STATE OF MICHIGAN

COURT OF APPEALS

GINA S. FLORIA,

Plaintiff-Appellant,

v

BOB EVANS FARMS, INC. and O'NEIL JONES,

Defendants-Appellees.

UNPUBLISHED
March 19, 2009

No. 282954
Genesee Circuit Court
LC No. 07-085511-CL

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

In this race discrimination case brought under the Michigan Civil Rights Act, MCL 37.2101 *et seq*., plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, who is Caucasian, worked as a server at a Bob Evans restaurant. It is undisputed that on July 25, 2005, a regular customer left money on the counter and plaintiff put the money in her pocket. Plaintiff claimed the money was a $3.00 tip. However, plaintiff's assistant manager, who is Caucasian, testified in his deposition that plaintiff put the money *and* the food ticket in her apron, that he saw a $5 bill on top with more money underneath, that plaintiff never went to the register to cash out the ticket, which was procedure, and that plaintiff did not cash out the ticket by the end of the shift. The assistant manager reported this to the general manager, defendant O'Neal Jones, who is African-American. Jones discussed the matter with plaintiff and then fired her. Plaintiff maintains that Jones had previously said he would look out for his people and take care of his brothers and sisters, and had made a joke in which he referred to white people as "crackers." Based on these statements, as well as claims that African-Americans were assigned to better sections in the restaurant and other employees subject to discipline were not fired, plaintiff maintains that race was a factor in defendant Jones' decision to fire her. In granting summary disposition to defendants, the trial court determined that there was not enough evidence to suggest that plaintiff was terminated based on her race.

We review a grant of summary disposition de novo. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 219; 600 NW2d 427 (1999). A motion for summary disposition based on MCR 2.116(C)(10) "tests the factual support of a claim and requires this Court to consider the pleadings, admissions, affidavits, and other relevant documentary evidence of

record in the light most favorable to the nonmoving party to determine whether a genuine issue of material fact warranting a trial exists. *Elezovic v Ford Motor Co*, 274 Mich App 1, 5; 731 NW2d 452 (2007). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

In *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (citations omitted), our Supreme Court held:

> In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case . . . . For purposes of the analogous federal Civil Rights Act, the Sixth Circuit Court of Appeals has defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999); see also *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

See also *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 539; 470 NW2d 678 (1991).

Plaintiff argues that Jones' racial comments, as well as alleged preferential treatment of African-American employees, gave rise to an inference that race was a motivating factor in her discharge.[1] However, in this case "reasonable minds" could not conclude that these allegations support an inference of a connection between racial animus and Jones' decision to fire plaintiff. It is undisputed that the Caucasian assistant manager perceived that plaintiff was stealing and reported this fact to Jones. There is no evidence that the assistant manager had any animus against plaintiff or any other bias that would have motivated him to make a false report. The evidence perhaps gives rise to plaintiff's suspicion of a connection, but it does not support a reasonable inference that the decision to fire was based on anything other than theft or perceived theft.

Plaintiff also argues that Jones discriminated by not exercising his discretion under the employee handbook to use progressive discipline. Plaintiff maintains that other employees were given progressive discipline. While the handbook states that the company can depart from guidelines, it also provides for termination for a first offense of theft. None of the other employees identified by plaintiff were disciplined because of theft. There is no evidence which,

---

[1] Plaintiff also relies on the mistaken assertion that Jones gave inconsistent reasons for the discharge. Jones represented at one point that plaintiff's transgression was not writing up an order ticket, and at another point that it was theft. However, in context, it is clear that Jones was asserting that plaintiff took money that was intended to pay for the customer's meal, and that the failure to write up a ticket was an attempt to cover up the alleged theft. Accordingly, we do not find this aspect of plaintiff's argument to be significant.

"if believed, [would] require[] the conclusion that unlawful discrimination was at least a motivating factor in the employer's action." *Hazle, supra* at 462.

In *Hazle, supra* at 462-463, our Supreme Court noted that where no direct evidence of discrimination existed, a plaintiff could establish discrimination based on the analysis set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See also *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 172-178; 579 NW2d 906 (1998). This analysis requires the plaintiff to present a rebuttable prima facie case based on proofs giving rise to an inference that the plaintiff was the victim of unlawful discrimination. In this case, the prima facie case would require that plaintiff show, among other factors,[2] that non-Caucasians engaged in the same or similar conduct were treated more favorably. Consistent with our previous analysis, we conclude that plaintiff did not establish this factor. She again relies on the purported use of progressive discipline with other employees who had transgressions. However, since none of the other identified employees were terminated because of theft, plaintiff could not establish that she was treated less favorably than other employees who had the same or similar conduct.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis

[2] We find it unnecessary to address the other factors for purposes of disposition of this case.