

STATE OF MICHIGAN
COURT OF APPEALS

JANE OWENS,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION and THOMAS I.
SHEPPARD,

Defendants-Appellees.

UNPUBLISHED

April 27, 1999

No. 205210

Wayne Circuit Court

LC No. 95-525019 CZ

Before: Hood, P.J., and Holbrook, Jr., and Whitbeck, JJ.

PER CURIAM.

Plaintiff-appellant Jane Owens appeals as of right the trial court's orders granting defendants' motion for summary disposition regarding her discrimination claim, denying her motion for rehearing or reconsideration, dismissing her defamation claim, and denying her motion for reconsideration and/or reinstatement. We affirm.

I. Basic Facts And Procedural History

Defendant-Appellee Chrysler Corporation ("Chrysler") hired Owens, a female African-American, in January, 1977. Correspondence in Owens' personnel file indicated that her supervisors were pleased with her performance.

In 1993, however, Owens updated her employee personnel file to reflect that she had completed the requirements for a Bachelors Degree from Wayne State University in December, 1992. In June, 1994, Owens again revised her personnel file, listing that she had a BA degree from Wayne State University. Owens had been asked twice to submit proof of her degree, but did not submit any proof until June, 1994, when she was requested for the third time to submit proof of her degree. Owens' academic advisor at Wayne State, at Owens' request, indicated in a correspondence that Owens had completed graduation requirements in the fall of 1992. However, pursuant to correspondence from the personnel administrative supervisor at Wayne State University, as of mid-May, 1995, Owens had attended, but had *not* received a degree from that University.

Owens admitted in her deposition that when she modified her personnel file to show that she had received her degree from Wayne State University, she did not have her degree. She testified that she “falsified [her] PHR to reflect that [she] had a bachelors degree.” Owens further testified that she understood she had received her degree pursuant to information she had received from Wayne State University and that she subsequently learned that she was five credits short of qualifying for her degree. Owens subsequently received her Bachelor’s Degree in interdisciplinary studies in May, 1996.

In early February, 1994, defendant-appellee Thomas I. Sheppard issued a written reprimand to Owens alleging she was “unprofessional, abusive and insubordinate” during a meeting between the two of them. The letter alleged that Owens stated that Sheppard “. . . didn’t know a god damn thing about pensions” and otherwise directed obscenities at Sheppard. In addition, Sheppard reprimanded Owens regarding the inaccuracy of her time card and for reporting extended lunch hours and personal time away from the plant as overtime. Owens wrote a letter of rebuttal which stated, in part:

The fictious [sic] statements that have were [sic] written in this letter does not reflect my charter [sic] as a professional individual. This letter is far from the truth and is incriminating libel literature. I feel this letter was written by Tom Sheppard with efforts of demoralizing my self-esteem, self-respect and dignity as a female. I also feel this letter was part of a personal endeavor against me and ongoing hostile harassment from Tom Sheppard for the past two years.

During her deposition, Owens denied using the obscenities, but admitted to calling Sheppard a “stupid fat ass.”

In late June, 1995, Sheppard advised Owens that he had received information that she had not obtained a Bachelors Degree from Wayne State University as she had claimed. Although Owens asked Sheppard if she was going to have a chance to resolve the discrepancy between her belief that she had received a degree and the information he had received, he refused her the opportunity and told her to gather her belongings and leave immediately.

Chrysler terminated Owens from her employment in late June, 1995. The letter of discharge stated the following:

You have repeatedly claimed to be a graduate of Wayne State University but have failed to provide substantiation to support this claim. In June of 1994, you submitted a Personnel History Record and a Salaried Personnel Development Data Form again claiming to have a Bachelors Degree but again failed to provide the supporting documentation. The fact that you had not provided proof of degree was also noted on the Career Interest/Development section of the 1994 Performance Appraisal.

In May of 1995 you submitted a letter again claiming to have graduated from Wayne State in an attempt to substantiate your claim. A verification check at Wayne

State's Central Records revealed that you had not met degree requirements and have not graduated.

This lack of integrity and gross misconduct is in violation of the Corporation's Standards of conduct-Rule #1 and will not be tolerated.

You are now advised that your employment with Chrysler Corporation is terminated immediately.

Signed: T. Sheppard

Owens filed her complaint against defendants in late August, 1995. She alleged defendants violated the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq* (the "ELCRA") because she was disciplined for acts for which white employees who committed the same acts were not disciplined.¹ Owens further alleged defamation as a result of the memo placed in her personnel file indicating that she had demonstrated unprofessional, abusive and insubordinate conduct during a meeting. Moreover, Owens alleged that Sheppard made slanderous statements to three employees which were false and defamatory and caused harm to her reputation.²

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Defendants argued that Owens' race discrimination claim failed because "plaintiff cannot rebut Chrysler's articulated non-discriminatory reason for having terminated her employment." Moreover, defendants argued that Owens' defamation claim was privileged, untimely and failed to raise a genuine issue of material fact.

In the hearing of defendants' motion, Owens' counsel agreed that Sheppard had a qualified privilege, as Owens' employer, to write the reprimand of Owens. However, Owens' counsel argued that the privilege was lost because Sheppard wrote the reprimand with malice. In support of the claim of malice, Owens' counsel pointed out that it was Sheppard who called Wayne State University to determine whether Owen had received a degree and never provided her with an opportunity to explain the discrepancy. Moreover, Owens' counsel argued, Sheppard was the one who signed Owens' termination letter. Owens' counsel also argued that proof that Owens was terminated because she was a black female was shown by the fact that defendants hired a white male, who had also falsified his educational background; Owens' counsel admitted, however, that he had no evidence to show that Sheppard's participation in the hiring of this individual was more than merely the presentation of information.

The trial court ruled on defendants' motion for summary disposition, as follows:

So the Court will decline to grant the summary disposition as relates to the two denied statements of defamation. It was my understanding, and therefore the question of defamation goes forward on those two assertions, the g.d. and the too stupid. On the issue of the Elliott-Larsen claim, this focuses solely on, I think, I guess it doesn't solely, because I'm going to say solely on two things, can't do that.

Focus on two issues, one, whether or not Mr. Shepard [sic] was a decision maker who was able to affect the wages, hours, terms or conditions of employment of Ms. Owens and did so based upon race and/or sex, and whether or not the plaintiff can meet her burden of going forward on pretext.

Plaintiff asserts that Mr. Shepard [sic] was a decision maker or a person with significant influence on the decision to terminate Ms. Owens due to her failure to obtain a degree and her assertion that she had one on employment papers.

She alleges this in part because she says that Mr. Shepard treated, approached the situation relative to Ms. Owens' termination differently than his approach to the situation regarding Mr. Johnstone. In support of this, she has offered deposition testimony of Mr. Brown and of Mr. Fox. Mr. Fox indicating that he based his decisions on information from the plant without a specific person from whom he got it, and Mr. Brown's admission that he received information from Mr. Shepard on both Ms. Owens and Mr. Johnstone. In looking at the Johnstone situation, the Court can see that the ultimate result was different, certainly. That he was, in fact, hired and kept on and that Ms. Owens was, in fact, terminated.

In the Johnstone situation, there is no evidence but that the decision to hire Mr. Johnstone was made in concert with persons from the hiring committee, whose names I'm not going to try to remember or pronounce and Mr. Brown.

There is no testimony upon which the rationale [sic] trier of fact could make an inference that Mr. Shepard proceeded favorably relative to Mr. Johnstone. This leaves us, then, to look to whether or not Mr. Shepard acted negatively as relates to Ms. Owens. Plaintiff alleges that he acted negatively as relates to Ms. Owens by virtue of his presenting – no, by virtue of his failure to convene a meeting prior to the recommendation to terminate from Mr. Brown to Mr. Fox. There is no showing that he convened a meeting relative to Mr. Johnstone, so the Court can't find that this is a difference.

The next assertion is that he acted differently in the manner of his presentation of material. The plaintiff would have the Court assume that only portions of a file were given in the case of Ms. Owens, and that the mere selection of the materials significantly influenced the decision. The Record, however, is absolutely void as to information – any information as to whether all of Mr. Johnstone's file was presented to Mr. Brown or not. That being the case, the Court can't find that there was – that Mr. Johnstone was treated differently relative to the selection of materials to be presented to Mr. Brown differently than Ms. Owens.

The Court cannot find that the plaintiff meets her burden of going forward of showing that Mr. Shepard as a decision maker or a significant person of influence treated Ms. Owens differently than Mr. Shepard treated Mr. Johnstone, the Court believes,

reluctantly, that Ms. Owens['] claim under Elliott-Larsen has to be dismissed. The case will go forward on the defamation claim.

Owens filed a motion for rehearing or reconsideration on defendants' motion for summary disposition arguing that a palpable error was committed and that she had produced sufficient evidence from which a reasonable juror could conclude that she was discriminated against because of her race and sex. The trial court denied the motion, stating that it was not persuaded of error.

A Notice of Trial was sent to the parties in early December, 1996. The notice stated the following:

1. This case is scheduled for trial no earlier than 4/28/97 and no later than 5/19 in room 1719 City-County Building for 7 days.
 2. Jury selection will occur on 5/19/97, or on the day of trial, if trial commences before that date.
 3. You will receive no less than twenty-four hours telephonic notice before jury selection if the date is other than the one at number 2, and at least forty-eight hours notice before commencement of trial unless it occurs on the last date in number 1.
- [Appendix F.]

Owens' counsel filed a motion to withdraw as counsel in late February, 1997. The motion indicated that the relationship between Owens and counsel had broken down and that counsel's firm could not litigate the case because it placed an unreasonable financial burden on the firm. The trial court granted the motion in mid-March, 1997, and gave Owens twenty-nine days to secure further counsel. The order also indicated that a status conference would take place in mid-April, 1997, and that "the trial scheduled for April 28, 1997/May 19, 1997 [was] not postponed."

Owens sent the trial court correspondence dated late March, 1997, requesting additional time to find counsel and requesting an explanation of the order to withdraw as counsel. The trial court responded in correspondence to both parties:

The order indicates that there will be an in-person status conference on April 14, 1997 at 10:00 a.m. The trial date continues to be between April 28, 1997 and May 19, 1997. A stay is in effect until April 11, 199 [sic]. After that date if you do not have new counsel you may proceed representing yourself.

Please remember that you must appear on April 14, 1997 either by yourself or with an attorney. Failure to appear may result in dismissal of your case.

Owens filed a motion to adjourn trial in late April, 1997. In the motion, Owens indicated that although she had diligently sought new counsel, she was unable to locate such counsel as a result of the pending trial date. Owens requested a ninety-day adjournment of the trial date. During the hearing on this motion, on May 9, 1997, the trial court ruled as follows:

I am not going to adjourn the trial on an, if, if a lawyer comes in.

If a lawyer comes in who shows up in this courtroom and says, I have in my right hand an appearance, I have in my left hand a motion to withdraw, and I will do one, if you give me the other then I'm prepared to do that.

On May 19, 1997, when Owens did not appear as required by the notice of trial, the trial court entered an order dismissing the case pursuant to MCR 2.504(B)(1). Owens filed a motion for reconsideration and/or for reinstatement in early June, 1997, in propria persona. Owens argued that she was not provided with notice that she had to appear in trial court on May 19, 1997. The trial court denied Owens' motion.

II. Standard Of Review

A. Summary Disposition

MCR 2.116(C)(10) permits summary disposition when “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” When deciding a motion for summary disposition, a court must consider the pleadings, depositions, affidavits, admissions and other documentary evidence available to it in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists on which reasonable minds could differ. *Farm Bureau Mutual Ins Co v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991); *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). “[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.” MCR 2.116(G)(4). This Court reviews the grant of summary disposition pursuant to MCR 2.116(C)(10) de novo. *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co*, 220 Mich App 347, 352; 559 NW2d 93 (1996).

B. Abuse of Discretion

This Court reviews a trial court's decision to dismiss an action under the abuse of discretion standard. *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995).

III. Summary Disposition

Owens argues that a question of fact exists concerning whether defendants discriminated against her on the basis of her gender or race. We disagree.

In an employment discrimination case, a plaintiff may establish a prima facie case of discrimination under the ELCRA by showing that the plaintiff was a member of a class entitled to protection under the statute and that, for the same or similar conduct, she was treated differently by the employer than a person outside that class. *Reisman v Regents Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991).

Once a plaintiff establishes by a preponderance of the evidence that a prima facie case of discrimination exists, for purposes of the ELCRA, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997) (Brickley, J.); *Reisman, supra* at 539. If the defendant is able to articulate legitimate, nondiscriminatory reasons for its actions, the plaintiff is then given the opportunity to prove by a preponderance of the evidence that the reasons offered by the defendant were not its true reasons for its actions, but were a mere pretext for proscribed discrimination. *Town, supra* at 696-698 (Brickley, J.); *Reisman, supra* at 539.

Applying these standards and viewing the evidence at trial in a light most favorable to Owens, we are persuaded that she did not carry her burden of proof sufficient to support an inference that defendants intentionally discriminated against her on the basis of race or gender or that defendants' actions against her were motivated by racial or gender considerations. As an African-American female, Owens was able to establish that she was a member of two classes entitled to protection under the statute. However, she was unable to show that she was treated differently because she was an African-American or female. There was testimony that when Chrysler learned that a white female employee did not have her Master's Degree as she claimed, Chrysler also terminated that white female's employment.

However, there was also testimony regarding a white male who misrepresented his education background in a resume he sent to Chrysler. Although the white male told the individuals who interviewed him that he did not have a college degree as he claimed in his resume, Chrysler nevertheless hired him.

We find that the white female was in the same or similar circumstances as Owens and that the white female received substantially the same treatment as Owens. However, we find that the white male applicant was *not* engaged in the same or similar conduct as Owens. The white male was *not* an employee of Chrysler when he misrepresented his educational background *and* he advised Chrysler of the misrepresentation prior to being hired. Owens *was* an employee of Chrysler when she misrepresented her background and presumably would have benefited from her misrepresentation during the remainder of her career at Chrysler. Thus, Owens' conduct was significantly more egregious than the apparent misconduct by the white male *prior* to his employment.

In addition, although Owens argued that Sheppard was the only employee of Chrysler who discriminated against her, she did not present any evidence that Sheppard was involved in the decision to terminate her. Therefore, because Owens failed to establish a prima facie case of discrimination (or to present direct evidence of discriminatory animus in relation to her discharge, *Harrison v Olde Financial Corp*, 225 Mich App 601, 609-610; 572 NW2d 679 (1997)), we hold that summary disposition on her discrimination claims was proper.

IV. Abuse Of Discretion

Owens argues that the trial court abused its discretion in denying her motion for reconsideration of the order dismissing her defamation claim when she failed to appear for the day scheduled to begin trial or for reinstatement. We again disagree.

As noted above, Owens' attorney withdrew subsequent to the dismissal of her discrimination claim and the receipt of the notice of trial. Owens did not retain new counsel prior to the date scheduled for trial. When Owens failed to appear for the beginning of trial, the trial court dismissed the case pursuant to MCR 2.504(B)(1). Owens then filed a motion for rehearing pursuant to MCR 2.119(F) and 2.612(C)(1)(a) and (f), asserting that the trial court erred because she had a valid excuse for not appearing on the first day of trial and that she had never before shown a disregard of the trial court's orders.

Owens argues that she was unaware that she had to appear for trial on May 19, 1997, despite the trial notice. Although Owens indicated her confusion regarding the meaning of this notice through correspondence to the trial court, the trial court responded in correspondence, as noted above, with the statement that,

The trial date continues to be between April 28, 1997 and May 19, 1997. A stay is in effect until April 11, 199 [sic]. After that date if you do not have new counsel you may proceed representing yourself.

Moreover, Owens showed her awareness of the date scheduled for trial in her motion to adjourn trial, in which she indicated that she was unable to locate new counsel because new attorneys were reluctant to take the case because of the pending trial date. Furthermore, the trial court specifically stated during the hearing of Owens' motion to adjourn trial that it would not adjourn trial.

In light of this evidence, we find it incredible that Owens was unaware that trial was scheduled to commence on May 19, 1997, and that she should appear before the trial court. As Owens did not demonstrate "a palpable error" entitling her to reconsideration, MCR 2.119(F), we hold that the trial court did not abuse its discretion, *Vicencio, supra*, in denying Owens' motion for reconsideration.

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

¹ However, Owens testified in her deposition that only Sheppard discriminated against her.

² Owens also claimed wrongful discharge for discharging her without just cause. However, she subsequently conceded that this claim should be dismissed.