STATE OF MICHIGAN

COURT OF APPEALS

DIANNE HARRIS,

Plaintiff-Appellant,

v

MICHAEL HUTCHESON, D.D.S., PC, also known as MICHAEL B. HUTCHESON, D.D.S., PC, and MICHAEL B. HUTCHESON,

Defendants-Appellees.

UNPUBLISHED
January 18, 2018

No. 335304
Ingham Circuit Court
LC No. 15-000633-CD

Before: O'CONNELL, P.J., and HOEKSTRA and SWARTZLE, JJ.

PER CURIAM.

Plaintiff filed the current lawsuit against defendants, her former employers, alleging discrimination under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2201 *et seq.*, negligence, intentional infliction of emotional distress, and wrongful termination. The trial court granted summary disposition to defendants on all counts under MCR 2.116(C)(10). Plaintiff now appeals as of right. Because the trial court did not err by granting defendants' motion for summary disposition, we affirm.

Defendant Michael Hutcheson is a dentist and sole owner of Michael Hutcheson, D.D.S., PC, also known as Michael B. Hutcheson, D.D.S., PC.[1] Plaintiff is a dental hygienist, who was employed by defendants from 1991 until her termination in August of 2013. The evidence indicates that, for the entire time she worked for Hutcheson, plaintiff was overweight. When she was hired, plaintiff, who is 5 feet 5 inches tall, weighed approximately 230 pounds. At the time of her termination, she weighed approximately 350 pounds and she was the heaviest of Hutcheson's four dental hygienists. At his deposition, Hutcheson acknowledged that plaintiff's "performance as an employee was always good." At her deposition, plaintiff maintained that Hutcheson was in the process of preparing to sell his practice and that, "to attain the most value" from the sale, Hutcheson fired plaintiff because his staff needed "to look good."

[1] In this opinion, defendant Michael Hutcheson will be referred to individually as "Hutcheson," while defendants will be referred to collectively as "defendants."

According to plaintiff, Hutcheson disliked overweight people, particularly overweight women. Plaintiff maintains that, over the course of her 22 years of employment, Hutcheson "always made comments" about weight and appearance. For instance, he discussed diet, espousing a belief in "calories in, calories out" as a means of weight loss and he also advised plaintiff to eat nothing but fruit before noon if she wanted to lose weight. Alternatively, Hutcheson suggested that plaintiff consider gastric bypass surgery. He also commented on plaintiff's appearance, noting that she was "waddling down the hall" because her weight was affecting her legs and observing that, when she had a tan, she had "stripes" around her neck due to the weight in her neck. Although he did not actually mention weight, plaintiff also inferred criticism of her weight when Hutcheson told her that he was "surprised" that she worked out as an employee and when he wrote in her 50th birthday card something to the effect that he "[t]hought [she'd] never make it." More generally, Hutcheson purportedly told a patient that "most of his staff" was "overweight." At one point, in December of 2012, without a specific reference to weight, Hutcheson told plaintiff that he had "big changes coming next year" and he urged her to "get healthy and stay healthy." According to plaintiff, Hutcheson also arranged for work-related office trips to Las Vegas in which plaintiff could not participate because, although she was invited and indeed encouraged to attend, she was concerned about the walking required in Las Vegas. At that time, Hutcheson offended plaintiff by suggesting that she use a scooter. Plaintiff contends that, in contrast to his remarks about overweight individuals, he favored thin women insofar as he "flaunt[ed] over" thin women, evaluated women's appearances based on their weight, and encouraged thin female members of his staff to engage in sexual behavior, such as exposing themselves to him in a limousine in exchange for money.

Notably, in October of 2012, Laura Dyras, D.D.S., began working with Hutcheson as a dentist at his practice. By all accounts, Dyras and plaintiff had disagreements regarding patient care. In particular, plaintiff acknowledged that she and Dyras had some difficulties. Plaintiff asserted that Dyras was "rude" to her in front of patients. Plaintiff also indicated that, outside the presence of any patients, Dyras stated that plaintiff could give her "opinion" when Dyras first came into see a patient, but after that plaintiff was to "shut up" because it was Dyras's responsibility to make decisions and it was Dyras's "butt on the line." Dyras confirmed that there had been discord between herself and plaintiff. According to Dyras, plaintiff questioned her diagnoses of patients and did so in front of patients. Dyras initially reported the matter to Hutcheson, who told Dyras to resolve the problem with plaintiff. However, when the problem continued, in August of 2013, Dyras again spoke to Hutcheson and she told him that, if plaintiff were her employee, she would terminate plaintiff for insubordination. It was following this meeting with Dyras that Hutcheson terminated plaintiff, informing her that she was "no longer a good fit" for the practice. Dyras later purchased the dental practice from Hutcheson.

Plaintiff filed the current lawsuit in August of 2015. Plaintiff alleged that she had been discriminated against and ultimately discharged from her employment because of her weight in violation of ELCRA. Plaintiff's complaint also included claims of negligence, intentional infliction of emotional distress, and wrongful termination. Defendants moved for summary disposition under MCR 2.116(C)(10). Relevant to the arguments on appeal, defendant maintained that plaintiff had not presented direct evidence of discrimination and that plaintiff's claims of discrimination based on indirect evidence must fail because plaintiff was fired for insubordination to Dyras and not because of her weight. The trial court granted defendants' motion. Plaintiff now appeals as of right.

On appeal, plaintiff's sole argument is that the trial court erred by dismissing her discrimination claim under ELCRA. Specifically, according to plaintiff, defendants discriminated against her by firing her because of her weight in violation of MCL 37.2202(1)(a). Plaintiff argues that Hutcheson's remarks about weight constitute direct evidence that plaintiff's weight was a factor in Hutcheson's decision to terminate her employment. Plaintiff maintains that this direct evidence is sufficient to warrant a trial. Alternatively, plaintiff asserts that she has presented a prima facie case of weight discrimination under the *McDonnell Douglas*[2] burden-shifting framework and that reasonable minds could conclude that defendant's proffered reason for the discharge, i.e., plaintiff's insubordination, was nothing but a pretext. We disagree.

We review de novo a trial court's decision on a motion for summary disposition. *Barnes v Farmers Ins Exch*, 308 Mich App 1, 5; 862 NW2d 681 (2014). "When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all the evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 427; 760 NW2d 878 (2008). "A genuine issue of material fact exists when reasonable minds could differ on a material issue." *Braverman v Granger*, 303 Mich App 587, 596; 844 NW2d 485 (2014).

According to plaintiff, defendants discriminated against her on the basis of her weight by terminating her employment in violation of MCL 37.2202(1)(a), which states:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff asserting discrimination under MCL 37.2202(1)(a) may show discrimination through (1) direct evidence or (2) indirect evidence under the *McDonnel Douglas* framework. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

I. DIRECT EVIDENCE

Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* (quotation marks and citation omitted). "Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 135; 666 NW2d 186 (2003). Derogatory remarks may constitute direct evidence, provided that the remarks "display, on their face, hostility toward a group" and the remarks "reasonably may be considered as indicating a

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

likelihood that the speaker would discriminate against the targets of the remarks." *Lamoria v Health Care & Ret Corp*, 230 Mich App 801, 810 n 8; 584 NW2d 589 (1998), reasoning adopted by special panel, 233 Mich App 560 (1999). For example, with regard to weight in particular, all references to weight or weight loss are not necessarily an indication of hostility or evidence that the speaker would be likely to discriminate against an individual based on weight. See *id*.

> [W]eight is an aspect of oneself that is subject to some control by one's conduct. It is common knowledge that many health professionals advise against being "overweight." Accordingly, comments that could be reasonably taken as mere advice about diets and the like do not amount to expressions of animus sufficient to indicate a likelihood that one would engage in illegal weight discrimination. [*Id.*]

Additionally, "stray" remarks are typically not direct evidence of discrimination. See *Sniecinski*, 469 Mich at 135; *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 541; 620 NW2d 836 (2001).

> Factors to consider in assessing whether statements are "stray remarks" include: (1) whether they were made by a decision maker or an agent within the scope of his employment, (2) whether they were related to the decision-making process, (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias, (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. [*Sniecinski*, 469 Mich at 136 n 8; see also *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 292, 300; 624 NW2d 212 (2001).]

In this case, viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff has failed to present direct evidence of discrimination.[3] First, some of the remarks in question contain no reference to weight and, on their face, these remarks certainly do not demonstrate weight-related animus or a likelihood that Hutcheson would discriminate based on weight. For instance, Hutcheson purportedly expressed "surprise" that plaintiff worked out so well as an employee, he wrote in her 50th birthday card that he "thought [she'd] never make it," and at one point he urged her to "get healthy and stay healthy." None of these comments pertain directly to weight, and plaintiff's subjective interpretation of these remarks does not transform

[3] Because plaintiff's ELCRA claim is subject to a three-year statute of limitations under MCL 600.5805(10), *Garg v Macomb Co Cmty Mental Health Servs*, 472 Mich 263, 284-286; 696 NW2d 646 (2005), defendants contend on appeal that plaintiff cannot rely on evidence of events that occurred before August of 2012. Defendants are mistaken. The fact that plaintiff cannot *recover* for injuries that occurred outside the three-year statute of limitations does not prevent plaintiff from relying on evidence of events outside the limitations period "as background evidence to establish a pattern of discrimination." *Campbell v Human Servs Dep't*, 286 Mich App 230, 238; 780 NW2d 586 (2009). Accordingly, we have considered all of plaintiff's evidence.

these comments into direct evidence of discriminatory animus based on weight. See *Hein v All Am Plywood Co, Inc*, 232 F3d 482, 489 (CA 6 2000). Second, many of the remarks about which plaintiff complains relate to diet and exercise, such as "calories in, calories out" and eating fruit before noon, and these comments cannot reasonably be taken as an expression of animus sufficient to indicate a likelihood that Hutcheson would engage in illegal weight discrimination, particularly when it appears that many of the comments were made in the context of general discussions among staff about diet and exercise. See *Lamoria*, 230 Mich App at 810 n 8.

Finally, and perhaps most significantly, there is no causal connection between any of Hutcheson's comments and his decision to terminate plaintiff's employment in August of 2013. See *Sniecinski*, 469 Mich at 135. Even if Hutcheson routinely talked about weight and even if some of his remarks appear insensitive, none of the remarks suggest that Hutcheson would terminate, or otherwise illegally discriminate, against an individual based on weight.[4] Cf. *Lamoria*, 230 Mich App at 809-810. To the contrary, the evidence shows that the remarks in question occurred over the course of 22 years, during which Hutcheson hired plaintiff and continued to employ her, while she was overweight. In particular, Hutcheson hired plaintiff in 1991. In 1998, he persuaded her to remain in his employ and to not accept an offer of employment with another dentist. And, when Hutcheson terminated plaintiff in 2013, he made absolutely no mention of weight. Cf. *DeBrow*, 463 Mich at 540. Further, according to plaintiff, one of the other hygienists, who was not fired, was also overweight and Hutcheson is quoted by plaintiff as stating that "*most* of his staff" is overweight. Considering the fact that Hutcheson's remarks occurred over the course of 22 years during which plaintiff and other overweight individuals remained in Hutcheson's employ, reasonable minds could not view Hutcheson's comments as causally related to plaintiff's termination in August of 2013. See *Sniecinski*, 469 Mich at 135.

In sum, on this record, even if a jury believed that Hutcheson made the statements identified by plaintiff, these statements do not require the conclusion that unlawful discrimination based on plaintiff's weight was at least a motivating factor in Hutcheson's decision to terminate plaintiff. *Hazle*, 464 Mich at 462. Thus, plaintiff has not presented direct evidence to merit a trial. See *id.* Because plaintiff has not presented direct evidence, she must rely on the *McDonnell Douglas* framework. *Id.* at 463.

II. *MCDONNELL DOUGLAS* FRAMEWORK

Under *McDonnell Douglas*, when a plaintiff fails to cite direct evidence of unlawful discrimination, courts "allow a plaintiff to present 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." *DeBrow*, 463 Mich at 537-538. To establish a prima facie case of

[4] Plaintiff's arguments on appeal relate solely to the assertion that Hutcheson discriminated against her by discharging her because of her weight. While in the lower court there was some discussion of a hostile work environment, see generally *Downey v Charlevoix Co Bd of Rd Com'rs*, 227 Mich App 621, 629-632; 576 NW2d 712 (1998), plaintiff has not pursued such arguments on appeal.

discrimination, plaintiff must show that (1) she was a member of the protected class; (2) she suffered an adverse employment action, such as discharge; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). "When the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises." *Hazle*, 464 Mich at 463 (quotation marks and citation omitted). The defendant then "has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Id.* at 464. "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. At the summary disposition stage, "a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision." *Hazle*, 464 Mich at 466.

In this case, as an overweight individual, plaintiff is a member of a protected class; and she suffered adverse employment action when she was discharged from her position as a dental hygienist. See MCL 37.2202(1)(a). Thus, plaintiff has established the first two elements for a prima facie case of discrimination. With regard to the third element, plaintiff has been a dental hygienist for 33 years and she was employed by Hutcheson for 22 years in this position. Hutcheson stated at his deposition that plaintiff's "performance as an employee was always good." Thus, it appears that, in terms of her skills, plaintiff was qualified for the position. In terms of the fourth element, of the four hygienists employed by defendant, plaintiff—who was the heaviest of the hygienists—had more experience and, according to plaintiff, a larger "following" of patients, and yet it was plaintiff who was terminated. From this, if defendants' actions are not otherwise explained, a jury could infer unlawful discrimination by defendants. Cf. *Hazle*, 470-472. In short, plaintiff has presented evidence to establish a prima facie case of unlawful discrimination based on weight.

Consequently, the burden shifts to defendants to articulate a legitimate, nondiscriminatory reason for their employment decision. *Id.* at 464. In this case, the proffered justification for defendants' decision was plaintiff's insubordination to Dyras, particularly plaintiff's questioning of Dyras's diagnoses in front of patients. Dyras, who plaintiff described as a "young dentist," began working at the practice in October of 2012. Plaintiff concedes that she had a dispute with Dyras. At her deposition, she testified that Dyras was rude to her in front of patients and that Dyras told her to "shut up" about her opinions in front of patients. Dyras confirmed the existence of a conflict between herself and plaintiff. According to Dyras's affidavit, she complained of plaintiff's behavior to Hutcheson on two occasions, and she told him that, if she owned the practice, she would terminate plaintiff for insubordination. Hutcheson made the decision to terminate plaintiff after this conversation with Dyras. The office manager, Laura Zapoli, confirms in her affidavit that, in August of 2013, Hutcheson told her that plaintiff was being let go due to insubordination relating to her questioning of Dyras's diagnoses in front of patients. Based on this evidence, defendants have made a sufficient showing that they had a legitimate, nondiscriminatory reason for terminating plaintiff's employment. See *id.* at 473.

Given defendants' legitimate, nondiscriminatory reason for terminating plaintiff, the question becomes whether, viewing the evidence in a light most favorable to plaintiff and

drawing any reasonable inferences in her favor, plaintiff has created a triable issue for the jury concerning whether weight was a motivating factor in defendants' employment decision. See *id.* at 473-474. Plaintiff maintains that insubordination is a mere pretext invented after she initiated the current litigation and that, in actuality, any problems with Dyras "were very minimal" and she was willing to work with Dyras at the time of her termination.[5] However, while plaintiff asserts that, from her perspective, the problems with Dyras had been, or could be, resolved, her own deposition testimony confirms the existence of a dispute regarding patient care and she has not refuted the evidence that Dyras complained to Hutcheson or that these complaints by Dyras prompted plaintiff's termination.

Moreover, even if plaintiff's insubordination problem with Dyras could have been resolved differently, plaintiff cannot succeed on a claim under ELCRA simply by showing "that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 476 (quotation marks and citation omitted). "The only requirement is that, when evaluating its employees, employers are to evaluate them on the basis of their merits, in conjunction with the nature of their businesses at the time of the evaluation, and not on the basis of any discriminatory criterion." *Id.* (quotation marks and citation omitted). By firing plaintiff for insubordination, Hutcheson evaluated plaintiff on her merits in light of the practice's needs and Dyras's complaints at that time. There is no evidence that plaintiff's weight played a role in this evaluation. Indeed, as discussed, Hutcheson employed plaintiff for 22 years, during which she was overweight. On this record, there is no reasonable basis to infer that, after 22 years, Hutcheson suddenly decided to terminate plaintiff because of her weight or even in part because of her weight. Rather, it is plain that what had changed, and what motivated plaintiff's termination, was Dyras's arrival at the practice and her disagreements with plaintiff regarding patient care.[6] While plaintiff maintains that insubordination was a mere pretext, there is nothing

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[5] Additionally, in the context of establishing pretext, plaintiff presents a somewhat convoluted argument regarding the staff trip to Las Vegas, asserting that she was essentially discharged for "personality problems" and that these problems arose from her unwillingness to go to Vegas to bond with the other staff members. Because her weight played a role in her decision not to go to Vegas, plaintiff contends that she was terminated for being overweight. We see no basis for this argument. The Vegas trip was optional, plaintiff was invited to attend, and plaintiff opted not to go. Beyond plaintiff's subjective belief, we see nothing to support her claim that the Vegas trip played any part in Hutcheson's termination decision or that, as a result of plaintiff's refusal to attend the Vegas trip, Hutcheson acted with weight-related animus toward plaintiff.

[6] Plaintiff asserts on appeal that Dyras's opinions of plaintiff cannot be used to justify Hutcheson's decision to terminate plaintiff because Dyras did not own the practice at the time the termination decision was made. However, Dyras worked at the practice as a dentist and we see no evidence of pretext in Hutcheson's desire to employ dental hygienists who do not act with insubordination toward the dentists at the practice. See generally *Wurtz v Beecher Metro Dist*, 495 Mich 242, 249-250; 848 NW2d 121 (2014) ("[T]he employer can make its decision for good reasons, bad reasons, or no reasons at all, as long as the reasons are not unlawful, such as those based on discrimination."). Further, while plaintiff speculated that she was fired

but her subjective claim of discrimination to establish that weight-related animus motivated Hutcheson's termination decision. Cf. *id.* at 476. Because plaintiff has failed to offer any evidence that her weight was a motivating factor in defendants' termination decision, she has not rebutted defendants' stated reasons as a pretext for discrimination and defendants were, therefore, entitled to summary disposition as a matter of law. See *id.* at 477.

Affirmed. Having prevailed in full, defendants may tax costs pursuant to MCR 7.219.

/s/ Peter D. O'Connell
/s/ Joel P. Hoekstra
/s/ Brock A. Swartzle

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because Hutcheson wanted the staff to "look good" in order to promote the sale of the practice, this speculation has no basis in the evidence. Indeed, accepting plaintiff's assertion that Hutcheson intended to sell the practice only provides further reason why Hutcheson would want to eliminate office strife and accommodate Dyras in the conflict with plaintiff.