

STATE OF MICHIGAN
COURT OF APPEALS

STACEY RILEY,

Plaintiff-Appellant,

v

ROBERT ENNIS,

Defendant-Appellee.

UNPUBLISHED

November 27, 2012

No. 305209

Genesee Circuit Court

LC No. 08-090154-CL

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

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant summary disposition in plaintiff's action alleging pregnancy discrimination in violation of Michigan's Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Plaintiff asserted a sex discrimination/pregnancy discrimination claim against defendant, who was president and CEO of the Ennis Center for Children. Ennis Center is a charitable organization that provides foster care and adoption services. Plaintiff began working at Ennis Center in September 16, 2002. She became pregnant in 2006 and took maternity leave during the summer of 2007. In the spring of 2008, defendant's wife, Jill Ennis, performed an assessment of the Center's development department. At the time of the assessment, plaintiff was one of two employees in the development department. The other was Bridget Goode, who took maternity leave at nearly the same time as plaintiff. Plaintiff's complaint alleged that up until the time of the assessment, she had enjoyed an excellent record of employment. After the assessment, however, numerous negative comments were made about the possibility that plaintiff could become pregnant again. Plaintiff was terminated in July 2008. She claimed that her discharge was the result of sex discrimination/pregnancy discrimination.¹

¹ Defendant moved to dismiss plaintiff's complaint based on an arbitration clause in plaintiff's employment contract. Plaintiff responded that defendant was being sued as an individual and that the employment contract's arbitration provision applied only to Ennis Center. The trial court granted defendant's motion, but this Court reversed, concluding that "[a]lthough

Defendant filed a motion for summary disposition, arguing that plaintiff was unable to set forth a prima facie case of discrimination where the evidence revealed that she was replaced by an individual within her protected class – a young woman of child-bearing age. Defendant argued that, even if plaintiff could set forth a prima facie case of discrimination, she failed to show that the reason advanced by defendant for firing plaintiff was merely pretext. Defendant pointed out that when plaintiff was Ennis Center’s Development Events Coordinator fundraising was woefully lacking. Defendant argued that the development department failed to raise money and that plaintiff made matters worse by failing to send a timely “thank you” note in response to a significant donation from Wendy’s. Defendant maintained that because plaintiff’s actions jeopardized Ennis Center’s relationship with one of its largest donors, defendant was well within his right to fire plaintiff.

The trial court granted defendant’s motion. It first recognized that the CRA allowed defendant to be sued in his individual capacity because, as President of the Ennis Center, defendant was an agent of Ennis Center. The trial court then noted that “[b]ecause Plaintiff was replaced by a woman who could become pregnant in the future, the Court is persuaded that her theory that she was fired because she may become pregnant in the future must fail.” Instead, the focus was on whether plaintiff was discriminated against because of her past pregnancy. The trial court did not find any direct evidence of discrimination. Additionally, the trial court determined that legitimate, non-discriminatory reasons existed for firing plaintiff. Plaintiff had a poor working relationship with other workers at the Center and, even after being told of the need to develop more funding, plaintiff failed to create a plan to increase unrestricted funds and then failed to write a crucial “thank you” to Wendy’s for their substantial donation. The trial court concluded “the Court is not convinced that Plaintiff presented enough evidence to establish a prima facie case. And even if she had, the Court is not convinced that Defendant’s legitimate, non-discriminatory, business-related reasons were pretext for unlawful discrimination.”

Plaintiff now appeals as of right.

II. ANALYSIS

On appeal, plaintiff argues that the trial court erred in granting summary disposition where there was both direct and indirect evidence of discrimination and where defendant’s proffered reason for discharging plaintiff – failure to raise money and failure to send a “thank you” for the Wendy’s donation – was mere pretext. We disagree. We review de novo a trial court’s decision on a motion for summary disposition. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). Summary disposition is appropriate 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. MCR 2.116(C)(10); *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 563; 766

plaintiff’s claims against defendant might be interwoven with her claims against the Ennis Center, because plaintiff and the Ennis Center did not agree to give the Ennis Center’s agents the protection of the arbitration provision in the employment contract with respect to their own potential individual liability, we conclude that defendant cannot compel arbitration.” *Riley v Ennis*, unpublished opinion per curiam of the Court of Appeals, issued February 25, 2010 (Docket No. 290510), slip op, p. 3.

NW2d 896 (2009). The trial court must consider all evidence submitted by the parties in a light most favorable to the non-moving party. *Id.* A trial court must deny the motion if, after reviewing the evidence, reasonable minds might differ as to any material fact. *Id.*

The CRA prohibits employers from discriminating against employees on the basis of pregnancy. MCL 37.2201(d), MCL 37.2202(1); *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). “‘Employer’ means a person who has 1 or more employees, and includes an agent of that person.” MCL 37.2201(a). A supervisor may be subject to individual liability, as a corporate employer’s agent. *Elezovic v Ford Motor Co*, 472 Mich 408, 426; 697 NW2d 851 (2005). As such, the trial court correctly concluded that defendant could be sued in his individual capacity under the CRA.

The trial court also correctly concluded that plaintiff’s claim that she was terminated as the result of the fact that she might become pregnant again in the future was without merit. Where a plaintiff presents a discriminatory replacement theory, an appropriate prima facie test may consist of a showing that: (1) the plaintiff was a member of a protected class; (2) the plaintiff suffered an adverse employment action; (3) the plaintiff was qualified for the position; and, (4) the plaintiff was replaced by an individual who was not a member of the protected class. *Smith v Goodwill Industries of West Mich, Inc*, 243 Mich App 438, 447; 622 N.W.2d 337 (2000). It was undisputed that plaintiff was replaced by a woman of child-bearing years.² As such, plaintiff’s theory that she was fired because she might become pregnant in the future must fail.

The only issue, therefore, is whether plaintiff was discriminated against because of her prior pregnancy. A plaintiff may prove discrimination using direct or indirect evidence. *Sniecinski*, 469 Mich 132. Direct evidence of discrimination is “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.* at 133 (internal quotation marks and citations omitted). A plaintiff may also set forth a prima facie case of discrimination by circumstantial evidence:

In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 93 SCt 1817, 36 L Ed 2d 668 (1973). This approach allows “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.” 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 failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. Once 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

² We reject the notion that plaintiff’s replacement had no intention of having additional children. There is simply no way of knowing for sure what her future family planning would be.

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 133-134.]

Plaintiff refers to only two direct instances of alleged discriminatory conduct on defendant's part: (1) referring to plaintiff and Goode as "the pregnant ladies in the department"; and, (2) slamming his fist on a desk and angrily responding to Goode's allegation that the development department was moved because she and plaintiff were pregnant. At that time, defendant questioned Goode and plaintiff why it was they were restricted from certain activities at work, but were able to continue extracurricular activities, such as bowling.

Neither of these instances, if believed, require a conclusion that unlawful discrimination was at least a motivating factor in plaintiff's termination. Specifically, defendant's comment about the "pregnant ladies" was clearly a stray remark. Factors to consider in assessing whether a statement was a "stray remark" include whether the statement was: (1) made by a decision-maker or an agent within the scope of his employment; (2) related to the decision-making process; (3) vague and ambiguous or clearly reflective of discriminatory bias; (4) isolated or part of a pattern of biased comments; and, (5) made close in time to the adverse employment decision. *Sniecinski*, 469 Mich 136 n 8. Defendant was admittedly the key decision-maker and testified that he had the final say in staffing decisions. However, the "pregnant ladies" comment was not related to the decision-making process. Defendant made this statement to the Ennis Center board of directors during a meeting 18 months prior to plaintiff's termination. The statement was not derogatory and, though perhaps inartfully used, was meant to apprise the board of the situation in the development department. The statement was isolated. In fact, plaintiff admits that she had no issues with defendant or his treatment of her. There was no pattern of behavior or biased comments.

As for the incident in which Goode and defendant engaged in a heated conversation and defendant eventually slammed his fist on the table and left the room, it should be noted that the exchange was between Goode and defendant. Plaintiff was in the room, but was not directly involved. Goode was the one that accused defendant of discrimination by moving the two women to another area of the building.³ Defendant felt that he was being "jerked around." Defendant's comments did not demonstrate discriminatory bias. Again, the incident took place over a year before plaintiff was terminated.

Plaintiff imputes onto defendant comments that other individuals made. Specifically, plaintiff points to Jill's comment that "heaven forbid the two of you become pregnant at the same time again." Plaintiff cites *Staub v Proctor Hosp.*, — US —; 131 S Ct 1186, 1190; — L Ed — (2011). *Staub* comes into play when a supervisor engages in a discriminatory act, if the act influences another supervisor to make an employment decision adverse to the plaintiff. *Id.* at 1190. The trial court concluded that Jill's comments could not be imputed onto defendant

³ As the trial court correctly noted, plaintiff specifically abandoned the claim that the move was at issue in the case in her response to defendant's motion for summary disposition wherein plaintiff writes that she "is not claiming pregnancy discrimination with respect to this action, thus, it is irrelevant. Plaintiff's adverse action in this case is her discharge."

because it did not see how Jill, who was “ a volunteer/contract consultant, had any supervisory control over Plaintiff. The evidence shows that Mrs. Ennis merely conducted the assessment and provided training to Plaintiff and her co-worker.” We disagree with the trial court that Jill played no part in the decision to terminate plaintiff. Her role in the decision was obvious: She conducted the assessment that revealed the extent of the development department’s deficiencies; she provided a plan to improve the department; she mentored and assisted both plaintiff and Goode; and Jill’s memo regarding the “thank you” note debacle recommended that both Goode and plaintiff be terminated. Thus, Jill was a de facto supervisor who was involved in the decision-making process and her comment was properly attributable to defendant. Nevertheless, the comment was another “stray remark.” It was made after plaintiff and Goode returned from their maternity leaves and was not meant as a disparaging remark, but was a fair comment on the stress the rest of Ennis Center’s staff was under during their absence. Defendant testified that his wife remarked to him that she hoped the situation did not repeat itself, but he did not interpret that as anything other than a fair comment on the unique situation. Jill’s remark was not related to the decision-making process. She made the statement many months before plaintiff’s termination. The statement was isolated and was not reflective of discriminatory bias. Also of critical importance is the fact that Jill’s comment was made as it related to the potential for future pregnancy. As discussed above, plaintiff’s claim cannot be for discrimination on the basis that she may become pregnant in the future where her replacement was a woman of child-bearing years.

Plaintiff has failed to set forth a prima facie case of discrimination. Even if she could have successfully done so, plaintiff has failed to rebut defendant’s allegation that plaintiff was terminated for legitimate, non-discriminatory reasons. In addition to the fact that plaintiff and other members of the Center did not have a good working relationship, the evidence demonstrated that plaintiff was wholly ineffective at her position. She did not know where donor histories were kept, did not know how to use the computerized programming material and, most importantly, did almost nothing to increase fundraising, which was a critical need for the Center. While it is true that Jill acknowledged that not all short-comings were due to the two employees in the development department, plaintiff did nothing to improve what was within her control. Although Jill’s assessment warned that plaintiff’s continued employment was not a good idea, defendant wanted to give her additional time to improve. She did not. Instead, the department remained in such disarray that a critical “thank you” note was not sent to a significant donor. There was adequate evidence on the record that plaintiff was fired for legitimate, non-discriminatory reasons. Plaintiff’s proffered evidence of pretext falls far short of that needed to allow her claim to survive. Accordingly, the trial court properly granted summary disposition in defendant’s favor.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio