STATE OF MICHIGAN

COURT OF APPEALS

ELYSA ROTT, Plaintiff-Appellant, v MADISON DISTRICT PUBLIC SCHOOLS, Defendant-Appellee.	UNPUBLISHED December 21, 2010 No. 294291 Oakland Circuit Court LC No. 2008-092261-CL

Before: SHAPIRO, P.J., and SAAD and K.F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's grant of summary disposition dismissing her retaliation claim brought under the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 *et. seq*. Defendant sought summary disposition asserting multiple failures to state a claim or establish a question of fact under the Act. The trial court granted summary disposition on the grounds that plaintiff had not suffered a material adverse employment action. We affirm the grant of summary disposition and the dismissal of plaintiff's case, albeit on other grounds. Specifically, we conclude that plaintiff has failed to create a question of material fact whether the actions she asserts were retaliatory were in response to a "charge . . . a complaint or [participation] in an investigation, proceeding or hearing . . . under [ELCRA]."[1]

Plaintiff was hired by defendant in 2000 as a special education teacher. She was certified as such and had worked in special education beginning in 1973. Immediately after being hired by the Madison District, however, she was reassigned to work as a guidance counselor, a second field in which she was certified, and from 2000-2007 she worked as a guidance counselor at Madison High School. In the 2005-2006 school year another individual, Mark Chapman, was hired as a second, but part-time counselor, at Madison High.

[1] The trial court also dismissed plaintiff's counts alleging that her discharge was itself discriminatory rather than retaliatory. Notably, Plaintiff has not appealed the dismissal of those counts.

Due to increasing budget deficits, defendant eliminated several positions in the 2006-2007 school year and in March, 2007 offered a buy-out to teachers at the top of the pay scale. Five fully employed and several laid off teachers accepted the buy-out.

In March 2007, plaintiff was involuntarily transferred by the district to Community High School to provide both counseling and special education services. Defendant asserted that the transfer was required because an internal report had revealed that Community High School was not providing state and federally mandated special education and counseling services; that budget constraints prevented any new hires; and that plaintiff was the only employee with the certifications that would allow her to handle both those responsibilities. Plaintiff was transferred to Community High School, beginning March 12, 2007. Mark Chapman, who had been a half time counselor and half time biology teacher, was made the "Dean of Students" and apparently handled counseling duties in that position at Madison High School at a salary approximately $22,000 less than Plaintiff was earning. [2]

Plaintiff complained about the involuntary transfer in a letter to defendant's superintendant on March 26, 2007. The superintendant agreed to move her back to Madison High School at the beginning of the next school year. However, on September 10, 2007, the superintendant informed plaintiff that she would instead be transferred to the middle school where her hours would be divided between counseling and special education duties and that her salary would not be affected. According to the district, this transfer was necessary because over the summer the middle school counselor had resigned to take a job in another district and the middle school special education instructor announced her retirement effective October 1, 2007. The district maintained that due to continuing budget constraints, it could not hire outside replacements for these positions and had to use existing personnel.[3]

Plaintiff began the 2007-2008 school year at the middle school, but she worked for only three weeks, at which time she took medical leave for psychiatric reasons. She did not return to work. Plaintiff testified that her ultimate retirement on August 14, 2008 constituted a

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[2] Chapman was hired as the Dean of Students in March 2007, a position created at that time by the district. As this new position required counseling work and it, unlike the position of guidance counselor, was not a union position, the union grieved the elimination of a bargaining unit position. The district then reestablished the eliminated counseling position. Chapman, who was initially not certified as a counselor, did obtain his full certification in the summer of 2007, a procedure that was approved by the State Department of Education.

[3] At the same time, the Madison High special education instructor was transferred to Community High and the full-time Madison High social worker's assignment was changed to half-time at Community High and half-time at Madison.

constructive discharge resulting from defendant "shuffling the plaintiff from position to position, closing out positions . . . and ultimately forcing the plaintiff to leave the school district."[4]

> The relevant provision of ELCRA, MCL 37.2701, provides:
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> 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.

To establish a prima facie case of retaliation, a plaintiff must show:

> (1) that he 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. [*Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Defendant sought dismissal alleging a lack of evidence on each of these elements. The trial court held that the involuntary transfers did not constitute "materially adverse action". On appeal, plaintiff argues that there was a question of fact as to this element under the standard for materially adverse actions in retaliation cases recently enunciated by the U.S. Supreme Court in *Burlington N and Santa Fe Co v White*, 548 US 53; 126 S Ct 2405, 165 L Ed 2d 345 (2006). We agree with the plaintiff that the decision in *Burlington* does broaden the definition of "materially adverse action." *Burlington* held that a reassignment of duties can constitute retaliatory discrimination where both the former and present duties fall within the same job description. *Id*. at 70-71. Here, whether the change from counseling high school students to teaching elementary and middle school special education students is "materially adverse" is a question for the jury. Moreover, plaintiff presented evidence that as a result of the transfer she was not eligible to perform and receive wages for certain extra work available only at the high school level.

Despite our disagreement with the trial court on this issue, we agree that the dismissal was proper given plaintiff's failure to establish other necessary elements of her claim.

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[4] During the proceedings below, plaintiff further maintained that she was retaliated against in part by defendant's decision not to hire her for the Dean of Students position defendant posted in early 2007. However, plaintiff has not presented any evidence, even through an affidavit or deposition testimony, that she actually applied for this position. Moreover, the position paid approximately $20,000 less than plaintiff was earning.

Plaintiff cannot prevail on a claim of retaliation in violation of the CRA without establishing that she engaged in activity protected under the act. *Garg*, 472 Mich at 273; MCL 37.2701(a). Accordingly, we must determine whether plaintiff's complaints concerning her transfer to Central High School and her replacement at Madison High School by Chapman amounted to a charge made under the CRA or opposition to a violation of the CRA. As to this determination, this Court has held:

> An employee need not specifically cite the CRA when making a charge under the act. However, the employee must do more than generally assert unfair treatment. See *Mitan v Neiman Marcus*, 240 Mich App 679, 682; 613 NW2d 415 (2000) (holding complaints amounting to generic claims of "job discrimination" did not qualify as a charge made under the Persons with Disabilities Act, MCL 37.1101 et seq.; MSA 3.550[101] et seq.). The employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA. *McLemore v Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 396; 493 NW2d 441 (1992). [*Barrett v Kirtland Community College*, 245 Mich App 306, 318-319; 628 NW2d 63 (2001).]

Plaintiff has proffered three pieces of evidence in which she asserts that she "raised the specter of a claim of unlawful discrimination." However, none of these do so.

The first is plaintiff's March 26, 2007, letter to the superintendant concerning the first transfer. In this letter, plaintiff clearly states that she is displeased with the transfer and that the need for coverage at the middle school should have been met by a different arrangement. However, she does not assert, either directly or even by inference, that she is being discriminated against due to her age or gender.

The second is plaintiff's assertions regarding communications with her union representatives. In a March 20, 2007, letter, the high school's union representative stated that given the superintendant's stated intention to "groom" her for a higher position, he did not believe that there were "ulterior motives" behind the transfer. Putting aside the fact that the representative did not see any evidence of ulterior motives, this letter was not sent or communicated to the superintendant or any other representative of the district. Even assuming that a reference in a letter that an employer's action did *not* have an ulterior motive could trigger retaliation, it could not have in this case since there is no evidence that concern about an ulterior motive was ever communicated to, or otherwise known by, the defendant. The defendant cannot retaliate for actions or statements about which it has no knowledge, and here plaintiff does not present any evidence that her allegation was communicated to the district. The other union communication relied upon by plaintiff is her assertion that another union representative told her the district would never put her back at Madison High. However, plaintiff does not provide any testimony or affidavit from this union official, nor any documentary evidence to establish that this statement was ever made, let alone the context in which it was made.

Third, plaintiff directs us to the fact that after the first transfer she telephoned the State Department of Education to advise them that she did not think that Chapman was properly certified as a counselor, and states that Defendant was aware that she made this report. If, in

fact, plaintiff could have demonstrated that her second transfer was in retaliation for making this report, it might have given rise to an action under the Whistle-Blowers Protection Act, MCL 15.361 et seq. However, plaintiff did not bring such a claim and there is nothing in the testimony or documents relevant to that report that suggest she was claiming discrimination. The same is true regarding the plaintiff's statement to the superintendant that Chapman did not have counselor certification; there is no evidence that it took place in the context of a claim of discrimination, only that plaintiff did not want to be transferred and she raised the subject of Chapman's certification in hopes that the district would conclude that he could not fulfill any counseling duties and thereby require defendant to keep plaintiff at Madison High.

Since plaintiff has not created a question of fact from which a reasonable jury could find that she engaged in a protected activity under the CRA, we affirm the trial court's grant of summary disposition.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Kirsten Frank Kelly