STATE OF MICHIGAN

COURT OF APPEALS

SHANNON SCOTT,

Plaintiff-Appellant,

v

GFS OF MICHIGAN, INC., MIG MANAGEMENT SERVICE OF MICHIGAN, INC., DANIEL POWERS, DANIEL MUSINSKI, MICHAEL FORREST, and VONNE REDLEY,

Defendants-Appellees,

and

PINNACLE REALTY MANAGEMENT COMPANY, INC.,

Defendant.

UNPUBLISHED
June 16, 2000

No. 208115
Wayne Circuit Court
LC No. 97 707682-CZ

Before: Cavanagh, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's October 13, 1997 grant of summary disposition under MCR 2.116(C)(8) in favor of defendants GFS of Michigan, Inc. (hereinafter GFS), Daniel Powers, Daniel Musinski, Michael Forrest, and Vonne Redley (hereinafter "the individual defendants"), and the trial court's November 7, 1997 grant of summary disposition under MCR 2.116(C)(10) in favor of defendant MIG Management Service of Michigan, Inc. (hereinafter MIG). We affirm.

This appeal arises from a series of events which allegedly occurred while plaintiff worked as a leasing agent for GFS at River Place Apartments in Detroit. Plaintiff alleges that after she placed a Bible on her desk in 1997, she was discriminated against because of her religious beliefs by GFS and the individual defendants. After she filed a grievance with the City of Detroit Human Rights Department over the alleged discrimination, plaintiff alleges that GFS and the individual defendants harassed her in

retaliation. Plaintiff later filed a complaint with the Michigan Civil Rights Commission and the Equal Employment Opportunity Commission. Plaintiff claimed that after she filed the complaint, defendants harassed her further in retaliation.

MIG replaced GFS as the manager of the apartment complex in December 1997. GFS then terminated all its employees at the complex, including plaintiff. The former employees of GFS were informed by a letter from MIG that they were required to apply for employment with MIG to be considered for positions at the complex. Plaintiff never applied for employment with MIG. Plaintiff's explanation for not applying is twofold. First, plaintiff alleges that she never received the letter sent to former GFS employees because it had been sent to a former address. Second, plaintiff contends that she relied on a letter sent by MIG to residents of the apartment complex that stated that the present staff would be retained.

Plaintiff filed suit against defendants, contending that all defendants discriminated against her in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., and that MIG had committed fraudulent misrepresentation and negligent misrepresentation. GFS and the individual defendants moved for summary disposition under MCR 2.116(C)(8), contending that (1) plaintiff had failed to state a cause of action against the individual defendants because they could not be sued in their individual capacities for employment discrimination, (2) plaintiff failed to state a cause of action under the Civil Rights Act because she did not allege that she was not hired or wrongfully discharged by GFS or that she suffered any discrimination with respect to the terms and conditions of employment, (3) plaintiff failed to state a cause of action for retaliation because she had failed to show a single act of retaliation, and (4) plaintiff had failed to state a claim for hostile work environment. On October 3, 1997, the trial court granted the motion.

Later, MIG moved for summary disposition under MCR 2.116(C)(10), contending that (1) plaintiff could not recover on her employment discrimination claims because she never applied for employment with MIG, (2) plaintiff could not recover for harassment because she never worked for MIG, and (3) plaintiff could not recover on her claims for fraudulent and negligent misrepresentation because the alleged misrepresentation did not go to a past or existing fact, and because plaintiff could not prove either an intention to deceive, a reasonable reliance by plaintiff on the alleged misrepresentation, or that defendant benefited from the misrepresentation. On November 7, 1997, the court granted summary disposition as to MIG.

Plaintiff first contends that the trial court erred in granting summary disposition under MCR 2.116(C)(8) as to her claims of employment discrimination against GFS and the individual defendants. We disagree. We review de novo a trial court's decision on a motion for summary disposition. *Burchett v Rx Optical*, 232 Mich App 174, 177; 591 NW2d 652 (1998). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). "All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. However, the mere statement of the pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action." *ETT Ambulance Service Corp v Rockford Ambulance, Inc*, 204 Mich App 392, 395; 516 NW2d 498 (1994).

Plaintiff asserts that she has stated a legal claim against GFS and the individual defendants under either a disparate treatment or hostile work environment theory of employment discrimination.[1] Although it is not clearly stated in her brief on appeal, plaintiff appears to be arguing that she set forth below a pretextual *McDonnell Douglas*[2] type of prima facie case of disparate treatment.[3]

> A plaintiff may establish a pretextual *McDonnell Douglas* type prima facie case of protected discrimination by demonstrating that "(1) she was a member of a protected class; (2) she suffered an adverse employment action . . . ; (3) she was qualified for the position; but (4) she [suffered the adverse employment action] under circumstances that give rise to an inference of unlawful discrimination." *Lytle* [*v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998)] (Weaver, J.). Circumstances give rise to an inference of discrimination when the plaintiff "was treated differently than persons of a different class for the same or similar conduct." *Reisman* [*v Wayne State Univ Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991)]. [*Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (footnote omitted).]

In order to make out a cause of action for hostile work environment, plaintiff was required to show that

> "(1) the employee belonged to a protected group; (2) the employee was subject to communication or conduct on the basis of [her protected status]; (3) the employee was subject to unwelcome . . . conduct or communication [involving her protected status]; (4) the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior." [*Quinto v Cross & Peters*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

In this case, plaintiff alleged in her pleadings that after she placed a Bible on her desk, defendants discriminated against her and later harassed her. Her claims of discrimination and harassment, however, were not supported by factual allegations. *ETT, supra* at 395. Accordingly, because plaintiff failed to state a cause of action in her pleadings, we conclude that the trial court did not

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[1] Although both theories of employment discrimination are being argued on appeal, it appears that plaintiff proceeded below on the single theory of hostile work environment. Nevertheless, we choose to address both theories.

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

[3] We reach this conclusion based on plaintiff's quotation from *Rasheed v Chrysler Motors*, 196 Mich App 196; 493 NW2d 104 (1992), rev'd 445 Mich 109 (1994), and her assertion that discrimination can be inferred from the fact that she was treated differently than other employees who were "less demonstratively religious."

err in granting summary disposition under subrule (C)(8) to GFS and the individual defendants on plaintiff's claims of employment discrimination.[4]

In a related argument, plaintiff contends that the trial court abused its discretion in denying her motion for reconsideration on the grounds that it erred in inquiring as to the underlying facts of her discrimination and harassment claims against GFS and the individual defendants. We disagree. MCR 2.116(I)(5) states that when a motion for summary disposition is filed under subrule (C)(8), "the court shall give the parties an opportunity to amend their pleadings . . . unless the evidence then before the court shows that amendment would not be justified." We note that when plaintiff's original complaint was summarily dismissed under (C)(8), plaintiff was given the opportunity to amend her pleadings. As previously noted, the amended complaint contained conclusory statements about alleged discrimination but no factual allegations. Then, at the hearing on GFS and the individual defendants' second motion for summary disposition, the court specifically asked counsel for plaintiff what conduct his client believed constituted discrimination. When counsel could not articulate any actions which plaintiff believed were a result of discriminatory motives, the court granted summary disposition. Under these circumstances, we see no abuse of discretion on the part of the trial court. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

Plaintiff also argues that the court erred in granting summary disposition under MCR 2.116(C)(10) in favor of MIG on plaintiff's discrimination claims. Again, we disagree.

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id*. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute,

[4] Given our conclusion that plaintiff failed to state a cause of action against any of the defendants, we need not address plaintiff's argument that a cause of action may lie against the individual defendants for employment discrimination.

> the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993). [*Quinto, supra*, 362-363.]

Plaintiff was never employed by MIG. To the extent that she had any cause of action for discrimination, it appears that her claim was for discrimination in failure to hire. To make out a prima facie case of discrimination for failure to hire, plaintiff had to show that: (1) she was in a protected class; (2) she applied and was qualified for a job for which the employer was seeking applicants; and (3) despite her application and qualifications, she was rejected. *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 362; 575 NW2d 290 (1997). Plaintiff's discrimination claim fails because it is undisputed that she never applied for a job with MIG. There is no allegation or evidence that anyone was hired by MIG to work in the leasing office without first having filled out an employment application. We also reject plaintiff's assertion that the misdirection of MIG's letter to her old residence establishes the basis for her claim against MIG. The undisputed evidence showed that the letter was sent from, and returned to, MIG's Seattle headquarters. Plaintiff presented no evidence that MIG had any knowledge of plaintiff's correct address. Indeed, plaintiff admitted that she never notified GFS's personal department that she had changed her address. As for the letter sent to plaintiff as a resident of the apartment complex, in which MIG indicated that the present staff would be retained, we do not believe this establishes that MIG's assertion that it failed to hire plaintiff because she did not file an application was a pretext. Accordingly, we conclude that the trial court did not err in granting MIG's motion for summary disposition.

Finally, plaintiff-appellant's counsel specifically withdrew any intentional infliction of emotional distress claim at oral argument.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly