

STATE OF MICHIGAN
COURT OF APPEALS

HELEN C. HARVEY and O'DEAIL HARVEY,

Plaintiffs-Appellees,

UNPUBLISHED
December 19, 2000

v

FORD MOTOR COMPANY,

Defendant-Appellant.

No. 217499
Wayne Circuit Court
LC No. 97-734238-CZ

Before: Bandstra, C.J., and Fitzgerald and D. B. Leiber*, JJ.

PER CURIAM.

Defendant appeals by leave granted the order denying in part its motion for summary disposition under MCR 2.116(C)(10) in this employment discrimination action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Helen Harvey is an African-American woman who was employed by defendant as a human resource assistant. Plaintiff had been employed by defendant for 28 years. At the time of her termination, she was 51-years-old and working on her doctoral dissertation. Plaintiff was terminated after an audit showed that she had used company resources for her own benefit in completing her degree in violation of company policy.

Plaintiffs filed a complaint alleging age, sex, and race discrimination, wrongful discharge, intentional infliction of emotional distress, and loss of consortium. After the close of discovery, defendant moved for summary disposition.

The trial court found that the firing could be pretextual where defendant had recently taken a harder position of firing people for using company property. The court dismissed the implied contract, public policy, and intentional infliction of emotional distress counts of the complaint.

Defendant filed an interlocutory application for leave to appeal, and motion for stay, which were granted by this Court. Defendant argues that the trial court erred in denying summary disposition where there was no evidence to support plaintiff's claim of pretext.

* Circuit judge, sitting on the Court of Appeals by assignment.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for the claim. The trial court must consider affidavits, pleadings, depositions, and other admissible documentary evidence submitted in favor of the nonmoving party and grant the benefit of any reasonable doubt to the opposing party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Appellate courts review decisions regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

To establish a prima facie case of discrimination under disparate treatment theory, plaintiff must show that she is a member of a protected class and that for the same or similar conduct she was treated differently than one who is a member of another class. *Schellenberg v Rochester Michigan Lodge No 2225*, 228 Mich App 20, 33; 577 NW2d 163 (1998).

Plaintiff presented evidence that at least two similarly situated employees were treated differently than she was for the unauthorized use of company property. A document identifies two white employees who used company property for personal reasons involving similar amounts of money. Plaintiff alleges that they were only reprimanded, allowed to make restitution, and either continued their employment or retired.

The trial court found that there was sufficient evidence of disparate treatment to raise a question of fact precluding summary disposition. The evidence is thin, and it was presented poorly. However, plaintiff was a 28-year employee, who had a good performance record. Her supervisors were aware that she was in a doctoral program, and allowed her to work outside business hours at the office on that program. Some use of company resources, such as copying, was allowed. If other workers who were not in a protected class were not discharged for similar behavior, a prima facie case of disparate treatment would be established. Under these circumstances, defendant has failed to show that the trial court erred in denying summary disposition. *Schellenberg, supra*.

We affirm. This matter is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Dennis B. Leiber