STATE OF MICHIGAN

COURT OF APPEALS

DIANNE GRISWOLD,

Plaintiff-Appellant,

v

ALCON LABORATORIES, INC., EDWARD HICKS and DOUG HILTON,

Defendants-Appellees.

UNPUBLISHED
April 21, 1998

No. 201089
Wayne Circuit Court
LC No. 96-603158 CZ

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, a fifty-year-old female former senior sales representative employed by defendant Alcon Laboratories, filed suit claiming that Alcon and defendants Hicks and Hilton, who are Alcon supervisory employees, discriminated against plaintiff based upon her age and sex, in violation of the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.* Plaintiff further claimed that Alcon breached an employment contract providing for just cause termination. Defendants moved for summary disposition, arguing that plaintiff had failed to establish a genuine issue of material fact with respect to these claims. The trial court agreed and granted defendants' motion.

The allocation of the burden of proof in discrimination cases is (1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; (3) the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Manning v Hazel Park*, 202 Mich App 685, 696; 509 NW2d 874 (1993). A prima facie case of discrimination requires proof of either intentional discrimination or disparate treatment. *Id.* To prove intentional discrimination, the plaintiff must establish that she was a member of a protected class, that she was discharged, and that the person discharging her was predisposed to discriminate against members

of the protected class and actually acted on that predisposition. *Id.*, p 697. "To prove disparate treatment, the plaintiff must show that she was a member of a class entitled to protection under the act and that she was treated differently than persons of a different class for the same or similar conduct." *Id*.

Here, plaintiff has not established a material factual dispute with respect to intentional discrimination. Plaintiff contends that her supervisor occasionally treated her rudely and accompanied her on sales calls. These facts do not establish that plaintiff's working conditions were so intolerable that she was forced to resign, however. Plaintiff has also failed to show that defendants were predisposed to discriminate based on age and sex and then acted on that predisposition in their treatment of plaintiff. Alleged comments by Hilton were isolated and do not bear any apparent relationship to defendants' alleged constructive discharge of plaintiff. See *Phelps v Yale Security, Inc*, 986 F2d 1020, 1025-1026 (CA 6, 1993).

Plaintiff also failed to present a prima facie case under a disparate treatment theory because she did not identify any similarly situated persons who were treated differently than she was. Plaintiff in 1994 sold 5.6 percent less than she had in the prior year, and ranked eighty-ninth out of ninety employees in meeting her sales quotas. A plaintiff is not similarly situated to employees with performance levels that are higher than hers. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997).

Even if plaintiff had established a prima facie case under a disparate treatment theory, summary disposition would still be appropriate because she failed to establish a genuine issue of material fact regarding whether defendants' stated nondiscriminatory reason for their treatment of plaintiff was a pretext for discrimination. *Town*, *supra*, p 698. Defendants increased their supervision of plaintiff because she had failed to meet her sales quota and was ranked eighty-ninth out of ninety employees in 1994. Alcon calculates each employee's quota with a formula that takes into account the sales history for each sales territory and is not based on race or gender. Plaintiff has not shown that the use of this quota system was a pretext for discrimination. While plaintiff presented evidence that other employees' quotas were not increased to the extent that hers was, the variation in the amount that sales quotas were increased was explained by the fact that quotas were calculated based on the sales history of the employee's sales territory. There is no indication that the quotas were calculated or determined based on an employee's age or sex. Because there was no evidence that age or sex discrimination was a determining factor in the alleged decision to constructively discharge plaintiff, summary disposition was properly granted. *Town*, *supra*, p 703.

Plaintiff's remaining arguments are also without merit. She contends that the trial court should have presumed that certain evidence destroyed by Alcon was favorable to plaintiff's case. There is no indication, however, that Alcon destroyed the evidence when it knew or should have known that it would be relevant. It was therefore unnecessary to sanction defendants by presuming that the evidence would favor plaintiff's case. *Brenner v Kolk*, 226 Mich App 149, 160; 573 NW2d 65 (1997).

Plaintiff further contends that the trial court erred in deciding not to consider an affidavit filed by plaintiff's counsel. This issue is not preserved because it was not decided below. *Bowers v Bowers*,

216 Mich App 491, 495; 549 NW2d 592 (1996). In any event, the affidavit, even if properly admitted, would not alter the conclusion that plaintiff did not establish a genuine issue of material fact.

Finally, plaintiff argues that the court erred in dismissing her breach of contract claim. We disagree. There is no evidence of an express written or oral agreement for just cause termination. *Manning*, *supra*, p 692. Moreover, defendant's internal corporate policy regarding terminations did not create a legitimate expectation of continued employment absent just cause; plaintiff did not know about that policy and made no agreement with respect to it. *Id*. Thus, assuming that plaintiff was constructively discharged, the decision to grant summary disposition was proper.

Affirmed.

/s/ William C. Whitbeck
/s/ Barbara B. MacKenzie
/s/ William B. Murphy