STATE OF MICHIGAN

COURT OF APPEALS

DONNA E. HOLMWOOD,

Plaintiff-Appellant,

v

PONTIAC OSTEOPATHIC HOSPITAL,

Defendant-Appellee.

UNPUBLISHED
December 21, 2001

No. 225152
Oakland Circuit Court
LC No. 1998-009825-NZ

Before: Murphy, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The trial court dismissed plaintiff's retaliatory discharge claim, MCL 37.2701, and promissory estoppel claim. We affirm the dismissal of the promissory estoppel claim, and reverse the dismissal of plaintiff's retaliatory discharge claim.

This case arises out of the elimination of plaintiff's data entry job by defendant hospital after plaintiff had earlier filed a gender discrimination complaint with the Equal Employment Opportunity Commission [EEOC] based on pay disparity. Plaintiff claims that the elimination of her job was in retaliation for her gender discrimination complaints made to hospital management and the EEOC, and defendant maintains that plaintiff's position was eliminated due to automation, which resulted in there no longer being a need to have data entry analysts in defendant's information services department [ISD].

The trial court, in granting defendant's motion for summary disposition, ruled that plaintiff established a prima facie case of retaliatory discharge; however, plaintiff failed to present evidence showing that defendant's reason for elimination of plaintiff's job was a mere pretext. The trial court also ruled that plaintiff's promissory estoppel claim, which was premised on defendant's alleged promise to recall plaintiff if a job vacancy arose, failed because plaintiff did not comply with defendant's employee handbook by not remaining in contact with defendant after plaintiff was terminated.

As to the retaliatory discharge claim, plaintiff argues that there were genuine issues of material fact regarding causal connection, pretext, and direct evidence of discrimination. We agree. As to the promissory estoppel claim, plaintiff claims that there were genuine issues of material fact regarding the elements of the claim. We disagree.

This Court reviews rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999).[1]

The Elliott-Larsen Civil Rights Act [CRA], and specifically MCL 37.2701, provides in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
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> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of retaliation under the CRA, a plaintiff is required to show (1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

There is no dispute that the first two elements were satisfied in the present case. The dispute arises out of the "adverse employment action" and "casual connection" elements, which necessarily tie into further issues regarding the reasons for discharge, pretext, and direct evidence of discrimination. Although the trial court ruled that a prima facie case had been presented, defendant disagrees and raises issues regarding the third and fourth elements of a retaliatory discharge claim.[2]

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[1]MCR 2.116(C)(10) provides for summary disposition where 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. Our Supreme Court has ruled that 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. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties is viewed "in the light most favorable to the party opposing the motion." *Id*. Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

[2] Although not raised pursuant to a cross appeal, defendant can properly raise the issues because an appellee may urge in support of a judgment in its favor reasons rejected by a trial court without taking a cross appeal. *First Public Corp v Parfet*, 246 Mich App 182, 186; 631 NW2d 785 (2001).

Defendant argues that numerous incidents which occurred before the elimination of plaintiff's job did not constitute adverse employment actions, nor did the failure to recall plaintiff for job vacancies. We find it unnecessary to determine whether those incidents constituted adverse employment actions because it is undisputed that the elimination of plaintiff's job was an adverse employment action; therefore, in the context of determining whether plaintiff established a prima facie case, the "adverse employment action" element of the cause of action was satisfied.

Defendant next argues that plaintiff failed to present documentary evidence establishing a causal connection between the protected activity, the discrimination complaints, and the adverse employment action, elimination of plaintiff's job. We disagree.

To establish causation, the plaintiff must show that his or her participation in activity protected by the CRA was a significant factor in the employer's adverse employment action, not that there was a casual link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

We believe, as did the trial court, that plaintiff presented sufficient evidence, in establishing a prima facie case, as to the existence of a causal connection. We reach that conclusion by taking into consideration the totality of the circumstances, viewed in a light most favorable to plaintiff, which circumstances were comprised of a somewhat negative performance evaluation,[3] criticisms about work performance, negative comments by a supervisor and department director, a questionable written reprimand, and comments indicating displeasure with lawsuits, in reference to the EEOC complaint, made by the supervisor and executive assistant administrator, who was also acting CEO at the time of plaintiff's dismissal, all which occurred after complaints of discrimination were voiced, culminating with the elimination of plaintiff's job a little over a year after the EEOC complaint was filed, and followed by the failure to recall.[4]

Defendant incorrectly seeks to view these incidents individually and not collectively, and it focuses on the time frame between the EEOC complaint and the layoff as not constituting close temporal proximity. However, this case can not be viewed in a vacuum, and it must be remembered that the analysis is made in the context of summary disposition.

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[3] We note that the June 1995 performance appraisal, although evaluating plaintiff's overall performance as "effective," did not contain any positive comments as were contained in each of plaintiff's pre-complaint evaluations.

[4] Plaintiff presented numerous job postings listed by defendant. The fact that plaintiff was not contacted regarding these positions provides additional evidence supporting a causal connection. Viewing the evidence in a light most favorable to plaintiff, if the promises to recall plaintiff were made, regardless of any employee handbook provision, and defendant did not contact plaintiff about job vacancies, we believe that a trier of fact may conclude that discriminatory animus was involved in terminating plaintiff's job. We do not believe that it is necessary to deem the failure to recall as an adverse employment action [such an action already existed – termination], nor is it relevant if the promise to recall fails to support a promissory estoppel action, *see infra,* because the failure to recall can simply be considered in the context of whether defendant was motivated by a discriminatory purpose in eliminating plaintiff's job.

We believe it appropriate to look at federal cases involving retaliatory discharge claims. While federal decisions interpreting the federal Civil Rights Act are not binding in Michigan, the decisions are often used as guidance by Michigan courts. *Meagher v Wayne State University*, 222 Mich App 700, 710; 565 NW2d 401 (1997).

In *Jackson v RKO Bottlers of Toledo, Inc*, 743 F2d 370, 377 n 4 (CA 6, 1984), a retaliatory discharge case, the United States Court of Appeals for the Sixth Circuit, rejecting the federal district court's reliance on a 2½ year lapse between a discrimination charge and the employment discharge, stated that "[t]his reliance makes it clear that the trial court ignored evidence introduced by plaintiff, which if believed, would raise an inference that defendant had engaged in a pattern of retaliatory conduct beginning soon after plaintiff filed discrimination charges."

In *Kachmar v Sungard Data Systems, Inc*, 109 F3d 173, 178 (CA 3, 1997), the United States Court of Appeals for the Third Circuit, addressing a retaliatory discharge claim, stated:

> In concentrating exclusively on the gap between Kachmar's protected activity and her firing, and the sufficiency of Kachmar's allegations of a pattern of antagonism, the district court failed to make the more generalized inquiry into whether Kachmar's protected activity was the likely reason for her termination. ("A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario."). [Citations omitted.]

When viewing the overall scenario in a light most favorable to plaintiff, the trial court did not err in finding that plaintiff established a prima facie case of retaliatory discharge.

We now turn to the issue of pretext. Relying on *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), this Court has held that the establishment of a prima facie case means that the plaintiff produced enough evidence to create a rebuttable presumption of discrimination. *Meagher, supra* at 710-711.

If a plaintiff establishes a prima facie case of retaliatory discharge, the burden shifts to the defendant to articulate a legitimate business reason for the discharge, and if the defendant establishes a legitimate reason for discharge, the plaintiff has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but only a pretext for the discharge. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 281; 608 NW2d 525 (2000).

A party may prove "mere pretext" (1) by showing that the reason for discharge had no basis in fact, (2) if the reason had a basis in fact, by showing that it was not an actual factor motivating the decision, or (3) if the reason was a motivating factor, by showing that it was insufficient to justify the decision. *Meagher, supra* at 712.

Plaintiff argues that the trial court erred in ruling that she provided no evidence of pretext, and plaintiff argues that, at a minimum, documentary evidence was submitted, which sufficiently created an issue of fact as to whether the reason for plaintiff's layoff was merely a pretext. We agree.

As is abundantly clear from the documentary evidence, there are issues of fact regarding whether defendant's reason for eliminating plaintiff's position was pretextual. Based on the same documentary evidence cited above concerning the causal connection issue, said evidence supports a finding that an issue of fact exists as to whether automation was merely a pretext by which defendant could terminate employees who had engaged in protected activity. Based on the documentary evidence, defendant may have been motivated to automate in an effort to eliminate the data entry positions, by not only financial reasons, but by the opportunity to rid itself of employees who were causing problems.[5]

Additionally, and importantly, we believe that even if automation was a legitimate reason for eliminating the data entry positions, it might not have been a legitimate reason for terminating plaintiff's employment with the hospital. Defendant, in essence, states that plaintiff was not qualified for a senior computer operator position, but then indicates that she was offered that position in the past. Moreover, plaintiff previously trained an individual who held that position. Plaintiff's argument that she should not have been laid off but offered another position based on seniority, may be relevant in indicating discriminatory animus.[6] The department director testified at his deposition that before 1999, the seniority policy was not limited to seniority within job classifications. The director admitted that he did not look for another position for plaintiff in the hospital, nor was he aware of anyone making such an effort.

Further, numerous job positions were posted by defendant, including an accounts payable clerk position, which apparently was open at the time of plaintiff's dismissal. The department director indicated that plaintiff had handled that position in the past. Accepting as true plaintiff's claim that she was promised by defendant that she would be recalled if a vacancy occurred, regardless of the employee handbook, the claim could support a finding that the automation was a pretext for eliminating the data entry positions, or for terminating plaintiff's employment with the hospital. Defendant acknowledges that the ISD has grown since plaintiff's termination; however, no attempt to rehire plaintiff was made.

The trial court erred in finding that plaintiff failed to provide any evidence of pretext; therefore, the trial court erred in dismissing plaintiff's retaliatory discharge claim. We also hold

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[5] We note that two other data entry analysts, there were three in total within the ISD, were laid off, and those individuals also filed suit for retaliatory discharge in the Oakland Circuit Court.

[6] Defendant's handbook states:

> It is the policy of the Hospital to recognize seniority in making decisions concerning layoffs and time off. The Hospital appreciates the value of long-serving employees and operates within the following guidelines:
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> ***
>
> Should the Hospital find it necessary to reduce the work force through layoffs, the Hospital will attempt to lay off employees based on their seniority.

that, regardless of the issue concerning pretext, plaintiff presented direct evidence of discrimination, thereby precluding summary disposition.[7]

Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor, e.g., racial slurs by a decisionmaker. *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

Statements by plaintiff's supervisor and the executive assistant administrator, who was acting CEO at the time of plaintiff's dismissal, which indicated a displeasure over the EEOC complaint, could be considered direct evidence that discrimination was at least a motivating factor in plaintiff's termination because both statements, when viewed in a light most favorable to plaintiff, indicated that they were upset about the EEOC complaint. Although the record is unclear as to who, or whom, was specifically involved in the decision to eliminate plaintiff's job, the very nature of the positions necessarily suggests involvement in the automation/termination decision. The trial court erred in granting defendant's motion for summary disposition because there was direct evidence of a discriminatory purpose. Based on our decision, it is not necessary to address issues regarding plaintiff's motion for reconsideration.

Finally, we turn to the promissory estoppel claim. The elements to support a cause of action for promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, (3) which in fact produced reliance or forbearance of that nature, and (4) in circumstances such that the promise must be enforced if injustice is to be avoided. *Ardt v Titan Ins Co*, 233 Mich App 685, 692; 593 NW2d 215 (1999).

The doctrine of promissory estoppel is applied cautiously by courts. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 442; 505 NW2d 275 (1993), mod in part by *Patterson v Kleiman*, 447 Mich 429, 433-434; 526 NW2d 879 (1994). To support a claim of promissory estoppel, a promise must be definite and clear. *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995). If there are qualifications and conditions attached to a promise, an action based on breach of that promise cannot be maintained. See *First Security Savings Bank v Aitken*, 226 Mich App 291, 311; 573 NW2d 307 (1997), overruled only as to summary disposition test pursuant to *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456; 597 NW2d 28 (1999).

In the present case, defendant's promise, when viewed in a light most favorable to plaintiff, was not clear and definite. The promise to recall plaintiff was qualified and conditional, i.e., if an opening occurred and if plaintiff was qualified. Moreover, there was no induced action of a definite and substantial character on the part of plaintiff as required to support a cause of action based on promissory estoppel. Plaintiff did nothing in response to the alleged promise. Plaintiff's claim is, in essence, simply one premised on a broken promise for which there is no cause of action, though it was relevant as to discriminatory animus concerning

[7] In *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), our Supreme Court stated that "[t]he shifting burdens of proof described in *McDonnell Douglas* are not applicable if a plaintiff can cite direct evidence of unlawful discrimination."

the retaliatory discharge claim. Although the trial court dismissed the claim based on the handbook provisions, the claim is appropriately dismissed based on failure to state a cause of action pursuant to MCR 2.116(C)(8). This Court will not reverse a trial court's order if it reached the right result for the wrong reason. *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 470; 628 NW2d 577 (2001). The trial court properly granted defendant's motion for summary disposition on the promissory estoppel claim.

Affirmed in part and reversed in part.

/s/ William B. Murphy
/s/ Janet T. Neff

I concur in result only.

/s/ Joel P. Hoekstra