STATE OF MICHIGAN

COURT OF APPEALS

JONI LINDSEY and SUSAN ANGLIN,

Plaintiffs-Appellants,

v

OUTDOOR ADVENTURES, INC.,

Defendant-Appellee.

UNPUBLISHED
October 28, 2008

No. 278451
Genesee Circuit Court
LC No. 06-083321-CZ

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). The order was based on a finding that the evidence was not sufficient to establish a genuine issue of material fact regarding whether plaintiffs had been fired as a result of gender discrimination. For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. FACTS.

Terry Vonderhaar had previously worked with plaintiffs, most recently as their supervisor when he was the sales manager at Thousand Trails in Florida, a company that sold campground memberships. Ron Penix, defendant's general manager, hired Vonderhaar away from Thousand Trails to set up a sales office and lead a sales team at one of its resorts in Standish, Michigan.[1] Defendant sold memberships that enabled members to use its five different resort facilities throughout the state. Vonderhaar was told he could hire people and he recruited plaintiffs and five men as part of his sales force. The men hired were Jerry Layne, Kenrick Thomas, Larry Abshier, Brian Duford, and Lee Woodruff. Vonderhaar noted that plaintiff Anglin had awards for being the top sales person at Thousand Trails and plaintiff Lindsey also had done well at Thousand Trails.

[1] The Standish office was closed within weeks and all of defendant's employees worked out of the Davison office.

Defendant kept efficiency reports showing how its sales people in Davison were performing. The first report in which plaintiffs' names appeared was dated May 1, 2005. The efficiency is calculated by dividing the salesperson's volume (dollars in business generated, which may vary per sale depending on the membership sold) by the number of tours given to prospective buyers. Penix indicated that there was no official acceptable efficiency rating, but that the goal was 600, and he opined that a valid efficiency score would require 75 to 100 tours.

Plaintiff Lindsey indicated that sales the first month is not typical, as the salesperson is still learning about the product and the new salesperson is at the bottom of the "wheel," meaning they do not get as many tours as other salespeople. In their brief on appeal, plaintiffs assert that they generally "got at least one less opportunity each day to make a sale." Plaintiff Lindsey also claimed below that, unlike the male salespeople, the "closers" were not trying to close plaintiffs' sales. She explained that a closer learns from the salesperson a stated reason for not buying, and the closer works the buyer to try to overcome the resistance. She claimed that with her, the closer would often simply accept the buyer's reason and not work to close the deal. Plaintiff Anglin claimed the closers would let plaintiffs wait rather than coming to their tables to close the deal. Further, she indicated that sometimes they would close for friends out of order, causing her and her customer to wait longer.

Defendant contends that plaintiffs were fired because their numbers were down, there were too many salespeople and not enough tours, they had been in the back room making telephone calls about other jobs, and they had presented an ultimatum about leaving unless defendant paid their lot fee. However, the record before us reveals that Larry Abshier, whose numbers were consistently lower than plaintiffs' numbers, was not fired. Moreover, plaintiffs provided documents showing that from January through June, after they were fired, male employees falling below the $600 efficiency goal were not fired. Regarding the number of tours, Vonderhaar stated that "[w]e were backed up several days. We had tours." Plaintiff Lindsey claimed she was previously told she was doing a great job and that nothing was said about the number of tours being down. Vonderhaar said that the Sunday before plaintiff Anglin was fired, Penix told her she was doing a great job, and that she had five deals on the board that Friday.

Plaintiffs claimed that on the night they were fired, Vonderhaar told them it was because they were women and defendant did not like women on their sales line. Vonderhaar indicated that he told plaintiffs they were being fired, but that Penix had made the decision. Also, Vonderhaar confirmed that on the first sales day after the firing, Penix said women did not fit in and that they could "go back to normal." Furthermore, Vonderhaar said a lot of profanity was typically used at the end of sales meetings, which had been tempered while plaintiffs were there. As an example, he said that sales meetings ended with an attempt to pump everyone up by having everyone stick their hands together and say a word for the day; they resumed using words with sexual overtones after plaintiffs left. More bluntly, Vonderhaar said Penix had said he did not like women there because the employees liked to cuss and "cut up," and that Penix had said he did not think plaintiffs would work out to "begin with." Further, he said Penix stated: "[W]omen never work out here. We're just getting rid of them. . . . I'll give them some traveling expenses and we'll send them down the road."

The day after she was fired, plaintiff Lindsey's son, Jerry Layne, allegedly told her that Penix said, "Well, boys, we don't like girls in our house, and we don't have to worry about it, because they're gone now. I motivate you through sex. Now we can get back to it." Plaintiff

Anglin then called to say that Abshier had reported the same comment to her. Penix acknowledged telling the remaining salespersons that they could return to their old ways once plaintiffs were gone, explaining that they had been more aware of cleaning up; he also told them "if they wanted to tuck their pants in they wouldn't have to look over their shoulder."

The trial court concluded that the data about sales by all employees provided some, albeit unclear, circumstantial evidence of discrimination. The court also concluded that statements by Penix indicative of gender bias post-dated the actual firing and therefore were not shown to have influenced the decision. The court therefore held that the evidence did not give rise to an inference that discrimination was a factor in the firing, and that analysis would therefore have to proceed under *McDonell Douglas*.[2] It noted that plaintiffs were members of a protected class, that the firing was an adverse decision, and that plaintiffs were qualified. Thus, the court determined that the case turned on whether the stated reason for dismissal—poor performance—was pretextual. The court referred to the sales data and noted that plaintiffs had the lowest sales. Accordingly, the court concluded that there was no evidence to show that the reason was pretextual.

II. ANALYSIS.

We review a trial court's decision on a motion for summary disposition de novo, limited to the evidence presented to the trial court at the time the motion was decided. *Péna v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). Under MCR 2.116(C)(10), the pleadings, affidavits, depositions, admissions and other documentary evidence are construed in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact and whether the moving party is entitled to judgment as a matter of law.

Neither party disputes that plaintiffs are members of a protected class and that they suffered an adverse employment action. Defendant argues that evidence of Penix's predisposition to not liking women on his sales staff did not rise to a level of establishing discrimination against them, and that there was no direct evidence to show that his attitude colored his decision to terminate plaintiffs for poor performance. Defendant asserts that these comments at best would give rise to an inference of discrimination, and that direct evidence does not exist when an inference is called for.[3] We disagree. A plaintiff may prove unlawful discrimination through use of direct evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). The Michigan Supreme Court has adopted the definition of direct evidence utilized by the United States Court of Appeals for the Sixth Circuit, which is "'evidence which, if

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[2] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[3] Defendant relies on *Cushman-Lagerstrom v Citizens Ins Co*, 72 Fed Appx 322 (CA 6, 2003), for the proposition that direct evidence calls for no inferences. The Sixth Circuit did not recommend this case for full text publication. In any event, the offensive comments in Cushman-*Lagerstrom* did not directly relate to ability to do the job or reflect a belief, like that of Penix, that, even if capable, women were not desirable on his sales force.

believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's action.'" *Sniecinski v Blue Cross Blue Shield of Michigan*, 469 Mich 124, 132-133; 666 NW2d 186 (2003), quoting *Hazle, supra* at 462, in turn quoting *Jacklyn v Schering Plough Health Care Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). If a plaintiff produces direct evidence of discrimination in the employment decision, there is no need to utilize the burden shifting methods of proof utilized in discrimination cases involving indirect evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Instead, the direct evidence satisfies plaintiff's proofs, and where the defendant produces evidence that a legitimate reason actually motivated its decision, it is for the fact-finder to decide whether it was the legitimate, or statutorily prohibited reason, that motivated the adverse employment action. *Downey v Charlevoix Co Bd of Comm'rs*, 227 Mich App 621, 633-634; 576 NW2d 712 (1998).

We conclude that direct evidence of discrimination in the employment decision was provided through the deposition testimony of Terry Vonderhaar and the plaintiffs. Those same witnesses also provided evidence of a predisposition on the part of Ron Penix to discriminate against females. As to the predisposition, Vonderhaar testified that Penix, who was at least a decision maker in this case, stated repeatedly that he did not like having women on his work force. That testimony certainly sets out Penix's predisposition against having women working for defendant.

Direct evidence of discrimination was also provided by Vonderhaar's testimony about the phone call he had with Penix when Penix told him that plaintiffs were being fired. According to Vonderhaar, Penix told him that "women never work out here. We're just getting rid of them." This same statement was then repeated to plaintiffs when they were informed of their termination. Additionally, deposition testimony was submitted showing that on the day after plaintiffs were terminated, Penix indicated to the remaining sales members (all of whom were male), "we can go back to normal" and that "women never really fit in here," referencing plaintiffs in particular. These statements by a decision maker regarding the decision to terminate plaintiffs' employment are direct evidence of discrimination. *Sniecinski, supra*, *Downey, supra*. See, also, *Graham v Ford*, 237 Mich App 670, 676-677; 604 NW2d 713 (1999).

Although defendant has also articulated a legitimate reason for their termination, i.e., their alleged inability to meet the sales quotas, plaintiffs have submitted evidence putting into doubt the validity of this evidence in that at least one other male was not terminated for essentially the same or worse sales record. More importantly, it is a credibility contest for the fact-finder to decide whether Penix's decision to terminate their employment was motivated by plaintiffs' gender or their sales record. *Downey, supra* at 634. Accordingly, it is for a jury to determine whether or not plaintiffs were subjected to intentional discrimination when their employment was terminated.

Defendant also argues that because Penix was responsible for both hiring and firing, the same actor inference applies, giving rise to a strong presumption that discrimination was not a determining factor. We disagree. The same actor inference does not justify summary disposition

for defendant. In *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997), quoting *Proud v Stone*, 945 F2d 796, 797 (CA 4, 1991), the Court stated:

> "[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." [Alteration by *Town* Court.]

Our Supreme Court's decision in *Town* is based on the presumption that discriminatory animus is not likely to arise in a short time. However, the facts here are different from those presented in *Town.* Unlike the facts in *Town*, the record before us reveals a question of fact regarding who hired plaintiffs. Although Penix apparently had actual authority to hire, it appears that Vonderhaar was charged with assembling his own sales staff and did the de facto hiring of plaintiffs. Even if we were not persuaded that *Town* is inapplicable given the factual dispute presented in this case, we would still find *Town* inapplicable because *Town* indicates that the same actor inference can be overcome with evidence of pretext, *Id*. at 701. Accordingly, for the reasons set forth in this opinion, we conclude that summary disposition was erroneously granted.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood