

STATE OF MICHIGAN
COURT OF APPEALS

SYLESTINE MCQUEEN,

Plaintiff-Appellant,

v

THIRD JUDICIAL CIRCUIT COURT,

Defendant-Appellee.

UNPUBLISHED

October 25, 2011

No. 299148

Wayne Circuit Court

LC No. 08-127297-CD

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

In this unlawful retaliation case brought under the Elliot-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, plaintiff, Sylestine McQueen, appeals as of right the trial court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant, Third Judicial Circuit Court. Because plaintiff failed to establish a *prima facie* case of retaliation under the ELCRA, we affirm.

I. FACTS AND PROCEEDINGS

In January 1996, plaintiff was hired by defendant as the court appointed special advocate program director. Plaintiff was promoted to the position of senior court analyst on April 28, 1998, and was promoted again to the position of director of assigned counsel and special projects on February 2, 2004. With each promotion, plaintiff's responsibilities expanded and her salary was increased. As director of assigned counsel and special projects, plaintiff's supervisor was Bernard Kost, the court administrator; however, in the fall of 2004, plaintiff was informed she should report directly to Kelli Moore, who was the deputy court administrator. In December 2004, plaintiff heard that then-Chief Judge Mary Beth Kelly wanted her to be assigned to the position of juvenile court register when the current juvenile register retired. In January or February of 2005, Judge Kelly discussed the juvenile court register position with plaintiff. However, on March 31, 2005, plaintiff was informed that the juvenile court register position was filled by an attorney, Johanna O'Grady-Ward, who was a white female, aged 42 at the time she was hired. Plaintiff is a black female, and was aged 46 at the time.

On July 12, 2005, in response to defendant's decision not to hire plaintiff for the juvenile court register position, plaintiff filed a charge of discrimination with the Equal Employment

Opportunity Commission (EEOC). Additionally, plaintiff alleged that the result of a recent job audit was motivated by a discriminatory purpose; plaintiff's position was reclassified and her salary was reduced. Plaintiff claimed that she suffered discrimination based on her race, sex, and age. On September 25, 2005, the EEOC issued its decision, which concluded: "Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes." The EEOC indicated it was closing its file in regard to plaintiff's charge.

On December 2, 2005, defendant reassigned plaintiff to a new position as a collections agent liaison. This position's salary was lower than the salary for the position plaintiff held before. Because the new position was basically a clerical position, plaintiff had significantly less responsibility. Plaintiff was informed that her reassignment was in response to her performance problems. Specifically, plaintiff was assigned the task of assembling the court's annual report for the year 2004 on January 5, 2005. Plaintiff failed to meet every deadline that was established for the report and submitted unsatisfactory drafts of the report throughout the year. The original deadline for the report was June 1, 2005. This deadline was later extended to July 22, 2005, when it became clear that plaintiff would be unable to meet the June 1, 2005 deadline. Plaintiff did not submit a final draft of the report until October 27, 2005. Plaintiff worked as a collections agent liaison until the position was terminated because of budget cuts on March 3, 2009.

Plaintiff argues that she was demoted to the position of collections liaison in retaliation for the EEOC claim she filed in July 2005. On December 7, 2005, plaintiff filed a second claim with the EEOC alleging that she was the victim of retaliation. An EEOC investigator sent defendant a letter dated January 12, 2006, requesting information and records. The EEOC specifically requested statements from plaintiff's supervisors regarding her job performance. Kost and Moore submitted statements in response to the request. Kost's statement explained that plaintiff repeatedly failed to meet deadlines that were set for the annual report project, and that when plaintiff submitted work it was only partially completed and had numerous factual, grammatical, and typographical errors. Kost also noted that plaintiff failed to timely draft a local administrative order necessary for the court to obtain approval from the State Court Administrator to install video equipment for use in juvenile court proceedings. As a result of plaintiff's failure to meet the deadline, the court "wasted" \$70,000 on equipment it was not given approval to implement. Similarly, Moore's statement discussed plaintiff's failure to meet deadlines in regard to the annual report project. Moore also noted other specific deadlines plaintiff missed, and stated that plaintiff "would disregard or not respond to requests made by me." Plaintiff's second EEOC charge was dismissed and a right to sue letter was issued to plaintiff.

On October 24, 2008, plaintiff commenced the instant lawsuit. In plaintiff's complaint she alleged that defendant retaliated against her for filing an EEOC complaint because defendant demoted her to a position in which she had less responsibility and received a lower salary. On April 14, 2010, defendant moved the trial court for summary disposition pursuant to MCR 2.116(C)(10) and argued that plaintiff could not establish a prima facie case of retaliation because she could not demonstrate causation. Plaintiff responded to defendant's motion and claimed that Moore's deposition testimony regarding the comments of Kost established causation. During her deposition, Moore indicated that Kost admitted that he wanted to take adverse employment action against plaintiff because plaintiff filed an EEOC charge.

A hearing regarding defendant's motion for summary disposition was held on June 2, 2010. The trial court granted defendant's motion for summary disposition. The trial court found that plaintiff failed to establish a prima facie case of retaliation because plaintiff failed to show that the decisionmaker, Judge Kelly, was in any way influenced by plaintiff's act of filing an EEOC charge. The trial court also found that plaintiff could not show that defendant's proffered legitimate reason for demoting plaintiff was a pretext.

II. ANALYSIS

On appeal, plaintiff argues that she raised a genuine issue of material fact regarding whether she established a prima facie case of retaliation under the ELCRA and in regard to pretext. Specifically, plaintiff argues that there was a factual question concerning whether defendant had knowledge of her protected activity and whether there was a causal connection between her protected activity and her demotion.

We review the grant of a motion for summary disposition de novo. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The ELCRA prohibits specific retaliatory and discriminatory conduct against a person whose actions are protected by the Civil Rights Act. The relevant portion of the ELCRA, MCL 37.2701(a), provides:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

Retaliation under the ELCRA may be proven by direct evidence or by using circumstantial evidence to establish a prima facie case of retaliation. *DeBrow v Century 21 Great Lakes, Inc.*, 463 Mich 534, 537-538; 620 NW2d 836 (2001). The latter method of establishing retaliation is often referred to as the *McDonnell Douglas*¹ approach, and employs a burden shifting analysis. *Id.* at 537. When the burden shifting analysis is applied, the plaintiff bears the initial burden of establishing a prima facie case of retaliation. *Roulston v Tendercare (Mich), Inc.*, 239 Mich App 270, 280; 608 NW2d 525 (2000). If the plaintiff establishes a prima facie case, the "burden shifts to the defendant to articulate a legitimate business reason" for the adverse employment

¹ *McDonnell Douglas Corp v Green*, 411 US 792, 802-805; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

action. *Id.* at 281. “If the defendant produces evidence establishing the existence of a legitimate reason” for the adverse employment action, the plaintiff has an opportunity to prove that the proffered legitimate reason “was not the true reason, but was only a pretext” for the adverse action. *Id.* In this case, the burden shifting analysis applies because plaintiff has not presented any direct evidence of discrimination.

Direct evidence is “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 133; 666 NW2d 186 (2003) (citation and quotation omitted). Plaintiff states that she submitted “direct evidence,” and points to the testimony of Moore at her deposition where Moore stated that she heard Kost specifically admit to Griffin that he wanted to take adverse employment action against plaintiff in part because plaintiff filed an EEOC charge. However, Judge Kelly was indisputably the individual who made the decision to demote plaintiff, and the fact that Kost was motivated by a retaliatory purpose does not constitute direct evidence that Judge Kelly was motivated by a retaliatory purpose.

In order to establish a prima facie case of retaliation under the ELCRA, a plaintiff must demonstrate:

(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), amended 473 Mich 1205 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

There is no dispute that plaintiff’s EEOC charge constituted a protected activity under the ELCRA or that plaintiff’s reassignment to a lower paying position with less responsibility constituted an adverse employment action. Further, there is no dispute that some of defendant’s employees knew about plaintiff’s protected activity. It is undisputed that defendant’s human resources department responded to the charge, and that Kost and Moore, plaintiff’s supervisors, were aware that plaintiff filed a charge with the EEOC. However, defendant argues that plaintiff failed to provide any evidence that Judge Kelly, who made the decision to demote plaintiff, was aware that plaintiff filed an EEOC charge. There is no evidence in the record in regard to whether Judge Kelly was aware of the charge. However, even if Judge Kelly’s knowledge of the protected activity is assumed, plaintiff failed to present a prima facie case of retaliation because plaintiff cannot establish a causal connection between her protected activity and the adverse employment action.

To demonstrate causation between the adverse employment action and the protected activity, plaintiff must establish that her participation in the protected activity was a “significant factor” in defendant’s adverse employment action; merely demonstrating a causal link between the two is insufficient to establish causation. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). Plaintiff must show that defendant “took adverse

employment action *because of* plaintiff's protected activity." *West v Gen Motors Corp*, 469 Mich 177, 185; 665 NW2d 468 (2003) (emphasis in original).

In this case, plaintiff has failed to present sufficient evidence creating a triable issue of fact in regard to causation. The trial court correctly granted summary disposition in favor of defendant because plaintiff has failed to present any evidence that defendant's decision to reassign her was motivated by her protected activity. Plaintiff filed her first EEOC charge on July 12, 2005, and was not reassigned or demoted until December 2, 2005. The evidence shows that Judge Kelly met with Kost, Moore, and Griffin before making a decision. Judge Kelly "retained sole authority" to make the employment decision in regard to plaintiff's termination or demotion. At the meeting about plaintiff, Kost advocated for plaintiff's termination; however, Judge Kelly refused to terminate plaintiff. Judge Kelly ultimately decided to demote plaintiff. Importantly, there is no evidence that Judge Kelly based her decision to demote plaintiff on plaintiff's protected activity. While the evidence suggested that Kost wished to retaliate against plaintiff for filing the EEOC charge, there is no evidence that Kost expressed that desire to Judge Kelly. Further, Judge Kelly's affidavit clearly states that she made an independent decision to demote plaintiff and that she based her decision on numerous facts gathered from multiple people. "To establish causation using circumstantial evidence, the circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." *Shaw v Ecorse*, 283 Mich App 1, 14-15; 770 NW2d 31 (2009) (citation and quotation omitted). The evidence presented in this case does not support an inference that Judge Kelly was influenced by Kost or followed his directive in making her decision; especially in light of the fact that Judge Kelly elected to merely demote plaintiff when Kost advocated for plaintiff's termination. The fact that plaintiff was not formally disciplined or given a poor evaluation before her demotion similarly does not facilitate a reasonable inference of causation. Even when viewed in the light most favorable to plaintiff, the evidence does not support a conclusion that plaintiff's EEOC charge was a motivating factor in her demotion, nor could a jury reasonably infer that defendant's actions were motivated by retaliation.

Plaintiff, citing federal law, argues that this Court should find that Judge Kelly had the retaliatory motive necessary to find causation by imputing Kost's mindset to Judge Kelly's decision to demote plaintiff. Plaintiff argues that pursuant to the "cat's paw" or "rubber stamp" theory, Kost's retaliatory motive can be imputed to Judge Kelly because she was influenced by Kost. See e.g., *Arendale v Memphis*, 519 F3d 587, 604 n 13 (CA 6, 2008); *EEOC v BCI Coca-Cola Bottling Co of Los Angeles*, 450 F3d 476, 482, 484-485 (CA 10, 2006). No Michigan court has formally adopted the federal approach; however, we need not decide whether to apply the federal approach in this case because the evidence does not support a finding that Kost had any significant control or influence in regard to Judge Kelly's decision. Specifically, Judge Kelly indicated that she sought information from multiple people, not just Kost, and that she rejected Kost's proposal that plaintiff be terminated. Thus, it is clear that Judge Kelly made an independent determination and did not act as a "cat's paw" or "rubber stamp" for Kost.

We find that the trial court properly granted summary disposition because of plaintiff's

failure to establish a prima facie case of retaliation under the ELCRA. Because of our decision related to the prima facie case, we need not address whether genuine issues of material fact existed as to pretext.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter