

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN THOMAS,

Plaintiff-Appellant,

V

ROBERT HILTS, individually and in his official capacity as Sheriff, and the COUNTY OF LAKE, a Michigan municipal corporation,

Defendants-Appellees.

UNPUBLISHED
February 15, 2002

No. 224690
Lake Circuit Court
LC No. 98-004686-CZ

Before: Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.

PER CURIAM.

Plaintiff Robin Thomas appeals as of right from a circuit court order granting summary disposition in favor of defendants Robert Hiltz and Lake County pursuant to MCR 2.116(C)(10) on plaintiff's claim of sex discrimination. We affirm.

In April 1990, plaintiff began employment with defendant Lake County when she was hired as a part-time corrections officer by then Sheriff Peter Loucks and assigned to the county jail in Baldwin. She was subsequently transferred to the Technical Rules Violators (TRV) where she continued to work as a corrections officer. In March 1992, plaintiff became a full-time employee and in August 1995, she was promoted to the position of sergeant at TRV by the undersheriff and defendant, Sheriff Robert Hiltz. She remained a sergeant and continued working in corrections as a supervisor until her employment was terminated in November 1996.

While plaintiff was on vacation in October 1996, an incident regarding her treatment of another employee came to the attention of the TRV administrator. During the course of the investigation of this incident, several other corrections officers came forward with complaints regarding plaintiff. The undersheriff reviewed the complaints and reduced the charges against plaintiff to writing. On her return from vacation, plaintiff met with the undersheriff and defendant Hiltz and was placed on an unpaid suspension. Plaintiff responded to the charges, was provided a hearing, and had several meetings with the undersheriff. At the conclusion of the investigation, the undersheriff recommended that defendant Hiltz terminate plaintiff's employment, which he did by letter dated November 27, 1996. The stated reasons for plaintiff's termination were sexual harassment of her male subordinates, abuse of command position, and violation of policy for the manner in which she criticized employees.

Plaintiff subsequently filed the present complaint in Lake Circuit Court, alleging sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 USC 2000e *et seq.*, and Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq.* Although the analysis to be used in evaluating state and federal claims of sex discrimination is essentially the same, see *Cunningham v Dearborn Bd of Ed*, 246 Mich App 621, 626 n 1; 633 NW2d 481 (2001), on appeal plaintiff has made no argument in regard to her federal Title VII claim. Accordingly, we conclude that any issues related to her federal sex discrimination claim have been abandoned on appeal. MCR 7.212(C)(7); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998); *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 676 (1998); *Weiss v Hodge (After Remand)*, 223 Mich App 620, 634; 567 NW2d 468 (1997).

In her complaint, plaintiff claimed disparate treatment regarding her discipline and termination, alleging that similarly situated male employees accused of similar conduct had been suspended with pay and that defendants previously allowed a male supervisory employee accused of sexual harassment to retire rather than be terminated. Plaintiff also contended that male employees charged with sexual harassment were not terminated and were allowed to have outside agencies investigate harassment charges against them. Following discovery, plaintiff also alleged that there existed direct proof of discriminatory animus toward women on the part of the sheriff, defendant Hilts.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) and the circuit court initially denied the motion pending the close of discovery. Ultimately, however, the court granted defendants' motion, ruling that plaintiff failed to demonstrate the existence of a material factual dispute regarding an essential element of her disparate treatment claim -- that defendants treated her differently than similarly situated male corrections officers. Plaintiff now appeals.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Motions under MCR 2.116(C)(10) test the factual support of the plaintiff's claim. In reviewing such a motion, we consider the 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 nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial. *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 574 NW2d 314 (1996).

Disparate treatment claims may be established under ordinary principles of proof by the use of direct or indirect evidence. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999). "Direct evidence" is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001); *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231; 581 NW2d 746 (1998); *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

If, however, no direct evidence of discrimination can be produced, in order to avoid summary disposition the plaintiff must then proceed according to the prima facie test espoused in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which has been adopted in modified form and reaffirmed by the Michigan Supreme Court in *Town v*

Michigan Bell Telephone Co, 455 Mich 688, 689; 568 NW2d 64 (1997) (opinion by Brickley, J.) and *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-178; 579 NW2d 906 (1998). See *Hazle, supra* at 462; *Wilcoxon, supra* at 359.¹ Under this latter approach, in order to establish a prima facie case of disparate treatment, a plaintiff must prove by a preponderance of the evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) other, similarly situated employees outside the protected class, were unaffected by the employer's adverse conduct. *Town, supra* at 695; *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448; 622 NW2d 337 (2000). Once the plaintiff has established a prima facie case, a rebuttable presumption of discrimination arises, and the burden then shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for its employment decision. *Hazle, supra* at 463-464. If the defendant carries this burden, the presumption is extinguished and the burden shifts back to the plaintiff to prove, by a preponderance of the evidence, that the defendant's reasons for the employment decision were not its true reasons, but were merely a pretext for discrimination. *Id.* at 465-466.

Here, plaintiff alleges that under either the direct evidence² or the *McDonnell Douglas* burden-shifting approaches, she has produced sufficient evidence of discrimination to withstand summary disposition. We disagree.

Plaintiff cites the deposition testimony of James Rogers, a former sergeant at the TRV from 1988 to January 1995, as direct evidence of defendant Hilt's discriminatory animus toward women and contends that this testimony created a question of fact regarding whether her termination was motivated by sex discrimination. Rogers testified that Hilt felt intimidated by and intellectually inferior to women, did not like women, and believed that "women belonged in the kitchen." However, Rogers' testimony, apparently gleaned from numerous conversations with Hilt during the period preceding Rogers' involuntary termination of employment, constitutes merely a personal characterization of Hilt's views on women, based on unspecified statements. Ironically, these conversations ostensibly occurred before Hilt promoted plaintiff to the position of sergeant,³ and long before plaintiff's termination. We conclude that Rogers' testimony in this regard and the similar nebulous testimony of his wife, a former secretary of defendant Hilt, does not permit a reasonable inference that Hilt terminated plaintiff because of her sex. See, e.g., *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991) ("[o]pinions, conclusory denials, unsworn averments, and inadmissible hearsay do not satisfy the court rule [MCR 2.116(C)(10)]; disputed fact (or the lack of it) must be established by admissible evidence").

¹ "Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant's discriminatory intent." *Harrison, supra* at 610, quoting *Blalock v Metal Trades, Inc*, 775 F2d 703, 707 (CA 6, 1985). Direct evidence of discrimination removes the case from *McDonnell Douglas* because the plaintiff no longer requires the inference of discrimination provided by the "presumptive" prima facie case. *Id.*

² In its oral opinion granting defendants' motion for summary disposition, the circuit court did not address plaintiff's claim regarding direct evidence of discrimination.

³ Plaintiff's promotion was several months after James Rogers' employment was terminated.

Rogers further testified that in May of 1994, he was called into defendant Hilts' office for a meeting about two women that were under his ranking, one being plaintiff Thomas. Rogers testified that

basically, Sheriff Hilts had told me, he says that she [plaintiff] is the vice-president of the union, she's pushing too many grievances my way. He tried to order me to basically start writing Robin Thomas up, and eventually to where it would lead to where they would get rid of her.

Although this testimony, if taken as true, suggests that defendant Hilts, at one point in time, wanted to "get rid of" plaintiff because she was a union representative, it does not establish that she was later discharged because of her sex, the discriminatory animus that must be demonstrated in order to survive summary disposition under the direct evidence approach. Moreover, the requisite discriminatory animus is further contraindicated by the fact that this comment was purportedly made in May 1994, prior to plaintiff's promotion by defendant Hilts in August of 1995 and more than two and a half years before plaintiff's termination. We therefore conclude that plaintiff has not produced adequate evidence of any statement or action that constitutes the type of direct evidence that is sufficient to take a discrimination case out of the *McDonnell Douglas* framework. *Harrison, supra; Downey, supra.*

Alternatively, using the *McDonnell Douglas* burden-shifting analysis, plaintiff contends on appeal that the circuit court erred in granting defendants' motion for summary disposition on the ground that she failed to establish that defendants treated her differently than similarly situated male corrections officers. We disagree.

The "similarly situated" requirement of a prima facie disparate treatment case of discrimination does not require that the plaintiff be identical in every single aspect of employment to the other employees allegedly more favorably treated than plaintiff, *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (CA 6, 1998);⁴ rather, the plaintiff must simply prove that "all of the relevant aspects of [her] employment situation were nearly identical to those of [another employee's] employment situation." *Town, supra* at 699-700, citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). See also *Smith, supra* at 448. A determination regarding which aspects of an employment situation are relevant depends on the circumstances surrounding the alleged adverse employment action. See *Wilcoxon, supra* at 369; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 652-654; 513 NW2d 441 (1994).

In response to defendants' motion for summary disposition, plaintiff herein initially maintained that several male employees who purportedly committed acts similar to the incidents in question were suspended with pay and that the investigations concerning these employees were done by an outside agency, not internally. Following discovery, however, plaintiff ultimately presented proofs regarding only one other allegedly similarly situated male employee, a former undersheriff, who, plaintiff claims, was accused of sexual harassment of subordinate employees but allowed to retire with full benefits rather than be terminated.

⁴ Federal precedent, while not binding on this Court, is considered for its persuasive value when it addresses analogous issues. *DeFlaviis v Lord & Taylor Inc*, 223 Mich App 432, 437; 566 NW2d 661 (1997).

The record indicates that the undersheriff was, as plaintiff alleges, accused of sexual harassment by a subordinate employee. This claim was internally investigated and the undersheriff was allowed to retire, rather than have his employment terminated. However, plaintiff and the undersheriff were not similarly situated. Plaintiff was employed with defendant county for approximately six years and was not of retirement age. The undersheriff, on the other hand, had been employed for almost fourteen years and was over fifty-five years of age. He was a vested member of the Municipal Employees' Retirement System of Michigan (MERS); plaintiff was not and thus could not have been given the option to retire. Moreover, the undersheriff served in a different capacity than plaintiff. As undersheriff and second in command, he served at the sheriff's pleasure. Unlike plaintiff, he was not a member of a union and thus could not have availed himself of grievance procedures available to union members. Plaintiff, even if she had been given the option to resign, would have lost her option of grieving the termination.⁵

Further, we note that the undersheriff answered to the sheriff, who investigated and made the employment decision regarding the undersheriff. In the instant case, the record indicates that it was the undersheriff's successor who undertook the primary role of investigating the claims against plaintiff and recommending to defendant Hiltz that her employment be terminated.

Finally, and most significantly, the adverse employment action was ultimately the same. Following charges and ensuing internal investigations of sexual harassment, both plaintiff and the undersheriff had their employment with the county terminated, albeit by different avenues. The fact that the undersheriff was offered the option to retire can be logically attributed to the fact that he qualified for retirement; plaintiff did not.

In sum, the differing circumstances do not allow a feasible comparison between the male undersheriff and plaintiff for purposes of establishing a prima facie case under the burden-shifting test set forth in *McDonnell Douglas*. The record does not support the requisite element that plaintiff was treated differently than a similarly situated corrections officer.

Even assuming arguendo that plaintiff has established a prima facie case of sex discrimination, she has failed to raise a genuine issue of material fact regarding whether defendants' proffered reason for the termination was merely a pretext for discrimination. *Hazle, supra* at 465-466; *Lytle, supra* at 174. To survive summary disposition, "a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle, supra* at 176. See also *Hazle, supra* at 465.

In this case, defendants' proffered reason for plaintiff's termination was their determination that she sexually harassed subordinate male employees and abused her command position. Plaintiff relies on the same evidence she submitted to establish a prima facie case of sex discrimination in an attempt to show that defendants' stated reason was merely a pretext for discrimination. However, as previously noted, the evidence proffered by plaintiff with regard to

⁵ Plaintiff did in fact file a grievance and followed the process set forth in her union contract.

a purportedly comparable male employee who was not terminated in the same manner as a result of the same conduct does not raise a genuine factual dispute regarding underlying discriminatory motivation because the male undersheriff was not similarly situated.

In conclusion, plaintiff has neither presented direct evidence of discrimination nor demonstrated a prima facie case of sex discrimination pursuant to the *McDonnell Douglas* framework. Further, even were we to assume for sake of argument that a prima facie case has been established, plaintiff has not raised a genuine fact issue regarding whether defendants' proffered reason for the termination was merely a pretext for discrimination. We therefore conclude that the circuit court properly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra