STATE OF MICHIGAN

COURT OF APPEALS

ELYSE TUGENDER, as Personal Representative of the Estate of ADRIAN ZACK, Deceased,

Plaintiff,

and

MAUREEN HARTE and SHARON WILKINSON,

Plaintiffs-Appellants,

v

HENRY FORD HEALTH SYSTEM (HFHS), HENRY FORD ACCOUNTING DEPARTMENT, HENRY FORD MAPLEGROVE BUSINESS OFFICE, PATRICK IRWIN, MARY JEAN KOKOSKA, and LYNETTE TOTH,

Defendants-Appellees.

UNPUBLISHED
March 19, 2002

No. 225554
Oakland Circuit Court
LC No. 98-004703-CZ

Before: Hood, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs, Maureen Harte and Sharon Wilkinson, appeal as of right from the trial court's orders granting defendants' motions for summary disposition. We affirm.

Following a merger between Maplegrove Chemical Dependency Unit and Maple Park Psychiatry Unit, the job responsibilities of plaintiffs expanded to include computer appointment scheduling, admissions, insurance updates, transaction capture, and other computer functions. Plaintiffs and fellow employee Elizabeth Drinkwater had difficulty adapting to the new responsibilities. Consequently, efforts were made to improve performance through the use of a performance improvement plan (PIP). This written agreement identified expectations for improvement by establishing measurable criteria for a specific period. Although plaintiffs completed the PIP, defendant alleged that performance and attitude problems continued. Plaintiffs filed suit alleging age discrimination, retaliation, constructive discharge, tortious interference with contractual relationship, and intentional infliction of emotional distress. The

trial court granted defendants' motions for summary disposition of plaintiffs' second and third amended complaints.

Plaintiffs first argue that the trial court erred in dismissing their age discrimination claims when they presented direct evidence of discrimination. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. An affidavit consisting of mere conclusory allegations that are devoid of detail is insufficient to satisfy the nonmoving party's burden in opposing a motion for summary disposition. *Quinto, supra* at 371-372. The affidavit must be based on personal knowledge, stating, with particularity, the facts admissible as evidence that establish or deny the grounds stated in the motion. MCR 2.119(B)(1)(a), (b).

Intentional discrimination may be proved by direct and circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). When direct evidence is offered to prove discrimination, the shifting burden test does not apply. *Id*. at 540. In a case involving direct evidence, the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. *Harrison v Olde Financial Corp*, 225 Mich App 601, 612; 572 NW2d 679 (1997). Further, the plaintiff must establish evidence of the plaintiff's qualification or eligibility and direct proof that the discriminatory animus was causally related to the decisionmaker's action. *Id*. at 613. Once the plaintiff submits these proofs, the defendant may not avoid a trial by articulating a nondiscriminatory reason for its action. Rather, the presentation of direct evidence is generally sufficient to submit the plaintiff's case to the jury. *Id*. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was, at least, a motivating factor. *Id*.

Plaintiffs allege that direct evidence of discrimination is established by comments of defendant Lynette Toth. Specifically, it was alleged that defendant Toth was overheard stating, on the telephone, do not "send any older ones." Additional information regarding this telephone conversation, including the other party involved, was unknown. Plaintiffs contend that this stray remark presented direct evidence of discrimination.

To determine the admissibility of a stray remark based on a relevancy analysis, the court must determine: (1) whether the proffered comment was made by an agent of the employer involved in the decision to terminate; (2) whether the statements made related to the decision making process; (3) whether the statements were vague, ambiguous, or isolated remarks; and (4) whether the statements or comment were proximate in time to the termination. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 298-300; 624 NW2d 212 (2001). Once the proffered remark is determined to have some bearing on the employer's motivation, the probative value of the remark must be balanced in light of the potential or risk of unfair

prejudice. *Id*. at 302-303. An inflammatory remark may be extremely prejudicial to the defense where the jury might attribute a comment by an agent, unauthorized to make adverse employment decisions, to the employer. *Id*. at 303.

In light of these principles, we conclude that the stray remark by defendant Toth does not qualify as admissible evidence to oppose defendants' motion for summary disposition. *Maiden, supra*. The statements by defendant Toth were vague in that the identify of the party to whom she was speaking was unknown. Assuming the remark was age based, it was isolated and not proximate in time to the discharge. The probative value of the stray remark is far outweighed by the prejudicial effect, and therefore, the remark does not provide admissible evidence of direct discrimination. *Maiden, supra*; *Krohn, supra*.[1]

Plaintiffs next argue that the trial court erred in dismissing their retaliation claims. We disagree. The retaliation provision of the Civil Rights Act (CRA), MCL 37.2701(a) requires that the plaintiff prove: (1) he engaged in a protected activity; (2) this was known by the defendant; (3) the defendant took employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). To satisfy the causation requirement, the plaintiff must show that the participation in activity protected by the CRA was a "significant factor" in the employer's adverse employment action, not merely a causal link between the two. *Id*. Additionally, the shifting burden framework applies to retaliatory discharge actions filed pursuant to the CRA. *Roulston v Tendercare, Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). Therefore, the plaintiff bears the initial burden of establishing a prima facie case of retaliatory discharge. *Id.* If the plaintiff meets this burden, the defendant must then articulate a legitimate business reason for the discharge. *Id*. If the defendant meets this burden, plaintiff must demonstrate that the legitimate reason offered by the defendant was not the true reason, but a pretext for discharge. *Id*.

This case presents the rare factual scenario where plaintiffs filed the litigation while still employed by defendants. Consequently, plaintiffs contend that there were numerous instances when they engaged in protected activity, including complaints to human resources regarding defendant Toth, the filing of the lawsuit, and their testimony at depositions. Plaintiffs further contend that they suffered adverse employment action that included less favorable work schedules, the PIP agreements, meetings designed to harass and humiliate them, and ultimately

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[1] We note that plaintiffs have also presented the affidavits of co-workers at the facility that opine that defendant Toth was out to get the older workers and younger workers committed as many mistakes as the older workers. While the affiants assert that the affidavits are based on "personal knowledge," there is no foundation contained within the affidavits to support the assertion. Additionally, there is no delineation of the names of the younger workers, the amount of mistakes made, and the capacity of the affiant to be in a position render such an opinion. Accordingly, these affidavits do not serve as direct evidence of discrimination. *Maiden, supra*. Additionally, with respect to the discrimination claim, defendants contend that plaintiffs also allege theories based on the shifting burden test and hostile environment. However, the only theory alleged in the statement of questions presented is the direct evidence of discrimination theory. Consequently, we need not address any other theories. See MCR 7.212(C)(5); *Guardian Photo, Inc v Dep't of Treasury*, 243 Mich App 270, 281; 621 NW2d 233 (2000).

termination. Other than termination, the actions cited by plaintiffs do not qualify as adverse employment action, because they were not materially adverse. *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 597 NW2d 250 (1999). Furthermore, because of the numerous alleged exercises of protected action, plaintiff Wilkinson merely demonstrates an arguable causal link and cannot demonstrate that participation in protected activity played a significant factor in the adverse employment action of termination.[2] Accordingly, the trial court properly granted defendants' motion for summary disposition of the retaliation claims.

Plaintiffs next argue that the trial court erred in dismissing their claims of tortious interference with contractual relationship. We disagree. Plaintiffs failed to meet their heavy burden of establishing that defendant supervisors were acting outside the scope of their authority. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994).

Plaintiff Harte next argues that the trial court erred in dismissing her constructive discharge claim. We disagree. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation. *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151; 483 NW2d 652 (1992). Where reasonable minds could reach different conclusions regarding a claim of constructive discharge, the issue becomes a question of fact for the jury. Because the working conditions did not qualify as materially adverse, see e.g., *Wilcoxon, supra*, a question for the jury was not presented.[3]

Affirmed.

/s/ Harold Hood
/s/ Kathleen Jansen
/s/ Hilda R. Gage

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[2] With regard to plaintiff Harte, she provided a letter of resignation to defendant indicating that she was leaving because of a new employment opportunity. Nonetheless, plaintiff Harte alleges that she was terminated by defendant. Specifically, plaintiff Harte alleges that the working conditions caused her termination through constructive discharge. Irrespective of plaintiff Harte's underlying motivation for presenting the letter of resignation, plaintiff Harte cannot deny that the termination cannot constitute adverse employment action by defendants. Furthermore, plaintiff Harte has alleged a claim of constructive discharge.

[3] We also note that plaintiffs argue that the trial court erred in failing to strike affidavits by defendant Toth that referenced documentation that was not attached to the affidavits. This issue was not preserved for appeal because it was not *decided* by the trial court. *McKushick v Travelers Indemnity Co*, 246 Mich App 329, 341; 632 NW2d 525 (2001).