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CYNTHIA STEDMAN, Plaintiff-Appellant,	UNPUBLISHED February 15, 2002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.

WHITE, P.J., (*dissenting*).

I respectfully dissent.

The facts viewed in a light most favorable to plaintiff are that plaintiff worked for William Hodgman for 27½ years, as a legal secretary and as an assistant/paralegal. Plaintiff was thirty-two years old when Hodgman hired her in 1970, and sixty years old when Hodgman terminated her employment in November 1997. Over the years, Hodgman changed firms several times and asked plaintiff to move with him, which she did.

Although the majority asserts that plaintiff had received negative performance evaluations for years concerning her interpersonal skills and had been warned a month before her discharge that improvement in this area was necessary to avoid termination of her employment, the record can be construed otherwise. Plaintiff's evaluations in the four years before her discharge were highly positive, discussion below and see n 3, *infra*, and defendant continued her employment for many years. The warning a month before plaintiff's discharge came during the meeting during which plaintiff's retirement was discussed. On the record presented, it was for the jury to determine whether plaintiff was discharged because of her age or because of her assertedly deficient interpersonal skills.

In a January 15, 1997 performance evaluation of plaintiff, Hodgman rated her as "above standard," the next to the highest of five categories.[1] Hodgman rated plaintiff as "exceptional" in the individual categories of planning and organizing skills, quality of work, and dependability.

[1] The categories were inadequate, below [standard], standard, above standard, and exceptional.

Hodgman rated plaintiff as "standard" in "teamwork and cooperation," noting in the "remarks" section that he "would like to see improvement." He also rated plaintiff as "standard" in "professionalism/communication," noting "Professionalism: Exceptional[.] Communication: Needs Improvement." Hodgman also gave plaintiff an overall rating of "above standard" in a March 12, 1996 performance review.[2] Other employment evaluations, from 1995 and 1996, were complimentary of plaintiff's skills and work ethic, although the one from 1996 noted that plaintiff needed to respect Hodgman's privacy.[3] Two memoranda defendant produced in support

[2] That review does not contain individual ratings by Hodgman.

[3] Plaintiff's employment evaluations dated May 17, 1996 and March 2, 1995 were memos written by the then head of Human Resources, Carol Prindle, to plaintiff's personnel file.

The May 1996 evaluation stated in pertinent part:

> WDH [Mr. Hodgman] Advised:
>
> - Another good year and enjoyed celebrating 25th anniversary together
> - WDH had unusually good productivity during the year of which CES was a integral [sic] part.
>
> * * *
>
> Accomplishments
>
> 1. Good progress on paralegal skills – Improved writing skills and ability to get things out on her own – minutes, contracts, documents, etc.
>
> Now need to focus on making sure we get value for the work CES is able to do in place and stead of WDH (i.e., bill a quantum of time for WDH as well as CES on each project)
>
> 2. Great job on written self-evaluation. Helps communicate job performance, frustrations and goals to WDH and CP
>
> Moving Forward [sic]/Goals
>
> 1, Need to recognize WDH's changing role from high producer to firm leader, rainmaker, administrator and adjust CES job role accordingly:
>
> a) Watch for billable time falling through the cracks. Better system for keeping track of WDH time.
>
> Learn to use computerized billing systems – TABS
>
> b) Respect privacy
>
> If door is closed, don't come in

(continued…)

of its motion relative to plaintiff's job performance were negative, one dated March 17, 1993, over 4 ½ years before plaintiff's discharge,[4] and one dated November 14, 1991, six years before her discharge, concerning a "temper tantrum."[5]

(…continued)

> If absolutely necessary to speak with WDH when door is closed, call first to get permission to enter.
>
> WDH will try to close door only when he doesn't want to be disturbed.
>
> c) Have files at WDH's disposal 1 day prior to meetings

The memo of plaintiff's employment evaluation dated March 2, 1995 stated: "WDH expressed his overall satisfaction with her job and extended his gratitude for all her hard work throughout the year—acknowledging he was aware of how hard she had worked during the past year," and "WDH advised that he anticipated a very busy and productive year and that he looked forward to having her there as an important element to a successful year." The 1995 evaluation also noted that plaintiff would receive a $1,500 bonus "for her extra efforts," and a yearly increase in salary as well "retroactive to 1/1/95."

[4] Defendant produced a memorandum from Prindle to plaintiff's personnel file, dated March 17, 1993**,** but its admissibility was questioned. Plaintiff's affidavit, submitted in support of her response to defendant's motion for summary disposition, stated that she never received that memorandum until she requested her personnel file in November 1997. The memo may also be hearsay, as plaintiff's affidavit also states that she recalled meeting with Hodgman that day, but that Carol Prindle was not present. Yet, the wording of the memo indicates it was written by Prindle (so the memo would be Prindle's writing regarding something Hodgman told Prindle), and there is no testimony of Prindle's before us. Nevertheless, the memo stated:

> On Wednesday, March 17, 1993, WDH had a meeting with Cindy Stedman to discuss WDH's dissatisfaction with Cindy's recent job performance:
>
> 1) Not immediately informing WDH about a family emergency (sick child), but rather just writing a telephone message and leaving it on WDH's chair was irresponsible, infuriating and unacceptable.
>
> 2) Making disparaging remarks to other Firm members regarding Bruce Haffey (prior to his arrival) was damaging to Firm goals:
>
> - Ill-fated before he even starts working here
> - If she ever does anything like that again, WDH informed her that she will be fired
>
> 3) Advised that she needs to work with others and that we need to operate as a team
>
> * * *

(continued…)

Plaintiff's annual salary in 1990 was $39,000. She received salary increases in 1991, 1992, 1993, 1994, 1995, and 1996, and a $1,500 bonus in 1995. In 1997, with plaintiff's agreement, her work hours were reduced from 45 to 40 per week, but her salary remained the same, and she received a $500 bonus.

On October 24, 1997, plaintiff, Hodgman and the Human Resources director, Veronica Iauto, met. Hodgman testified at deposition that no single event triggered that meeting, but that

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(…continued)

> 4) Advised that she needs to be hospitable/gracious to co-workers and that written notes thrown on desks are not acceptable.
>
> 5) Advised that she should not "barge through" closed doors. If WDH's door is closed, he may be discussing highly confidential matters and she is to knock and/or call first.
>
> WDH also advised Cindy that the news was not all bad and that in the past she had been a good secretary and that the Firm would be doing her annual employment evaluation in the near future. However, at this juncture, with his current dissatisfaction in her attitude, skills and responsibilities, he wasn't sure that the employment relationship should continue and that they were having this discussion to make her aware of the areas she must improve in her job performance in order for her to keep her job.

[5] A confidential memorandum to plaintiff's personnel file from W. Hodgman and K. Smith, dated November 14, 1991, stated:

> Cindy's machine was not working properly this morning and Mr. Hodgman needed a document produced for a waiting client. He, therefore, asked Viann to produce the document off of Cindy's disk.
>
> Mr. Hodgman said that Cindy "threw a temper tantrum" and was very insubordinate to him. He indicated to her that if this behavior were to ever happen again, she would be fired immediately.
>
> Mr. Hodgman told the entire story to Kathy Smith and instructed her to also let Cindy know that she would be fired if such actions were to reoccur.
>
> Kathy Smith talked with Cindy within ½ hour of the incident. Cindy apologized for her insubordination and admitted that she was wrong. She also did say that it was a mistake to blow up at him but she was at her breaking point and could not control her anger.

Plaintiff testified at deposition that she did not recall an incident on November 14, 1991, and could not confirm whether it did, or did not, happen, and in an affidavit submitted in support of her response to defendant's motion stated that she "may have been visibly upset about something that occurred on November 14, 1991 but I deny throwing a temper tantrum."

an event earlier that week involving a client file "certainly was a contributing factor." On October 20, 1997, Hodgman had a meeting with a client, and plaintiff did not have the file to Hodgman before the meeting. Hodgman testified at deposition that before the October 24, 1997 meeting he had no intention of terminating plaintiff.

Hodgman testified that at the October 24, 1997 meeting, he gave plaintiff three typed documents he had dictated and Aiuto had typed. The documents were entitled "Issues," "Goals," and "WDH [Hodgman]/CES [plaintiff] problems." The "WDH/CES problems" document had three categories: "everyday," "atmosphere," and "relationships." It stated in pertinent part:

2. Atmosphere

-Must be cordial, positive

-New clients, referred sources must receive "tender loving care"

-Uneven treatment of callers must stop – all should be treated the same

3. Relationships

-The Firm is a <u>team</u>, and all attorneys and secretaries must play a role

-The whole is greater than the sum of parties [sic] only if there is <u>teamwork</u>

-share information

-help the other guy

-avoid invidious comparisons, interpersonal squabbles

The "Issues" document stated, among other things,

1. Cindy is <u>not</u> indispensable

* * *

2. Should Cindy consider retirement now? At age 62?"

- possible relocation to Atlanta?

- we could assist with recruitment as secretary for senior partner

-could tailor severance pay, unemployment comp, continuing healthcare until settled [Emphasis added.]

The document ended by stating:

> CONCLUSION: We will review Cindy's situation promptly after the holidays. Unless significant improvement occurs, her job will likely be terminated.

Plaintiff testified at deposition that Hodgman had known before the meeting that she planned to work until age 70, and that she told him at the meeting that she wanted to work another ten years. She testified that at the meeting Hodgman "made my age an issue and suggested retirement," and further testified:

> [Hodgman also] [s]uggested tailoring a severance pay program, unemployment compensation. When this was written [the documents Hodgman gave plaintiff on 10-24-97], he obviously had in mind the fact that he was going to let me go, fire me. You don't get unemployment for relocating to another state. Continuing health care until settled. I considered this discrimination, discriminatory.

Plaintiff testified that Hodgman's demeanor and attitude toward her changed after October 24, 1997. She testified that an employee of defendant, Kim O'Hara, told her during that period that Hodgman told O'Hara not to speak to plaintiff. Plaintiff also testified that by the time she left the firm, no one was talking to her.

By letter to Hodgman and Aiuto dated November 24, 1997, plaintiff responded to the items raised at the October 24, 1997 meeting. Plaintiff expressed bewilderment with a number of the concerns that had been raised, and denied that most of them were problems at all or were problems of any significance, noting the extent of her job duties and workload. Plaintiff's November 24, 1997 letter concluded by saying:

> At the October 24, 1997 meeting you also gave me a document entitled, "Issues".
>
> The only way I can respond to those three issues, is to say that I am totally amazed by your written statements and your comments at the meeting. It is obvious to me that **your sole purpose in holding the meeting was to set the groundwork to fire me so that you would be free to hire a younger and less expensive secretary**. In point #2 of the "Issues" discussion we had, **you made a point of telling me that I should retire at age sixty-two** and that one of your main concerns, or goals was to:
>
> "1. Make money 2. Work smart 3. Control overhead – secretary cost 4. Leverage computers."
>
> It is obvious that years of service would have a direct relationship to my age and that salary increases would then be directly proportionate to my service with the Firm.
>
> **I cannot understand why you made my age an issue at the October 24, 1997 meeting.** As you are aware, I am a competent and tireless worker who has devoted my last twenty-seven years to you and this Frm [sic].

> . . . . As you can surmise, I am heartbroken that it appears that I am about to be thrown out on the street after twenty-seven years of loyal and faithful service. I am bewildered as to why this is happening to me.
>
> I can only surmise that, based upon the comments associated with my age and salary, you wish to hire a younger secretary and pay her less than I am being paid.
>
> I shall appreciate your placing this in my personnel file. Thank you. [Emphasis added.]

Defendant terminated plaintiff by letter dated November 26, 1997, which stated:

> Dear Cindy:
>
> I read the letter dated November 24, 1997, you addressed to me and Veronica Aiuto and found many of the points you raised to be factually incorrect. More importantly, the tone and content of your letter and information we have received about statements you have made to other employees have convinced me that our relationship has deteriorated to the point that we should no longer be associated with each other. Therefore, the Firm hereby extends notice to you that your employment is terminated effective immediately.
>
> Your compensation will be continued through November 30, 1997, with your healthcare and life insurance being paid through December 31, 1997. If you wish to discuss the terms of your separation please contact Andrew Baran. Under the circumstances, it will not be necessary for us to meet this coming Friday, and you should contact Veronica if you need to remove any of your personal property from the offices, and if you have any property which belongs to the Firm it should be returned immediately.
>
> I have appreciated the years of dedicated service you have given to me and the Firm, and I am genuinely sorry that your termination has become a necessity.

Plaintiff was sixty years old and her annual salary was $46,200 when she was terminated. Defendant transferred an in-house secretary, Marsha Ladomer, to plaintiff's former position, at a salary of approximately $35,000.[6] Ladomer was fifty years old at the time and had worked at firms at which Hodgman worked since 1980.

The circuit court dismissed plaintiff's age discrimination claim on the basis that she had not shown pretext, and dismissed plaintiff's retaliation claim on the basis that she "failed to

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[6] Ladomer testified at deposition that she was transferred to fill plaintiff's position on November 25, 1997, and that at the time of the deposition in August 1998, she was earning $36,500, and that she had received a $1,500 raise the previous March.

demonstrate that it was her complaints about Hodgman's motive for firing her that constituted a significant factor toward the allegedly retaliatory act of firing her."[7] This appeal ensued.

I

Plaintiff argues that the circuit court erred in dismissing her age discrimination claim because it failed to consider her contention that defendant employer may have had an unlawful dual motive (also known as "mixed motive") in terminating her. Plaintiff argues that the circuit court erred in relying solely on the burden-shifting framework articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), rather than on a mixed motives analysis, given that she presented direct evidence of discriminatory animus. Defendant's appellate brief does not address this question.

When a plaintiff presents direct evidence of discriminatory animus, the *McDonnell Douglas* burden-shifting analysis does not apply. *Hazle v Ford Motor Co*, 464 Mich 456, 462, 466 n 12; 628 NW2d 515 (2001); *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997).

> For purposes of the analogous federal Civil Rights Act, the Sixth Circuit Court of Appeals has defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." [*Hazle*, *supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).]

Regarding mixed motive cases arising under the CRA, this Court noted in *Harrison*, *supra* at 612-613:

> [W]e hold that the following principles of proof apply in a typical single-plaintiff, mixed-motive employment discrimination case. First, as with circumstantial discrimination cases, in a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Second, whatever the nature of the challenged employment action, the plaintiff must establish evidence of the plaintiff's qualification (or other eligibility) and direct proof that discriminatory animus was causally related to the decisionmaker's action. Upon such a presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true.

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[7] The circuit court concluded regarding plaintiff's age discrimination claim that defendant had successfully articulated a legitimate reason to fire plaintiff, plaintiff's interpersonal skills, and that plaintiff had not established pretext. Regarding the retaliation claim, the court concluded that plaintiff failed to demonstrate that her complaints about Hodgman's motive for firing her were a significant factor in the termination of her employment.

> However, and alternatively, in addition to challenging the credibility of the plaintiff's claims of discrimination, in a case involving direct evidence of discriminatory action, the employer may also assume the burden of persuading the factfinder that, even if the plaintiff's allegations are true, the employer would have made the same decision without consideration of discriminatory factors. In other words, the employer may assume the burden of persuading the factfinder that consideration of the plaintiff's protected characteristics was not "a determining factor" in its employment action. See *Matras* [*v Amoco Oil Co*, 424 Mich 675, 684; 385 NW2d 586 (1986)]; *Meagher* [*v Wayne State Univ*, 222 Mich App 700, 710; 565 NW2d 401 (1997)]. We believe that the federal approach in dealing with direct evidence of employment discrimination and employer mixed motives is superior to the *McDonnell Douglas* formula, which Michigan courts have traditionally attempted to apply in these cases.

The most recent decision addressing direct evidence of discrimination is *DeBrow v Century 21 Great Lakes*, 463 Mich 534; 620 NW2d 836 (2001), an age discrimination suit brought by a forty-eight year old plaintiff against his former employer, in which the Court held that a statement by the plaintiff's superior during the conversation in which the plaintiff was fired that the plaintiff was "getting too old for this sh__," constituted direct evidence of age animus:

> [ ] We recognize that this remark may be subject to varying interpretations. It might reasonably be taken as merely an expression of sympathy that does not encompass a statement that the plaintiff's age was a motivating factor in removing him from his position as an executive. However, it is well established that, in reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we must consider the documentary evidence presented to the trial court "in the light most favorable to the nonmoving party." According to the plaintiff's deposition testimony, the remark was made during the conversation in which the plaintiff's superior informed him that he was being fired. Considered in the light most favorable to the plaintiff, this remark could be taken as a literal statement that the plaintiff was "getting too old" for his job and this was a factor in the decision to remove him from his position. While a factfinder might be convinced by other evidence regarding the circumstances of the plaintiff's removal that it was not motivated in any part by the plaintiff's age and that the facially incriminating remark was no more than an expression of sympathy, such weighing of evidence is for the factfinder, not for this Court in reviewing a grant of a motion for summary disposition.
>
> The shifting burdens of proof described in *McDonnell Douglas* are not applicable if a plaintiff can cite direct evidence of unlawful discrimination. . . . . [*DeBrow, supra* at 538-539. Citations omitted.]

In *DeBrow*, the comment made to the plaintiff by his superior was the only evidence of age discrimination presented, according to the concurring Justice. *DeBrow, supra* at 541 (Markman, J., concurring).

Under *DeBrow, supra,* viewing the facts in a light most favorable to plaintiff, Hodgman suggested, during a meeting called to discuss plaintiff's performance, that plaintiff consider retirement, and in documents he dictated, referred to plaintiff's immediate retirement, to retirement in two years, to her age, unemployment, and a severance package. These references could be understood by a factfinder as motivated in part by plaintiff's age. I thus conclude that plaintiff presented direct evidence of discriminatory animus and summary disposition was improperly granted.

II

Even if this did not constitute direct evidence of age animus, I conclude that summary disposition was improperly granted because plaintiff presented circumstantial evidence that her termination was a pretext for age discrimination and retaliation on the basis that she opposed age discrimination.

A

Plaintiff contends that the circuit court erred in dismissing both her claims because it failed to consider *circumstantial* evidence 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.

A reasonable fact-finder could conclude from plaintiff's performance reviews, her longevity with Hodgman, her history of salary increases, and her increased responsibilities, that although Hodgman's articulated reasons for terminating plaintiff had a basis in fact, they were not the actual factor motivating the decision to terminate her employment, or that they were jointly insufficient to explain Hodgman's decision to terminate plaintiff's employment. *Feick v Monroe* Co, 229 Mich App 335, 343; 582 NW2d 207 (1998). Thus, plaintiff presented evidence from which a reasonable fact-finder could find that Hodgman's articulated reason for terminating plaintiff was pretextual. *Woytral v Tex-Tenn Corp,* 112 F3d 243 (CA 6, 1997), relied on by the majority, is factually distinguishable and not binding. *Waytrol* involved allegations of age discrimination in the context of the defendant employer inquiring regarding the plaintiff-employee's plans for the future, after rumors of the employee's intended retirement had come to the employer's attention. 112 F3d at 247. The court noted:

> Asking questions about an employee's plans for the future, without referring to the employee's age, especially when rumors are circulating that the employee is planning to retire, does not amount to pressure to retire. This is so even though [plaintiff] may have interpreted it as pressure, because "[m]ere personal belief, conjecture and speculation are insufficient to support an inference of age discrimination." [*Woytral, supra* at 247, quoting *Chappell v GTE Products Corp,* 803 F2d 261, 268 (CA 6, 1986).]

In contrast, in the instant case, Hodgman referred to plaintiff's age in the documents he dictated for the meeting of October 24, 1997, and expressly mentioned retirement in the documents. Plaintiff testified that Hodgman knew before that meeting of her plans to work until age seventy, and that she told him at the meeting that she wanted to work another ten years.

Defendant argues that Hodgman's "isolated inquiry" into plaintiff's retirement goals is not evidence of discrimination. In *Krohn v Sedgwick James, Inc*, 244 Mich App 289; 624 NW2d 212 (2001),[8] this Court discussed "stray remarks," and the standard courts may use to determine the probative value of such a remark. Assuming Hodgman's statements regarding retirement and plaintiff's age were stray remarks, as defendant suggests, they have probative value under *Krohn, supra*, because 1) they were made by a decision maker (Hodgman), 2) were related to the decision-making process, 3) were not merely vague, ambiguous or isolated (were made during a meeting at which plaintiff's performance and longevity with the firm were addressed), and 4) were proximate in time to the act of termination. Defendant's other arguments also fail.[9]

B

Plaintiff also asserts that in dismissing her retaliatory discharge claim the circuit court failed to consider evidence supporting that her employment would not have been terminated if defendant had not received her letter of 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. Plaintiff relies on Mr. Hodgman's deposition testimony, which included:

> *Q*. Is it true, Mr. Hodgman, that had you not received this letter of November 24, 1997, Miss Stedman would not have been terminated?
>
> *A*. She certainly wouldn't have been terminated at this time—she would not have been terminated had I not received the letter at that time, no.
>
> *Q*. So it's fair to say you did terminate her because of what she said in the letter?
>
> MR. BRADY: I'm going to object.
>
> THE WITNESS: No.
>
> MR. BRADY: Go ahead and answer.

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[8] Plaintiff cited *Krohn, supra*, in a supplemental authority brief filed with this Court.

[9] Defendant's argument that plaintiff's replacement is in the same protected age group as plaintiff, and this is "further evidence that Plaintiff's age was not considered in her termination," misstates the law. There is no "protected age group" under the CRA, MCL 37.2202(1)(a), unlike the federal Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq*. See ICLE, *Employment Litigation in Michigan*, § 5.1, p 5-2, stating "the ADEA protects only those persons who are 40 years of age or older, 29 USC 631(a), while Michigan law refers only to chronological age and does not contain such a limitation." Plaintiff was sixty years old when Hodgman terminated her employment, and her replacement was fifty years old, i.e., substantially younger than plaintiff.

THE WITNESS: No, it's not true to say that. It's true that that was one of the factors that then went into my deliberations, along with the other factors I've mentioned earlier in my testimony.

Q. (BY MR. PITT) But that was the triggering situation, was it not, that triggered the termination, the letter?

A. No, it was an element that went into a decision to terminate.

Q. **Were you going to terminate her even if you had not received the letter?**

A. Not at that time. We were going to certainly continue the process, as we had suggested we'd review matters after the New Year begun [sic] and we had not –**it was premature to make such a decision at that time.** [Emphasis added.]

C

I conclude that plaintiff presented evidence that she opposed a violation of the CRA, i.e, her being terminated or made to retire because of her age, that defendant took an adverse employment action against her by terminating her employment, and that there was a causal connection between the protected activity and her termination. Hodgman's testimony that he decided to terminate plaintiff's employment immediately after receiving her November 24, 1997 letter, was evidence from which a reasonable fact-finder could conclude that plaintiff's termination was causally connected to her letter opposing age discrimination. The circuit court erred in dismissing plaintiff's retaliation claim on the basis that she had not established a causal connection between the protected activity and her termination.

I would reverse.

/s/ Helene N. White