STATE OF MICHIGAN

COURT OF APPEALS

JANET FRANKLIN,

Plaintiff-Appellant,

v

ABRAHAM & SONS, INC.,

Defendant-Appellee.

UNPUBLISHED
March 24, 1998

No. 196771
Oakland Circuit Court
LC No. 95-502822-NZ

Before: Gage, P.J., and Reilly, and Jansen, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition on her claim of employment discrimination based on race. We affirm.

Plaintiff is a white woman married to a black man. She was hired as a relief sales representative by defendant in June 1993 and began work on July 5, 1993. The first ninety days were deemed a probationary period. Plaintiff was subject to review at the end of the period and had to achieve an acceptable rating to retain her job. In late September 1993, plaintiff's supervisor expressed his concerns about plaintiff's performance to the vice president. The vice president agreed that plaintiff's performance was unacceptable and terminated her employment. Plaintiff claims that she was fired because her husband is black.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency which cannot be overcome. *Morganroth v Whitall*, 161 Mich App 785, 788; 411 NW2d 859 (1987).

A prima facie case of employment discrimination under § 202 the Civil Rights Act (CRA), MCL 37.2101 *et seq*; 3.548(101) *et seq*, can be made by showing either intentional discrimination,

disparate treatment, or disparate impact. *Singal v General Motors Corp*, 179 Mich App 497, 502-503; 447 NW2d 152 (1989). Claims of discrimination based on the race of the plaintiff's spouse in an interracial marriage are cognizable as claims of discrimination based on race under § 202 of the CRA. See *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424, 430; 390 NW2d 732 (1986). To establish a claim of "intentional discrimination," a plaintiff must prove (1) that she was a member of a protected class, (2) that she was discharged, (3) that the individual discharging her was predisposed to discriminate against persons in the protected class, and (4) that the individual discharging her acted on that predisposition. *Singal*, *supra* at 503.

Here, plaintiff's claim is premised on the fact that sometime in early September, her supervisor visited plaintiff's house and saw her son, who is black. Plaintiff's son answered the door, because plaintiff was not home. Plaintiff testified that according to her son, plaintiff's supervisor looked surprised to see him and asked, "You are Janet's son?" From the report of her supervisor's surprised reaction, plaintiff assumed that her supervisor had deduced that her husband was black. Sometime thereafter, plaintiff was ignored by the vice president when she greeted him at work. From the vice president's demeanor, plaintiff assumed that her supervisor told the vice president her husband was black and that the vice president snubbed her because of her interracial marriage. Apart from the fact that none of plaintiff's assumptions necessarily follow from the facts,[1] the vice president stated in an affidavit that he did not know plaintiff was married to a black man and that he did not consider plaintiff's husband's race in deciding to terminate her employment. Although plaintiff attacked the vice president's affidavit as self-serving and asserted that his statements were belied by prior discriminatory remarks he had made and had tolerated from others, she failed to present documentary evidence to support her assertion regarding the alleged remarks.

Plaintiff's statistical evidence of discrimination consisted of a list of the employees of various races holding various positions who left the company for a variety of reasons over a three-year period. Because the statistics did not show the overall racial makeup of defendant's workforce, they are essentially meaningless as statistical evidence. Finally, plaintiff also relied on a discrimination complaint filed with the Equal Employment Opportunity Commission by one of defendant's black employees. The employee alleged in the complaint that between June 1991 and May 1994, no black employee had remained on the job longer than six months. However, the complaint does not prove that blacks were discriminated against as they could have left for any number of reasons. That aside, plaintiff's statistical evidence proves the statement false: The records show that in 1993 and 1994, five black employees held their jobs for anywhere between seven months to three years. Because plaintiff failed to present any facts tending to suggest racial animus on the part of her supervisor or the vice president, or to otherwise establish the existence of a genuine issue of fact, the trial court properly dismissed her claim of intentional discrimination.

Plaintiff also argues that she proffered sufficient facts to establish discrimination through disparate treatment. Such a claim requires proof that plaintiff was a member of a protected class and that she was treated differently than persons of a different class for the same or similar conduct. *Plieth v St Raymond Church*, 210 Mich App 568, 572; 534 NW2d 164 (1995). Neither party raised this issue below or presented evidence to show that plaintiff was evaluated differently than employees who

were not married to black persons (or persons of a different race) despite similar job performance. Nevertheless, plaintiff contends that she established a rebuttable presumption of discrimination under the *McDonnell Douglas*[2] four-part test, which requires proof that (1) she was a member of a protected group, (2) she was qualified for her position, (3) she was terminated, and (4) she was replaced by a person outside the protected group. We disagree. Plaintiff failed to offer any facts to suggest that she was qualified for her position at the time of her discharge. The fact that she came to the job with good recommendations does not show how she performed once there, and the vice president's affidavit indicated that her performance was substandard. Nor did plaintiff offer any facts to suggest that she was replaced by a person without interracial ties. Finally, plaintiff failed to offer any evidence to rebut defendant's proffered nondiscriminatory reason for plaintiff's dismissal. Accordingly, regardless of the theory relied upon, the evidence did not establish a genuine issue of fact on the issue of racial discrimination.

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] The fact that plaintiff's son is black proves that one of his biological parents is black. It does not prove that plaintiff's husband is black because the boy could have been adopted or could have been the product of an earlier marriage. The vice president could have ignored plaintiff's greeting because he was preoccupied, because he was not feeling well, or for any number of other reasons and thus it cannot be inferred that his reaction was due to his knowledge of plaintiff's husband's race. Even assuming that the supervisor concluded that plaintiff's husband was black, nothing in the facts presented actually indicates that she related her conclusion to the vice president.

[2] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).