STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA STEDMAN, Plaintiff-Appellant,	UNPUBLISHED February 15, 2002
v	No. 216008 Oakland Circuit Court
COX, HODGMAN & GIARMARCO, P.C., Defendant-Appellee.	LC No. 98-004385-CL

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claims of age discrimination and retaliation against defendant, her former employer, arising out of defendant's termination of plaintiff's employment. We affirm.

I

First, plaintiff claims that, in dismissing her age discrimination and retaliation claims, the trial court failed to consider evidence in the record supporting her contention that defendant's assertion of poor performance after more than twenty-seven years of employment was false and a pretext for age discrimination and retaliation.

We review de novo the trial court's decision granting summary disposition. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 177; 579 NW2d 906 (1998). This Court, as the court below, is to consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of material fact exists to warrant a trial. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357-358; 597 NW2d 250 (1999). Here, as below, all reasonable inferences are to be resolved in the nonmoving party's favor, plaintiff in this case. *Id.* at 358. We do not make factual findings or weigh the credibility of the evidence. *Lytle, supra* at 176.

The trial court appropriately examined the pleadings, depositions and other documentary evidence presented by the parties and found that plaintiff could establish a prima facie case of age discrimination because (1) she was a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for her position, and (4) she was replaced by a

younger person. *Lytle, supra* at 177. The trial court then correctly noted that, plaintiff having established a prima facie case, the burden shifted to defendant to articulate a legitimate, nondiscriminatory reason for plaintiff's termination. *Lytle, supra* at 173. We agree with the trial court that defendant successfully articulated a legitimate reason to discharge plaintiff, which was amply supported by the record, that although her legal and technical skills were excellent, her interpersonal skills needed significant improvement.

The trial court next appropriately recognized that once defendant clearly set forth, through the introduction of admissible evidence, that there was a legitimate reason for plaintiff's discharge, the burden shifted back to plaintiff to show, by a preponderance of admissible direct or circumstantial evidence, that a triable issue of fact exists that defendant's proffered reasons were a mere pretext for discrimination, i.e., that discrimination was a motivating factor for her termination. *Lytle, supra* at 174, 176. Plaintiff could establish that defendant's articulated legitimate, nondiscriminatory reason was pretextual: (1) by showing that the reason had no basis in fact, (2) if the reason had a basis in fact, by showing that it was not the actual factor motivating the decision, or (3) if it was a factor, by showing that it was insufficient to justify the decision. *Feick v Monroe Co,* 229 Mich App 335, 343; 582 NW2d 207 (1998). See also *Lytle, supra* at 178. We hold that, even when viewed in a light most favorable to plaintiff, plaintiff failed to show, by a preponderance of admissible direct or circumstantial evidence, that a triable issue of fact exists that defendant's proffered reasons for firing plaintiff were a mere pretext for age discrimination. *Lytle, supra* at 174, 176.

II

Next, plaintiff claims that the trial court erred by failing to consider direct evidence of discrimination by defendant. Plaintiff's contention lacks merit.

Where a plaintiff presents direct evidence of discrimination, the shifting burden of proof analysis does not apply and the plaintiff no longer needs the "inference" of discrimination that arises from a prima facie case. See *Downey v Charlevoix Co Bd of Co Rd Comm'rs,* 227 Mich App 621, 633; 576 NW2d 712 (1998). Direct evidence is evidence that, if believed, would prove the existence of the employer's unlawful motive without the benefit of a presumption or inferences. *Lytle v Malady,* 209 Mich App 179; 530 NW2d 135 (1995), rev'd on other grounds 458 Mich 153; 579 NW2d 900 (1998). Derogatory or similar remarks which indicate prejudice are indicative of unlawful discrimination. See and compare *Lamoria v Health Care & Retirement Corp,* 230 Mich App 801, 810-811; 584 NW2d 589 (1998) (employer's remarks about "getting rid of older employees" constitutes direct evidence of age-based animus); *Harrison v Olde Financial Corp,* 225 Mich App 601, 609-613; 572 NW2d 679 (1997) (plaintiff must have direct evidence of age discrimination and has initial burden of proving that it was more likely than not a substantial or motivating factor in the defendant's decision). See also *Matras v Amoco Oil Co,* 424 Mich 675, 682-684; 385 NW2d 586 (1986). We conclude here that plaintiff did not present direct evidence of age discrimination.

We disagree with plaintiff's contention that defendant's suggestion regarding possible retirement for plaintiff, made in the context of a disciplinary discussion, constituted direct evidence of defendant's discriminatory animus. Questions about an employee's retirement plans

are not enough to raise an inference of age discrimination. *Woytral v Tex-Tenn Corp*, 112 F3d 243, 247 (CA 6, 1997).

Further, plaintiff did not establish that she was treated differently because of her age. Plaintiff made no showing that other similarly situated younger employees were not treated the same as plaintiff. See generally *Lytle, supra* at 178. Defendant presented evidence, unrebutted by plaintiff, that of nine secretaries other than plaintiff whose employment was terminated, seven were under forty and only two were over forty. This evidence does not indicate that younger, similarly situated employees were treated more favorably than older employees.

We conclude that the evidence, when viewed in a light most favorable to plaintiff, does not establish a genuine issue of material fact that age discrimination was a motivating factor for defendant's termination of plaintiff's employment. The trial court did not err in dismissing Count I, alleging age discrimination, in plaintiff's complaint.

III

Finally, plaintiff asserts that in dismissing her retaliatory discharge claim the trial court failed to consider evidence in the record supporting her contention that she would not have been terminated if defendant had not received a letter from plaintiff to defendant on November 24, 1997, which raised the spectre of age discrimination. Plaintiff alleged that she was fired because her November 24, 1997, letter to defendant Hodgman accused him of wanting to fire her so that he could hire a younger, less expensive secretary. In primary support of her claim, plaintiff relies on the fact that her employment was terminated within two days after defendant received her letter of November 24, 1997.

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, plaintiff had to show (1) that she was engaged in a protected activity, (2) that this was known by defendant, (3) that defendant took an employment action adverse to plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. MCL 37.2701; *Polk v Yellow Freight System*, 876 F2d 517, 531 (CA 6, 1989); *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000); *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). The causal connection required for proving a prima facie case may be satisfied by showing a close timing between the protected activity and the adverse employment action. See *Howard v Canteen Corp*, 192 Mich App 427, 434; 481 NW2d 718 (1991). Here, as for an age discrimination claim, if the plaintiff proves a prima facie case of retaliatory discharge, the employer must advance a legitimate, nondiscriminatory reason for the adverse decision. If the employer succeeds, the plaintiff must prove that the employer's reason was a pretext for retaliation. *Polk, supra.* Plaintiff had to show that the protected activity was a "significant factor" in the adverse employment action. *Id.* at 531. To show that the protected activity was a significant factor, plaintiff had to show that the activity was one of the reasons for the employer's action. *Id.* Stated slightly differently, where, as here, a plaintiff produces no direct evidence that a defendant fired an employee in retaliation for making a discrimination charge, the question is whether the circumstantial evidence, when viewed in a light most favorable to the plaintiff, is sufficient for a reasonable factfinder to legitimately infer that there was a causal connection between the plaintiff's claims of alleged age discrimination and the defendant's decision to fire her. *Feick v Monroe Co,* 229 Mich App 335, 344-345; 582 NW2d

207 (1998); *McLemore v Detroit Receiving Hosp,* 196 Mich App 391, 396; 493 NW2d 441 (1992).

We conclude that plaintiff failed to present sufficient circumstantial evidence by which a reasonable factfinder could legitimately infer that there was a causal connection between plaintiff's claim of alleged discrimination and defendant's decision to fire her. *Feick, supra.* In contrast with *McLemore, supra* at 396-398, this is not a case where plaintiff received negative performance evaluations by defendant only after plaintiff made allegations against defendant of age discrimination. Plaintiff had received negative performance evaluations for years concerning her interpersonal skills and had been specifically warned just a month before her employment was terminated that she needed to make significant improvement in this area or her employment would be terminated in the near future. Cf. *McLemore, supra* at 396-398. Moreover, the fact that defendant Hodgman testified that he was "very disappointed and unhappy with the contents of the letter" is insufficient to establish the causal connection. This Court has analogously determined that the fact that an employer stated that he was not pleased that the plaintiff employee filed an EEOC complaint and the employer then terminated the employee, is insufficient to establish a causal link between the complaint and the adverse employment action. *Feick, supra* at 344.

Even assuming arguendo that plaintiff did establish a prima facie case of retaliation based on the fact that defendant fired her two days after receiving the November 24, 1997, letter, we have nevertheless concluded that defendant was able to proffer a legitimate, nondiscriminatory reason for firing plaintiff and that plaintiff did not present sufficient evidence to raise a genuine issue of material fact that the proffered reason was a mere pretext. *Polk, supra* at 531. Thus, summary disposition was properly granted with respect to plaintiff's claim of retaliation, Count II of her complaint. *Id.*

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad