STATE OF MICHIGAN

COURT OF APPEALS

ANGEL WOLFGANG,

Plaintiff-Appellant,

V

DIXIE CUT STONE AND MARBLE, INC., DIXIE SERVICES, LLC, OLD CASTLE and RON LECRONIER,

Defendants-Appellees.

UNPUBLISHED
January 21, 2010

No. 285001
Saginaw Circuit Court
LC No. 05-057060-CK

Before: Bandstra, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

In this discrimination and retaliation suit filed under the Elliott Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., and the Family Medical Leave Act (FMLA), 29 USC 2601 *et seq*., plaintiff appeals as of right from an April 8, 2008, judgment of no cause of action entered by the trial court following a bench trial. We affirm.

We review a trial court's conclusions of law in a bench trial de novo, and its findings of fact are reviewed for clear error. *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). "A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made." *Id*. Additionally, we defer to the trier of fact's superior ability to judge the credibility of the witnesses who appeared before it. *Id*. And we will not reverse the findings of a bench trial just because we would have decided the case differently. *Beason v Beason*, 435 Mich 791, 803; 460 NW2d 207 (1990). Rather, if the trial court's decision is plausible, on the record as a whole, we must affirm. *Id*.

Plaintiff first challenges the trial court's entry of a judgment for no cause for action as to her gender discrimination and retaliation claims under the ELCRA.

The ELCRA prohibits discrimination in the workplace. Specifically, MCL 37.2202(1)(a) states in relevant part as follows:

> (1) An employer shall not do any of the following:

> (a) Fail or refuse to hire or recruit, discharge or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff may bring a discrimination claim under the ELCRA based on disparate treatment or disparate impact discrimination because of any of the above-protected classes. *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999).

A disparate treatment claim is a claim for intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Either direct evidence of discrimination or indirect or circumstantial evidence of discrimination can be used to prove a disparate treatment case. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Where a plaintiff offers direct evidence of discrimination, plaintiff may proceed and prove the unlawful discrimination in the same manner as in any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

Our Supreme Court 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.'" *Hazle*, 464 Mich at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). In a direct evidence case where the adverse employment decision could have been based on both legitimate and legally permissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a substantial or motivating factor in the decision. *Sniecinski*, 469 Mich at 133. A plaintiff must also establish her qualification for the position and that the discrimination was causally related to the termination. *Id.* Further, a defendant may avoid liability by showing that the same action would have been taken regardless of the impermissible, discriminatory consideration. *Id*.

If there is no direct evidence of discrimination, then the plaintiff must rely on the four steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), to establish a prima facie case of discrimination. *Hazle*, 464 Mich at 462. Under the *McDonnell Douglas* analysis, as applied in Michigan, the plaintiff must show that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she suffered the adverse employment action under circumstances inferring discrimination. *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff establishes a prima facie case, then there is a rebuttable presumption of discrimination and the burden shifts to the employer to articulate and present admissible evidence in support of a "legitimate nondiscriminatory reason" for its decision. *Id*., 173. The burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the reason offered by the defendant was mere pretext for unlawful discrimination. *Hazle*, 464 Mich at 465-466.

Plaintiff first argues that the trial court erred in entering a judgment of no cause for action because she presented direct evidence of gender discrimination at trial. Plaintiff contends that defendants' general manager Ron LeCronier's derogatory comments, such as "that was something stupid only a woman would say"; "Here we go, Angel, thinking that because I'm a woman I can sell this and . . . it ain't going to sell"; and that was "too much money for a woman

to make," as well as him calling plaintiff a "bitch"[1] are direct evidence of gender discrimination, which required the trial court to direct a verdict in plaintiff's favor. We disagree.

While a single remark from a supervisor in the context of a discussion regarding plaintiff's termination, even if the statement might be subject to multiple interpretations, is sufficient to constitute direct evidence, and the remark's weight and believability are matters for the fact-finder to determine, *DeBrow v Century 21 Great Lakes, Inc* (*After Remand*), 463 Mich 534, 539-540; 620 NW2d 836 (2001), a stray remark that is outside the context of the termination decision is not necessarily probative of an employer's discriminatory intent. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 301-302; 624 NW2d 212 (2001). Rather, certain factors must be considered, such as (1) whether the remark was made by a person involved in the termination decision, (2) whether the remark was made during the decision making process, (3) whether the remark was vague, ambiguous, or isolated, and (4) whether the remark was proximate in time to the termination. *Id*. at 292. Here, LeCronier testified that he was involved in the decision to terminate plaintiff, but he was not the ultimate decision maker in this case. Rather, there were several people involved in the termination decision. Further, none of LeCronier's remarks were made in connection with plaintiff's termination, they appear to be isolated, and they were made at least two months before plaintiff's termination. Therefore, we do not believe that plaintiff presented direct evidence of gender discrimination at trial.

Plaintiff next argues that she presented sufficient circumstantial evidence of gender discrimination under *McDonnell Douglas* to prevail in this case. Defendants counter that plaintiff failed to establish the last element of her prima facie case either under a replacement theory[2] or by showing that a similarly situated employee was treated differently than plaintiff.[3]

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[1] Plaintiff refers this Court to its decision in *Stanisz v Federal Express Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2003 (Docket No. 236371), which plaintiff contends supports her position that LeCronier calling her a "bitch" is direct evidence of discrimination in and of itself. However, *Stanisz* is an unpublished opinion. Therefore, we are not bound by that decision. MCR 7.215(C)(1). Further, in *Stanisz*, in addition to one employee repeatedly calling the plaintiff a "bitch," there were several other derogatory gender-related comments from upper management in that case. Therefore, it is not clear that the *Stanisz* Court actually held that the term "bitch" in and of itself is direct evidence of discrimination as plaintiff contends.

[2] A plaintiff may establish a prima facie case of employment discrimination under a replacement theory by showing: (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that the plaintiff was replaced by one who was not a member of the protected class. *Feick v Monroe Co*, 229 Mich App 335, 338; 582 NW2d 207(1998).

[3] A plaintiff may establish a prima facie case of employment discrimination under a theory of disparate treatment by showing: (1) that the plaintiff was a member of a protected class, (2) that an adverse employment action was taken against the plaintiff, (3) that the plaintiff was qualified for the position, and (4) that others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

We agree with defendants.

Plaintiff refers this Court to the following as evidence that she was treated differently than similarly situated males: (1) defendants withheld her commission checks, but did not withhold the male employees' checks; (2) the male employees were not disciplined for paperwork mistakes, plaintiff was; (3) plaintiff was provided with less resources than her male predecessor when she took over the inStone sales; (4) plaintiff's paperwork was scrutinized more closely than her male co-workers'; and (5) plaintiff was disciplined for infractions that male employees were not. However, as to plaintiff's commission checks being withheld, there was no evidence, other than plaintiff's testimony, that the delay was motivated by anything other than accounting issues. Further, neither plaintiff nor her immediate supervisor, Ted White, could provide any specific incidences of male salespersons committing the same offenses as plaintiff and not being disciplined for them. Moreover, while White believed that plaintiff's paperwork was probably being scrutinized more than the male employees in the sales department, he was not aware that she was being specifically targeted by defendants, and plaintiff was not terminated for her paperwork errors. Further, White testified that he did not believe that plaintiff's termination was motivated by her gender, and that even though he would have handled the situation differently, he did not believe that the decision was either irrational or unwarranted given plaintiff's conduct after she returned to work from medical leave. Accordingly, plaintiff failed to provide sufficient circumstantial evidence of gender discrimination in this case.

However, even if plaintiff had provided either direct or circumstantial evidence of gender discrimination at trial, the no cause judgment was still appropriate because defendants articulated a legitimate, non-discriminatory reason for its decision to terminate plaintiff—her repeated violations of defendants' policies after her return from medical leave—and plaintiff failed to show that defendants' proffered reason for her termination was mere pretext for unlawful discrimination. A plaintiff may show that the proffered reason was mere pretext by showing that the reason is false, that the reason is not the actual reason for the action, or that the reason does not warrant the adverse employment action. *Lytle*, 458 Mich at 174. Plaintiff did not meet this burden.

As evidence of pretext for its decision to terminate her, plaintiff refers this Court to the above circumstantial evidence, as well as the fact that her commission check was issued on the same day that plaintiff filed her complaint against LeCronier, which plaintiff asserts shows that there was no legitimate reason to withhold it in the first place, and the fact that defendants never provided a manual for how sales paperwork should be handled. We fail to see how this evidence established that defendants' proffered reason—plaintiff's violation of company policies—was false, that it was not the actual reason for plaintiff's termination, or that it did not warrant plaintiff's termination. *Id*. Rather, it appears that defendants were justified in their decision because plaintiff repeatedly violated company policies after her return from medical leave.

Indeed, the trial court, as the trier of fact, determined that gender was not an issue in plaintiff's termination and that plaintiff's actions in violation of defendants' policies caused her termination. In other words, it concluded that defendants' version of events was more credible than plaintiff's, and we defer to the trial court on matters of credibility. *Ambs*, 255 Mich App at 651. Accordingly, we conclude that the trial court did not err in entering a judgment of no cause for action as to plaintiff's gender discrimination claim.

Plaintiff further argues that the trial court erred in entering a judgment of no cause for action as to her ELCRA retaliation claim. Again, we disagree.

Section 701 of the Civil Rights Act prohibits retaliation against persons who either oppose violations of the act or who have filed a complaint under the act. MCL 37.2701 states:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding, or hearing under this act.

A plaintiff must show the following to establish a prima facie case of retaliation under the Civil Rights Act: (1) that the plaintiff engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

Here, plaintiff failed to show that there was a causal connection between the protected activity and the adverse employment actions taken against her, including her termination. Close temporal proximity by itself is not enough to establish causation for purposes of a retaliation claim. *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003) (stating that in order to show causation in a retaliation case, "plaintiff must show something more than merely a coincidence in the time between the protected activity and adverse employment action"). Further, causation requires that the protected activity was a "significant factor" in the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Here, other than referring this Court to the fact that she had a good performance record up to the time that she lodged her complaint against LeCronier, plaintiff provides no evidence that her complaint of discrimination was a significant factor in defendants' decision to terminate her for repeated violation of company policies. Therefore, the trial court did not err in entering a judgment of no cause of action as to plaintiff's retaliation claim.

Next, plaintiff challenges the trial court's entry of a judgment of no cause for action as to her FMLA claims.

The purposes of the FMLA are to entitle employees to take reasonable leave for medical reasons and to help working people balance the conflicting demands of work and personal life. 29 USC 2601(b)(1). An eligible employee is entitled to twelve work weeks of unpaid leave during any twelve-month period because of "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USC 2612(a)(1)(D). At the conclusion of the leave period, the employee is entitled to reinstatement to his or her former position, or to an equivalent one, with the same terms and benefits. 29 USC 2614(a). The FMLA makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided under [the FMLA]." 29 USC 2615(a)(1).

Plaintiff first argues that the trial court erred in concluding that she failed to establish her prima facie case for interference because after she returned from medical leave, she was placed

in a "substantially similar position." Plaintiff contends that her subsequent transfer to inStone was not a "substantially similar position." We disagree.

To establish a claim of interference under the FMLA, a plaintiff must show the following:

> (1) she was an eligible employee, (2) [her employer] is a covered employer, (3) she was entitled to leave under the FMLA, (4) she gave [her employer] notice of her intent to take leave, and (5) [her employer] denied her FMLA benefits or interfered with FMLA rights to which she was entitled. [*Hoge v Honda of America Mfg, Inc*, 384 F3d 238, 244 (CA 6, 2004).[4]]

And, again, at the conclusion of the leave period, an employee is entitled to reinstatement to his or her former position, or to an equivalent one, with the same terms and benefits. 29 USC 2614(a).

Here, plaintiff resumed her position as a salesperson when she returned from her medical leave, and she maintained that position until she moved to the inStone position on August 4, 2004. Further, the evidence presented at trial supported that plaintiff's transfer to the inStone department after her return to work was voluntary. Therefore, we conclude that plaintiff failed to establish her prima facie claim for FMLA interference.

Turning now to plaintiff's retaliation claim, she argues that the trial court erred in concluding that she failed to show that there was a causal connection between her medical leave and her termination. Again, we disagree.

To establish her prima facie claim for retaliation under the FMLA, plaintiff was required to show that:

> (1) she availed herself of a protected right under the FMLA by notifying [her employer] of her intent to take leave, (2) she suffered an adverse employment action, and (3) that there was a causal connection between the exercise of her rights under the FMLA and the adverse employment action. [*Edgar v JAC Products, Inc*, 443 F3d 501, 508 (CA 6, 2006).]

Other than the timing of the termination decision—22 days after plaintiff returned to work—there is nothing to support that plaintiff's medical leave caused her termination. And, again, temporal proximity alone is not sufficient to establish causation. *West*, 469 Mich at 186. While plaintiff refers this Court to the fact that White testified that plaintiff's absence was a hardship on Dixie Cut and that the human resource department sent threatening letters to plaintiff

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[4] When there is no Michigan law interpreting the FMLA, "review by this Court of the federal law regarding this federal statute is proper." *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 443; 622 NW2d 337 (2000).

while she was on leave, this evidence does not establish that plaintiff's medical leave was the reason for her termination, rather than her repeated violations of defendants' policies.

Further, even if plaintiff had established her prima facie case for retaliation under FMLA, as previously discussed, defendants proffered a legitimate, non-discriminatory reason for plaintiff's termination—plaintiff's violation of defendants' policies—and plaintiff has failed to establish that defendants' reason is mere pretext for retaliation. *Smith*, 243 Mich App at 443 (applying the *McDonnell Douglas* analysis to an FMLA claim). Therefore, the trial court did not err in entering a judgment of no cause for action as to plaintiff's FMLA claims.

Affirmed.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ Donald S. Owens