STATE OF MICHIGAN

COURT OF APPEALS

BARBARA JOHNSON-PRICE,

Plaintiff-Appellant,

v

ST. JOHN HOSPITAL & MEDICAL CENTER CORP, and LORITA WYTKA,

Defendants-Appellees.

UNPUBLISHED
December 20, 2002

No. 233522
Wayne Circuit Court
LC No. 96-648385-CL

Before: Cavanagh, P.J., and Jansen and Bandstra, JJ.

PER CURIAM.

In this action alleging age and race discrimination violations of the Michigan Civil Rights Act, MCL 37.2101 *et seq*., plaintiff appeals as of right from the trial court's orders granting defendants summary disposition and denying plaintiff's motion for reconsideration. We affirm.

Plaintiff, a fifty-seven-year-old African-American woman, began employment with defendant St. John Hospital & Medical Center Corporation in 1967. After plaintiff received a low performance evaluation and failed to successfully complete two work improvement plans, plaintiff's supervisor, defendant Lorita Wytka, terminated plaintiff's employment in 1996 and replaced plaintiff with a younger, Caucasian woman. The instant suit followed.

Because the trial court looked beyond the pleadings in granting summary disposition, we review the motion under MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim and is subject to review de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a trial court's grant of summary disposition under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id*.

In order to survive defendants' motion for summary disposition, plaintiff was required to first establish a prima facie case of age or race discrimination under the approach set forth in

McDonnell Douglas Corp v Green, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See generally *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001).[1] Under the *McDonnell Douglas* analysis, as applied in Michigan, a plaintiff may establish a prima facie case of discrimination by showing that (1) she was a member of the protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she suffered the adverse employment action under circumstances inferring discrimination. See *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). If the plaintiff is able to establish a prima facie case, discrimination is presumed. *Id*. at 173. The burden then shifts to the defendant to produce a nondiscriminatory reason for the action. *Id*. If the defendant is able to do this, "the presumption created by the *McDonnell Douglas* prima facie case drops away." *Hazle*, *supra* at 465. The plaintiff then has the burden to show that the defendant's nondiscriminatory reason is merely a pretext. *Lytle*, *supra* at 174.

There was no dispute regarding the first, second, and fourth prongs of the *McDonnell Douglas* test. Regarding the third prong, "a plaintiff is not required to provide evidence that [she] is at least as qualified as the successful candidate in order to establish a prima facie case under *McDonnell Douglas*." *Hazle*, *supra* at 470. Therefore, considering all evidence in plaintiff's favor, and giving plaintiff the benefit of any reasonable doubt, the trial court was correct in implicitly finding that plaintiff had satisfied the *McDonnell Douglas* test. As such, a presumption of discrimination arose and defendants were charged with providing a legitimate, nondiscriminatory reason for firing plaintiff.

Defendants contended plaintiff was terminated because of documented poor work performance, despite having been given eight months to improve. Thus, the burden rested on plaintiff to produce evidence that this reason was a pretext. In other words, plaintiff was required to show 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 . . . plaintiff." *Lytle*, *supra* at 176. To survive defendants' motion for summary disposition, plaintiff needed to create a genuine issue of material fact whether defendants' nondiscriminatory reasons for terminating her were their true reasons, or whether plaintiff's age or race were motivating factors. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 697; 568 NW2d 64 (1997).

The minimal evidence that plaintiff produced regarding her age discrimination claim, i.e., that Wytka referred to plaintiff as the "department historian," was insufficient. Wytka explained that plaintiff had worked in the department for twenty-nine years, which was far longer than any other staff members. Wytka's characterization of plaintiff could be as easily construed in a positive, rather than a negative fashion. Additionally, plaintiff failed to provide any connection between the comment and her termination. Plaintiff's poor evaluation and inability to perform either work improvement plan sufficiently established that defendants' purported reasons for firing plaintiff were factually based. Defendants' purported reasons for terminating plaintiff

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[1] In response to defendants' motion for summary disposition, plaintiff produced no direct evidence of age discrimination. The *McDonnell Douglas* burden-shifting analysis is appropriate in cases without direct evidence of discrimination. *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997).

were independently sufficient to justify the termination, and plaintiff did not create a genuine issue of fact regarding whether age was a motivating factor.

Plaintiff's most substantial piece of evidence regarding the racial discrimination claim was that Wytka had once told plaintiff that some staff members were intimidated by her, and that in doing so Wytka stated that she did not mean "the Nancys, the Emmas and Bonnies." Although the three referenced staff members are African-Americans, plaintiff provided no evidence that this statement was made in reference to ethnicity. Plaintiff conceded that there were at least five other African-American staff members in her department who were not referenced, and she was unable to articulate any reason to conclude that the comment was based on ethnicity, rather than personality. Plaintiff also argued that racial discrimination was implicit in the work improvement plan, based on the deposition testimony of plaintiff's expert. However, she was unable to specifically cite any evidence supporting her contention. We find that plaintiff's evidence was not sufficient to create a genuine issue of a material fact rebutting defendants' legitimate, nondiscriminatory reason for terminating plaintiff. The trial court correctly held that plaintiff failed to present a prima facie case of race discrimination.

In plaintiff's motion for reconsideration, and now on appeal, plaintiff contends that an additional affidavit established a prima facie case for racial discrimination. This Court reviews a trial court's decision on a motion for reconsideration for an abuse of discretion. *Charbeneau v Wayne Co General Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987). The disputed affidavit was procured twelve days after the trial court's order of summary disposition. The affiant was named on plaintiff's witness list more than a year before the trial court's decision. Plaintiff produced no evidence and made no argument that the affidavit was unavailable before the summary disposition motion was decided. This Court will find no abuse of discretion in the denial of a motion for reconsideration that rests on evidence that could have been presented the first time the issue was argued. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

We affirm.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Richard A. Bandstra