirements of a prima facie case can vary depending on the context," and "[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case." *Id*. at 512. Because Michigan has not established heightened pleading requirements in CRA cases, I believe that *Swierkiewicz* provides persuasive authority regarding the construction of CRA complaints. The Michigan Court Rule governing pleading only required plaintiff to provide defendants with reasonable notice of the basis for her claim. At the initial stages of a case brought under the CRA, a plaintiff should not be required to plead with specificity the elements necessary to *prove* a prima facie case of discrimination.

In *Wilcoxon*, the decision on which the majority primarily relies, this Court examined whether a trial court properly granted summary disposition pursuant to MCR 2.116(C)(10). The Court in *Wilcoxon* did not examine the plaintiff's complaint under the standards applicable to a motion based on subrule (C)(8). The *Wilcoxon* Court commenced its analysis of the plaintiff's race and sex discrimination claim by observing that "[d]isparate treatment claims may be established 'under ordinary principles of proof by the use of direct or indirect evidence.'" *Id*. at 359 (citation omitted). This Court continued, "Alternatively, courts may use the prima facie test

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[3] When analyzing discrimination claims, the Michigan Supreme Court often utilizes federal precedent for guidance. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

articulated in *McDonnell Douglas Corp*[, *supra*,] … as a framework for evaluating discrimination claims." *Id*. (internal quotation omitted). These quotations, as well as the balance of *Wilcoxon*'s analytical framework, illustrate that the issue in that case did not involve *pleading*, but rather proof. The plaintiff in *Wilcoxon* "failed to produce any objective evidence that her transfer was a materially adverse employment action," and "failed to produce any evidence that she had been treated differently than others similarly situated." *Id*. at 366, 370. In reaching these conclusions, this Court carefully considered all of the evidence gathered by the parties during discovery before deciding that the trial court properly dismissed the plaintiff's claims. Because *Wilcoxon* is premised on an evidence-driven analysis, as required by MCR 2.116(C)(10), it is wholly inapplicable here.

The only issue properly before this Court is whether plaintiff's complaint adequately *alleged* that race or sex discrimination motivated her termination. At the initial pleading stage, plaintiff need not make out a prima facie case of discrimination, specifically identify similarly situated employees treated differently, or otherwise reference evidence demonstrating discrimination. *Swierkiewicz*, *supra* at 511. I believe that it is inappropriate to consider *at the pleading stage* whether plaintiff will ultimately prove the necessary degree in consistency of conduct or treatment by defendants that a discrimination claim ultimately requires.

Plaintiff's complaint alleges disparate treatment due to sex and race discrimination, and includes several specific factual examples that support her claim. Because the court rules and the case law do not require that plaintiff plead in avoidance of ultimate defenses, such as the lack of similarly situated comparable employees, I would reverse the trial court's grant of summary disposition premised on subrule (C)(8).

/s/ Elizabeth L. Gleicher