STATE OF MICHIGAN

COURT OF APPEALS

KIM HOSENDOVE,

Plaintiff-Appellant,

v

AT&T, f/k/a SBC, TERRANCE CLAYBORNE, JEFF MAGGI, CINTHIA WILLIAMS, GREGORY GAWRON, TRACEY LOVE-JONES, and HEIDI LESSER,

Defendants-Appellees.

UNPUBLISHED
October 22, 2009

No. 287262
Oakland Circuit Court
LC No. 2007-082692-CD

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order that granted summary disposition to defendant AT&T (hereinafter "defendant") pursuant to MCR 2.116(C)(10) in this action alleging racial discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq*. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Proof of discriminatory treatment in violation of the Civil Rights Act may be established by direct or indirect evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132-133; 666 NW2d 186 (2003). Where, as here, there is no direct evidence of impermissible bias, to avoid summary disposition, a plaintiff must proceed through the burden-shifting steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001). To establish a rebuttable prima facie case of discrimination through disparate treatment, a plaintiff must show that (1) she is a member of a protected class, (2) she was subject to an adverse employment action, (3) she was qualified for the position, and (4) she suffered the adverse employment action under circumstances that give rise to an inference of unlawful discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 370; 597 NW2d 250 (1999). The fourth element is satisfied when the plaintiff was treated differently than a member of a different

race for the same or similar conduct. *Id*. To show that she and the other person were similarly situated, the plaintiff must prove that all relevant aspects of her employment situation were nearly identical to those of the differently treated person. *Id*. at 369-370; *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 449; 622 NW2d 337 (2000). "Plaintiff bears the burden of showing that the other employees were similarly situated. The employer does not, in the first instance, need to offer proof of dissimiliarity." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 178 n 28; 579 NW2d 906 (1998) (Weaver, J.) (citation omitted). In some decisions, whether the plaintiff has established similarity between herself and another employee is considered as part of the evaluation of whether the plaintiff established a prima facie case. See, e.g., *Smith, supra* at 449-450. In other decisions, the analysis is done in the context of evaluating whether the plaintiff created a question of fact that the defendant's stated reasons were a pretext for discrimination. See, e.g., *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (Brickley, J.).

In the present case, plaintiff failed to show that she and employee Barbara Steffes were similarly situated. Plaintiff presented several reports that showed some of the monthly sales results for herself and Steffes in 2003 and the beginning of 2004. However, according to the documents that the parties presented to the trial court, Steffes took an approved leave of absence from March 24 through August 11, 2003, which skews the comparison of their sales figures. Although plaintiff asserted that defendant treated plaintiff less favorably by placing her on a Performance Improvement Plan sooner than Steffes, plaintiff did not present evidence establishing whether Steffes was on a Performance Improvement Plan in 2003. The only reference to action taken with Steffes is in defendant's January 3, 2005, letter to the Equal Employment Opportunity Commission: "Respondent is unaware at this time[] if Ms. Steffes was unsatisfactory or on a PIP during this period of time." In addition, plaintiff did not present evidence concerning whether she and Steffes were similarly situated in aspects other than sales. A director of defendant averred that, as of March 26, 2004, plaintiff was "not attempting to fulfill the activity requirements of the Performance Plan." The record shows that Steffes was placed on a Performance Plan for "unsatisfactory performance" on March 18, 2004; the record does not show what the Plan required and whether, like plaintiff, Steffes also failed to fulfill its requirements. In short, plaintiff did not develop the record to show that all the relevant aspects of her employment situation were nearly identical to Steffes to support her claim that there was disparate treatment creating an inference of unlawful discrimination.

Even if this Court were to conclude that plaintiff created a question of fact regarding a prima facie case of discrimination, defendant articulated a legitimate nondiscriminatory reason for plaintiff's termination, specifically her poor performance after having been placed on a Performance Improvement Plan, and supported the assertion with evidence. *Hazle, supra*. Therefore, to survive summary disposition under those circumstances, plaintiff was required to "demonstrate that the evidence, when construed in plaintiff's favor, is '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.' " *Id.* at 465, quoting *Lytle, supra* at 176. On appeal, plaintiff asserts that a sale on which she had been working closed after her termination and the credit was given to a white female. This argument was not raised below, and there is no evidentiary support for plaintiff's factual assertions regarding the sale. Her bald assertion on appeal is inadequate to create a question of fact. Furthermore, the credit of a sale to an employee

of another race would be inadequate for a rational trier of fact to conclude that discrimination was a motivating factor for plaintiff's termination.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio