STATE OF MICHIGAN

COURT OF APPEALS

STEPHANIE FORD, Plaintiff-Appellee,	UNPUBLISHED October 21, 2010
v	No. 293040 Wayne Circuit Court
CITY OF DEARBORN, Defendant-Appellant.	LC No. 08-117448-CD

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

In this civil rights action brought under the Elliot Larsen Civil Rights Act (ELCRA), 37.2101 *et seq*, defendant, City of Dearborn, appeals by leave granted[1] the trial court's opinion and order denying its motion for summary disposition. The trial court ruled that plaintiff had met her burden of presenting a prima facie case in support of her claims of disparate treatment based on race, hostile work environment, and retaliation; and, that questions of fact precluded summary disposition. We reverse.

I. BASIC FACTS

Plaintiff is an African American woman who was first hired by defendant in 1993 as a library page. At the time of the events that gave rise to this litigation, plaintiff was employed as a department associate in defendant's human resources office. Plaintiff was hired internally for this position in July 2005, after defendant had eliminated defendant's previous position. Her duties as department associate were clerical and included: maintaining employees' time records and the department's budgetary control records, as well as other various records, filing correspondence, composing departmental correspondence, answering telephone and in-person inquiries, receiving employee applications, and providing new hires with paperwork. Plaintiff held this position for approximately 13 months before defendant fired her for deceptive behavior.

A. EVENTS LEADING TO PLAINTIFF'S TERMINATION

[1] *Ford v City of Dearborn*, unpublished order per curiam of the Court of Appeals, entered September 17, 2009 (Docket No. 293040).

On July 14, 2005, Celina Lawlor, plaintiff's immediate supervisor, allegedly handed a co-worker, Donna Boyd, a card and stated that she had to get the card for Boyd "when [she] saw how racial it was." Plaintiff was working nearby and overheard the conversation. Plaintiff complained of this conduct to Valerie Murphy-Goodrich, the director of human resources. Murphy-Goodrich investigated the incident by speaking to everyone plaintiff identified as involved. Lawlor and Boyd denied that the conversation occurred, as did another employee, Dale Swanson. After Murphy-Goodrich concluded her investigation in October 2005, plaintiff was asked to attend a counseling session with defendant's employee assistance counselor.

Plaintiff was allegedly subjected to other conduct at work that she also found offensive. For example, it was common for Murphy-Goodrich and Lawlor to allegedly glare at her from a short distance. Plaintiff alleged that her requests for training were denied, while other front-counter staff received human resources training on a Saturday. Plaintiff also indicated that one of her co-workers was late more than 40 times and that other staff falsified their timecards, indicating that they had only taken a half hour lunch when they had, in fact, taken an hour and a half lunch.

In May of 2006, Murphy-Goodrich received complaints from Lawlor regarding plaintiff's job performance. Lawlor indicated that plaintiff had been uncooperative and was not timely fulfilling her job duties. Plaintiff was provided with a memo regarding this complaint on May 26, 2006. Nonetheless, Lawlor submitted similar complaints to Murphy-Goodrich in July 2006. Plaintiff's co-worker also submitted a complaint in July 2006, indicating that she had seen plaintiff stop the copy machine and then denied doing so when the co-worker had confronted her. Lawlor submitted another memo to Murphy-Goodrich in August 2006, informing Murphy-Goodrich that plaintiff was not timely completing her tasks, or not completing them at all, that plaintiff had failed to prioritize her duties properly, and that other co-workers had "pick[ed] up [the] slack." Plaintiff was informed that she would be suspended for a day, on August 7, 2006, on the basis of her poor performance.

The incident that led to plaintiff's termination occurred the next day, August 8, 2006, when plaintiff gave a dental enrollment form to a newly hired employee, Robert Cockrum. Two days later, on August 10, 2006, defendant issued a directive that dental forms not be distributed because the forms were incorrect. In the interim, on August 17, 2006, plaintiff filed a grievance with the Equal Employment Opportunity Commission (EEOC) alleging racial discrimination; plaintiff informed Murphy-Goodrich that she had filed the grievance. That same day Murphy-Goodrich allegedly stood in front of plaintiff's desk and glared at plaintiff.

On September 1, 2006, Lawlor sent an email to all front desk clerical employees; it stated, "Who waited on Mr. Cockrum when he came in to pick up his new hire paperwork? If you did, please let me know. Also, if you didn't please let me know. Thanks." Apparently, plaintiff indicated to Lawlor that she had waited on Cockrum and also that she had removed all dental form paperwork from new hire packets on August 10th. When Lawlor further asked plaintiff, in an email, "My question then is why did Rob Cockrum have a dental from that he brought to Jill?[,]" plaintiff simply responded, without any further explanation, "I have not issued any dental forms." Allegedly, a meeting occurred on September 11, 2006, during which plaintiff was given further chance to explain the situation with the dental form. Defendant concluded that plaintiff had lied and plaintiff's employment was terminated on September 12, 2006, pursuant to defendant's civil service rules.

B. LITIGATION

Subsequently, in July 2008, plaintiff filed a three count complaint, alleging (1) that defendant subjected her to disparate treatment based on her race; (2) that she was subjected to a racially hostile work environment; and (3) that she was fired in retaliation for filing a grievance with the EEOC, all in violation of the ELCRA, MCL 37.2101 *et seq*.

During plaintiff's deposition, plaintiff admitted that no other comments of a racial nature were made during her employment after the card incident. She also made conflicting statements in regard to whether she had lied to defendant regarding the dental form. The following colloquy occurred:

> *Q*. Why don't you tell me what happened with regard to [the Cockrum dental form issue]?
>
> *A*. There was a change in policy, August 10th the memo went out, and it stated that Payroll would be issuing dental forms and not Human Resources . . . .
>
> And I issued Rob Cockrum a dental form on August the 8th before the change in policy, but yet I was still wrongfully fired.
>
> *Q*. Did you ever deny giving Cockrum that form?
>
> *A*. The – no. . . . I thought they were referring to after the change in policy.
>
> *Q*. Does that mean you did or didn't deny giving him the form?
>
> *A*. I did not deny, as it's-- . . . I did not lie or deny.

Defendant's counsel revisited the issue later in the deposition:

> *Q*. Do you remember whether or not you gave it to him?
>
> *A*. Actually, I – I did not issue any dental forms after August 10th, which I assume that's what they were referring to. Just like they did.
>
> *Q*. Didn't Miss Murphy-Goodrich ask you specifically about Robert Cockrum and whether you gave him the form?
>
> *A*. Yes.
>
> *Q*. And you told her you hadn't.
>
> *A*. Yes.

* * *

Q. You gave him the form but you told her you didn't. And I understand you've got your reason why. But I am right in saying you gave Robert Cockrum the form, but you told her you didn't?

A. Right.

* * *

Q. When did you first realize that you had given him the form before the change in policy?

A. It was – I don't recall.

Q. Was it after you were terminated?

A. Yes.

Plaintiff was also asked for what reasons she believed she was terminated based on race. She indicated that she was scrutinized at work and subjected to double standards. As evidence of this, plaintiff testified that her computer was searched for personal use, while her co-workers' computers were not. According to plaintiff, computer searches were mentioned in a staff meeting and she suspected that Lawlor had searched her computer because Lawlor was sitting in plaintiff's chair when plaintiff returned from lunch. Allegedly, plaintiff had overheard a conversation between Lawlor, Murphy-Goodrich, and another employee regarding computer searches. She admitted she had no documentary proof that her computer had been searched. Plaintiff also asserted that Beth Kramer, a part time employee was tardy over 40 times, but admitted that she did not know Kramer's schedule.

In March 2009, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Defendant argued that plaintiff had failed to establish a prima facie case of disparate treatment based on racial discrimination and, even if plaintiff had met her burden, defendant's reason for firing defendant was legitimate and plaintiff could not show defendant's reason was pretextual. For these same reasons, defendant contended that plaintiff could not sustain her retaliation claim. Defendant also asserted that plaintiff was not subjected to sufficiently severe or pervasive conduct to sustain hostile work environment claim. In response, plaintiff argued that she had established a prima facie case of disparate treatment based on racial discrimination because she is African American, she was fired, she was qualified for the job, and her replacement was a white female. Plaintiff asserted that she had not lied to defendant regarding Cockrum's dental form and that defendant's basis for firing her was therefore "necessarily pretextual." She argued that her retaliation claim was substantiated because of the close temporal proximity between her termination and the date she filed her grievance. The trial court ruled in plaintiff's favor and this appeal followed.

II. STANDARD OF REVIEW

Defendant argues that the trial court erred by denying its motion for summary disposition. We review a trial court's decision on a motion for summary disposition de novo. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 192; 729 NW2d 898 (2006). Although defendant

moved for dismissal on the basis of both MCR 2.116(C)(8) and (C)(10), the trial court did not specify which subrule it was denying defendant's motion under. However, because the trial court considered evidence outside the pleadings, we will treat the trial court's denial of the motion as based on the existence of a material factual dispute. A motion under MCR 2.116(C)(10) is properly granted if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Morris Pumps*, 273 Mich App at 192. We must view all the admissible evidence, including depositions, affidavits, interrogatories and other documentary evidence, in a light most favorable to the non-moving party. *Lee v Detroit Med Ctr*, 285 Mich App 51, 59; 775 NW2d 326 (2009). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 713; 706 NW2d 426 (2005) (citation and quotation marks omitted).

III. DISPARATE TREATMENT

Defendant first contends that no genuine issue of material fact exists that defendant's decision to terminate plaintiff's employment was not motivated by racial discrimination. Specifically, defendant asserts that plaintiff has not established a prima facie case of racial discrimination and, even assuming that plaintiff had, plaintiff has failed to show that defendant's reason for firing plaintiff was pretextual, rather than based on a legitimate purpose. We agree.

The ELCRA prohibits an employer from discharging an individual from its employment because of the individual's race. MCL 37.2202(1)(a). A plaintiff may show that his or her discharge was based on racial discrimination through either direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 464 NW2d 456 (2001). When a plaintiff has no direct evidence of such discrimination, as is the case here, the plaintiff must establish "[']a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.'" *Id*. (citation omitted). "To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) [her termination] occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski v BCBSM*, 469 Mich 124, 134; 666 NW2d 186 (2003). Further,

> [o]nce a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. [*Sniecinski*, 469 Mich at 134.]

We agree with defendant that plaintiff has failed to establish a prima facie case of race discrimination and her concomitant burden of showing that a genuine issue of material fact exists to avoid summary disposition. Certainly there is no question that plaintiff belongs to a protected class, that plaintiff suffered an adverse employment action when defendant terminated her

employment, and that defendant considered plaintiff to be qualified for the position when plaintiff was hired.[2] However, plaintiff has failed to produce prima facie evidence of the fourth element, i.e., that her termination occurred under circumstances giving rise to an inference of unlawful discrimination. The specific circumstances of a plaintiff's termination may give rise to this inference, as may proof that "the plaintiff was treated differently than persons of a different class for the same or similar conduct." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999) (citation and quotation marks omitted). As to the latter, a plaintiff is required to show that she and a coworker "were similarly situated, i.e., 'all of the relevant aspects' of [the plaintiff's] employment situation were 'nearly identical' to those of [a coworker's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997).

Here, no inference of discrimination can be drawn from the circumstances of plaintiff's termination. Ten months into her employment with defendant, Murphy-Goodrich began receiving complaints of plaintiff's performance on the job, including: reports of dishonest conduct, failure to timely complete tasks or complete them at all, unprofessional demeanor and attitude toward colleagues, and failure to properly prioritize her duties. Plaintiff was put on notice of her poor performance on May 26, 2006, and when she failed to improve, she was given another memo outlining her performance problems on August 7, 2006, and she was suspended, without pay, for that day. When she returned to work, she lied to Lawlor regarding whether she provided a new hire with a dental form and her employment was terminated, after further investigation, on September 12, 2006. Neither the fact that plaintiff's replacement was a Caucasian female, nor the fact that a racially charged comment, which was not directed at plaintiff, may have occurred more than a year before plaintiff's termination, is enough to create an inference of discrimination.

Moreover, plaintiff has presented no proof that she was treated differently from a similarly situated person of a different class for the same or similar conduct. Plaintiff alleged that her coworker, a part-time department associate, was late to work over 40 times but was never reprimanded. However, plaintiff admitted that she was not aware of the employee's exact schedule and provided no documentary proof in support of her allegation. The same can be said of plaintiff's allegation that her computer was the only computer searched; she provided no documentary proof of this alleged fact and merely relied on her assumption that her computer had been searched based on a conversation she overheard and the fact that Lawlor was sitting in her chair. Further, plaintiff failed to submit any documentary evidence showing that similarly situated employees were disciplined differently for the same type of misconduct, i.e., lying; rather, records submitted by defendant show that numerous city employees, of various races, had been terminated for deceptive behavior. In short, plaintiff's subjective speculations are inadequate proof that her termination occurred under circumstances giving rise to an inference of

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[2] Defendant argues in its brief on appeal that plaintiff was not qualified for the position due to her poor job performance after she was hired. While this position suggests that reasonable minds could differ as to whether plaintiff was qualified, the fact question created is insufficient to prevent summary disposition because, as discussed *infra*, plaintiff has otherwise failed to meet her burden under the fourth element of the burden shifting test.

unlawful discrimination. Plaintiff has failed to produce evidence from which a reasonable jury, even if unaware of the exact basis for plaintiff's termination, could infer that racial animus motivated defendant's decision to terminate her employment.[3] Thus, plaintiff has failed to establish a prima facie case that her termination was motivated by discrimination.

We further note that, even assuming plaintiff had met her burden, she nonetheless failed to rebut defendant's legitimate, nondiscriminatory reason for terminating her. Defendant terminated plaintiff's employment because she lied to Lawlor. On appeal, plaintiff attempts to characterize the incident as a misunderstanding; however, plaintiff clearly admits that she did, in fact, lie to defendant. During her deposition, plaintiff first demurred when defense counsel suggested that she had lied to defendant, but plaintiff later clarified that she did tell her supervisor that she had not given the dental form to Cockrum when she had in fact done so. Thus, there is no dispute on the record that plaintiff lied to defendant; it is immaterial whether the lie was a result of a misunderstanding. Plaintiff offers no documentary evidence or argument why this reason for termination is pretextual, other than her continued assertion that because she did not lie the reason for termination is necessarily a pretext. This argument is unavailing because it is unsupported by the record.

Accordingly, we conclude that the trial court erred by denying defendant's motion for summary disposition with regard to plaintiff's claim of disparate treatment based on racial discrimination. Plaintiff failed to meet her evidentiary burden of establishing a prima facie case. No reasonable jury could infer, based on the record before this Court, that plaintiff's termination was racially motivated.

IV. HOSTILE WORK ENVIRONMENT

Defendant next asserts that plaintiff's hostile work environment claim should have been dismissed because the complained of conduct, while inconsiderate, was not sufficiently severe or pervasive as to substantially interfere with plaintiff's employment. We agree.

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[3] We note that plaintiff urges this Court to disregard evidence of her employment history because defendant terminated her solely on the basis of plaintiff's lie. It follows, according to plaintiff, that evidence related to her employment history should not be considered, only the immediate circumstances surrounding her termination. However, plaintiff cites no authority for this proposition and the opposite appears to be the case given that plaintiff must establish, as part of her prima facie case, that her termination occurred *under circumstances* giving rise to an inference of unlawful discrimination. Consideration of these circumstances necessarily involves her relevant employment history.

Further, plaintiff also argues that several of defendant's exhibits relating to her early employment at the city's library are inadmissible under § 2 of the Bullard-Plawecki Employee Right to Know Act, MCL 423.502, because they were not part of her personnel record. However, it is not necessary for us to consider the propriety of this argument, because those documents are irrelevant to plaintiff's employment (seven years later) as a department associate in defendant's human resources department and have no bearing on her present claims.

To establish a prima facie case of hostile work environment, a plaintiff must prove:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Downey v Charlevoix Co Bd of Co Road Comm*, 227 Mich App 621, 629; 576 NW2d 712 (1998).]

Whether the unwelcome conduct created a hostile work environment under the fourth element of the test is determined by "whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." *Quinto v Cross & Peters Co*, 451 Mich 358, 369; 547 NW2d 314 (1996) (citation omitted). The conduct must be sufficiently "severe or pervasive," *id*., such that by permitting the conduct or communications creating the hostile environment, the employer effectively makes the plaintiff's ability to endure the hostile environment a term or condition of his or her employment, *Radtke v Everett*, 442 Mich 368, 385; 501 NW2d 155 (1993).

Plaintiff has not met her burden under the fourth element of this test. The only evidence plaintiff presented in support of her hostile work environment claim was Lawlor's statement to another coworker, "I just had to buy this card when I saw how racial it was." Plaintiff was close-by when Lawlor allegedly made this comment, but the comment was not directed at plaintiff and plaintiff's own deposition testimony does not suggest that Lawlor intended this comment to interfere with plaintiff's employment or to create an offensive work environment. When plaintiff reported the incident to Murphy-Goodrich, Lawlor and other co-workers denied that this exchange happened and denied that such a card existed. But, even assuming the exchanged did occur, no reasonable person could conclude that this isolated comment, while inconsiderate and in bad taste, is so severe that plaintiff's work environment was infused with hostility toward African-Americans. Thus, plaintiff has not shown that she was subjected to a hostile work environment and the trial court erred when it denied defendant's motion for summary disposition on this claim.

VI. RETALIATION

Lastly, defendant contends that because it had a legitimate business reason to terminate plaintiff's employment, that the trial court erred by denying its motion to dismiss plaintiff's retaliation claim. We agree.

To establish a prima facie claim of retaliation under the ELCRA, a plaintiff must show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005). "A causal connection can be established through circumstantial evidence, such as close temporal proximity between the protected activity and adverse actions, as long as the evidence would enable a

reasonable fact-finder to infer that an action had a discriminatory or retaliatory basis." *Rymal v Baergen*, 262 Mich App 274, 303; 686 NW2d 241 (2004). However, "[t]o establish a causal connection, a plaintiff must demonstrate that his participation in the protected activity was a 'significant factor' in the employer's adverse employment action, not merely that there was a causal link between the two events." *Aho v Mich Dep't of Corr*, 263 Mich App 281, 289; 688 NW2d 104 (2004). If a plaintiff meets this burden, then the defendant may rebut it by articulating a legitimate business reason for the discharge. *Id*. The burden then shifts back to plaintiff to prove that the reason offered is not the true reason for the adverse action. *Id*.

Here, the evidence is insufficient for a reasonable juror to conclude that a causal connection existed between plaintiff's act of filing the grievance and her termination. Certainly plaintiff engaged in a protected activity, filing the grievance with the EEOC, which she reported to her employer on August 17, 2006. And, a short time later, plaintiff's employment was terminated on September 12, 2006. This temporal proximity alone, however, is not prima facie proof that would allow a juror to conclude that plaintiff's participation in the protected activity was a "significant factor" in defendant's decision to terminate plaintiff's employment. Plaintiff presents no other evidence that her termination was retaliatory. However, even assuming that the temporal proximity is enough to establish a question of fact whether her termination was causally related to the protected activity, plaintiff, as we have already decided, cannot show that defendant's reason for firing her was pretextual. Thus, because defendant presented proof of a legitimate nondiscriminatory reason for firing plaintiff, her retaliation claim fails.

The trial court erred by denying defendant's motion for summary disposition. Plaintiff failed to meet her burden of establishing a prima facie case as to each of her claims under the ELCRA and defendant had a legitimate nondiscriminatory, and non-retaliatory, reason for terminating plaintiff's employment. Accordingly, the trial court, on remand, must enter an order in defendant's favor dismissing plaintiff's claims with prejudice.

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

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio