# STATE OF MICHIGAN

# COURT OF APPEALS

PAMELA LUMETTA,

Plaintiff-Appellant,

v

U.S. FOODSERVICE, INC., MARC SMITH, and LAZONJA SMITH,

Defendants-Appellees.

UNPUBLISHED
February 21, 2013

No. 306224
Oakland Circuit Court
LC No. 2010-113843-CD

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff, Pamela Lumetta, appeals as of right the order granting summary disposition in favor of defendants, U.S. Foodservice, Inc., Marc Smith and Lazonja Smith, in this reverse racial discrimination employment case. We affirm.

Lumetta contends the trial court erred in granting summary disposition because genuine issues of material fact exist. A trial court's grant or denial of summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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." *West*, 469 Mich at 183.

The Elliott-Larsen Civil Rights Act (ELCRA) prohibits employment discrimination on the basis of race. MCL 37.2202(1)(a). The framework used to evaluate employment discrimination claims was discussed by this Court in *Venable v Gen Motors Corp*, 253 Mich App 473, 476-477; 656 NW2d 188 (2002) (citations and footnote omitted). Referencing *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973) as authority, this Court stated as follows:

> [T]he United States Supreme Court established the elements of a prima facie case for claims alleging race discrimination in employment under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*.
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> > The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.
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> [O]ur Supreme Court adapted the *McDonnell Douglas* framework to the Michigan Civil Rights Act. This was done to accommodate additional types of discrimination claims-including employment discrimination based on sex and age-and to accommodate other "adverse employment action[s]." The framework, long used by courts of this state, requires a showing that plaintiff was "(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." [*Venable*, 253 Mich App at 476-477.]

Thus:

> 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).]

If a plaintiff is able to successfully establish a prima facie case of racial discrimination, the burden then shifts to the defendant to put forth legitimate, nondiscriminatory reasons for its actions. If the defendant does so, the burden shifts back to the plaintiff to show that the proffered reason was merely pretextual. See *id.*; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994).

The parties do not dispute that Lumetta, a Caucasian female, suffered an adverse employment action. Lumetta does not clarify whether the adverse employment action was the failure to promote her or her ultimate discharge. In her complaint, Lumetta merely asserts, "Plaintiff was ultimately let go from the company so that an African American employee could remain permanently in the Accounts Payable position." It is noteworthy that Lumetta was fully aware of the temporary nature of her employment with U.S. Foodservice, having acknowledged she was informed that her position as mailroom clerk was slated for elimination. Given this

knowledge at the outset of her employment, Lumetta is unable to demonstrate that loss of employment at U.S. Foodservice "occurred under circumstances giving rise to an inference of unlawful discrimination." *Sniecinski*, 469 Mich at 134. In addition, the parties proceed with their respective analyses after having assumed Lumetta's status as a "member of a protected class." *Venable*, 253 Mich App at 476-477. Yet, a review of Lumetta's complaint reveals that it lacks any allegation regarding such membership, and thus, is arguably deficient on its face.

Lumetta's cause of action is also rendered deficient by her failure to demonstrate that she was qualified for the position. *Venable*, 253 Mich App at 476-477. Lumetta and her counsel spent exorbitant amounts of time trying to convince the trial court that she was the victim of reverse racial discrimination because the individual hired for the accounts payable clerk position, Karen Sorrells, an African-American female, did not meet the minimum qualifications for the position of accounts payable clerk. At the same time, Lumetta readily admits that she herself does not possess the requisite qualifications for the position.

Lumetta has a high school diploma and an unspecified number of credit hours from a community college in an unknown area of study. Her prior work history before employment with U.S. Foodservice involved the performance of simple clerical tasks, primarily as a receptionist. Her experience in accounting through U.S. Foodservice was limited to the performance of some of the tasks of the accounts payable clerk for very short durations. This experience falls woefully short of the posted position criteria of a two-year college degree and two years of experience in accounting or finance.

Although Lumetta asserted that traditionally, mailroom clerks were promoted to the position of accounts payable clerk, this historical anecdote is insufficient to demonstrate that she qualified for such promotion. Janice Neal, the U.S. Foodservice manager for accounts payable, testified that when the company became U.S. Foodservice, procedures became more formalized regarding interviews for open positions, the posting of positions and the format for the conduct of interviews. In addition, contrary to Lumetta's assertion that the posting of the position was discretionary and undertaken as a means to secure a minority candidate for the position, defendants submitted a copy of the U.S. Foodservice handbook, which delineates the policy of posting job openings.

Both Janice Neal and Hristina Arnold, a supervisor at U.S. Foodservices, acknowledged that they considered Lumetta for the position and encouraged her to apply. Once they interviewed other candidates, however, they determined that other individuals were more qualified. Neal also indicated that she was seeking to fill the position with someone that had sufficient experience and education to permit her to restructure various jobs to allow for the redistribution and assumption of additional responsibilities within the duties assigned to the accounts payable clerk.

To the extent that courts have determined that a prima facie case requires a plaintiff to establish he or she is qualified for the position, "a plaintiff must show that her performance met her employer's legitimate expectations at the time of her discharge." *Vincent v Brewer Co*, 514 F3d 489, 495 (CA 6, 2007). In other words, "[t]o establish that he was 'qualified' a complainant must show that he was doing his job well enough to rule out the possibility that he was fired for

inadequate job performance, absolute or relative." *Town v Mich Bell Tel Co*, 455 Mich 688, 699 n 22; 568 NW2d 64 (1997) (citations omitted).

In this instance, Neal and Arnold both opined that Lumetta's performance was inadequate when she filled in as the accounts payable clerk because she was not given the full responsibilities of this position and would make errors in the parts of the job she was requested to perform. Arnold identified Lumetta's deficiencies, indicating Lumetta lacked competent accounting skills to perform all of the job requirements. Arnold further explained that if Lumetta were asked to perform the job responsibilities for the position without access to her "task set" that "she couldn't retain the information. She didn't really understand about general ledger accounts. She didn't understand about the . . . balance sheets." Arnold indicated that Lumetta lacked an understanding of the relevant codes used and did not properly code invoices. Neal echoed these performance concerns, stating:

> After we hired Karen we put [Lumetta] in doing some cash recording. She would have to post checks. She would get checks and do some of the posting, some other jobs. I was actually hoping that I could find a better fit for her. And almost daily I was getting phone calls because there were transpositions in the numbers, customer numbers, that type of thing, and it caused a lot of problems with the cash postings.

In addition, Arnold and Neal disputed Lumetta's contentions that she trained her predecessor for the position of accounts payable clerk and that she had developed a manual for the position.

Lumetta also mistakenly focuses on the alleged lack of qualification of Karen Sorrells, the individual hired for the position. Her assertions in this regard are not supported by the record. Sorrells had in excess of two years of experience in accounting and finance. Lumetta's contention that Sorrells's completion of approximately three years of a four-year bachelor's degree in accounting does not equate to the actual possession of a two-year degree borders on the frivolous. It is certainly arguable, and not unreasonable, as evidenced by the testimony of Neal and Arnold, for an employer to assume that Sorrells's educational pursuits met or exceeded the requirements for the position in this regard. At the very least, the extent of Sorrells's educational experience exceeded that of Lumetta and was in the required area of study. The evidence is heavily weighted against Lumetta's contention that she was the subject of reverse racial discrimination.

Even if Lumetta were able to establish a prima facie case of discrimination, which she has failed to do, her claim would still fail because she is unable to demonstrate that defendants' reason for hiring Sorrells constituted a pretext. "Ultimately, the plaintiff will have the burden of producing evidence, whether direct or circumstantial, that proves that discrimination was a determining factor in the employer's decision." *Town*, 455 Mich at 697. Lumetta was unable to demonstrate that she met the minimum requirements for the position. In contrast, Sorrells had the requisite amount of accounting and finance experience and sufficient college credits to meet an equivalency of the stated educational criteria.

Lumetta requested that the trial court infer discrimination premised on the low number of African-American employees retained by U.S. Foodservice at the time of Sorrells's hire. "The

use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual." *Dixon v WW Grainger*, 168 Mich App 107, 118; 423 NW2d 580 (1987). Yet:

> [S]tatistical evidence . . ., in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its decision. . . . This is because a company's overall employment statistics will, in at least many cases, have little direct bearing on the specific intentions of the employer when dismissing a particular individual. Without an indication of a connection between the statistics, the practices of the employer, and the employee's case, statistics alone are likely to be inadequate to show that the employer's decision . . . was impermissibly based. . . . [*LeBlanc v Great American Ins Co*, 6 F3d 836, 848 (CA 1, 1993) (citations and quotation marks omitted).]

Although statistics can be used to infer unlawful discrimination as part of the evidence in establishing a prima facie case, *Featherly v Teledyne Indus, Inc*, 194 Mich App 352, 360-361; 486 NW2d 361 (1992), Lumetta has failed to demonstrate that other qualified candidates were unreasonably passed over. The only evidence presented involved the rejection of a Caucasian male candidate that did possess the requisite college degree for the position. As explained by Neal and Arnold, however, this candidate was rejected because of his own admission that he was a "procrastinator," which, in the judgment of Neal and Arnold, rendered him inappropriate for the position. Similarly, another Caucasian female was considered to be Neal and Arnold's second choice. This individual had a college degree, but was ultimately rejected based on her acknowledged incurrence of two arrests for driving under the influence (DUIs).

Lumetta's contention that the decision to hire Sorrells was actually made by Marc Smith and Lazonja Smith, both African-Americans and employed in the area of human resources with U.S. Foodservice, was disputed by Neal and Arnold. There was no evidence that Marc Smith had any role or participation in the interviews for this position. Lazonja Smith did participate in the interview process, but the evidence demonstrates she did not make the hiring decision. Her presence at the interviews was in her capacity as a human resources employee to assure that applicable procedures were followed and that the process was fair. Consequently, any discrepancies in her notes from those of Arnold and Neal following the interviews, or disagreement in the testimony of these individuals regarding the sharing of those notes following the conclusion of the interviews, are irrelevant. The only basis Lumetta proffered to support her contention that the decision to hire Sorrells originated with Marc Smith and Lazonja Smith was their involvement in providing Sorrells with a formal offer of employment and a prior conversation with Neal, from which Lumetta assumed her promotion from mailroom clerk to accounts payable clerk would be automatic. The content and context of this alleged conversation was addressed by Neal, who explained that although she "would have considered" placing Lumetta in the position, it was not an automatic assumption that she would be promoted. Specifically, Neal opined:

> I don't know if I would have put her in that position. I would have wanted to test her out a little further, again, because Hristina supervised her directly and I did not. It wasn't till actually later, when I tried to move her into another position that I discovered there were some definite issues with her ability to handle numbers.

Further, Lumetta is unable to overcome the direct and unequivocal testimony of those involved in the hiring process that the decision to hire Sorrells was made by Neal and Arnold and was based on their determination that Sorrells was the best qualified candidate for the position. A trier of fact is not permitted to second-guess whether an employer's decision to hire a particular candidate was sound or wise. *Hazle v Ford Motor Co*, 464 Mich 456, 464 n 7, 475-476; 628 NW2d 515 (2001); *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997). "[T]he soundness of an employer's business judgment may not be questioned as a means of showing pretext." *Id.* In addition, "unfairness will not afford a plaintiff a remedy unless the unfair treatment was because of . . . discrimination." *Id.*

Arnold specifically asserted:

> [W]e felt Karen was the best qualified. She had a lot of accounts payable experience, she was going to college, she knew about general ledger accounts, P&L's, balance sheets. She knew accounting software. . . . I feel that three years of a four-year-degree is more than an associate's degree.

Similarly, Neal stated:

> When we interviewed, I saw a lot of very talented individuals that carried themselves very well and were very professional, not what I expected. . . . [B]ut when I made the comparison to Pam, they far outweighed the way she handled herself. . . . Just their demeanor, their professionalism. Just your overall body language. I really – it really became quite obvious that there was a huge difference between the people I interviewed and [Lumetta].
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> I think that Pam was our mail room clerk who was filling in for some of the jobs in [accounts payable]. She wasn't doing all the jobs, first of all. Secondly, I think that the experience and my own feelings about how I wanted to transition this job [] came into play for my final decision. And Pam did not have the qualifications that I was looking for that would allow her to progress to the point that I wanted her to go to.

Finally, Lumetta puts forth as evidence of discrimination the failure of Sorrells to complete all parts of the application form, which should have precluded her from obtaining an interview. First, Lumetta ignores that although some information was not provided, Sorrells and other applicants, including Lumetta, also attached resumes to their applications that provided the missing or incomplete information. Consequently, the technical adherence to an additional form is not problematic as the provision of the necessary information, which is undoubtedly the goal of the form, was made available to permit selection of the individuals found suitable for interview. Second, Lumetta ignores that if U.S. Foodservice and its employees did not use discretion in determining who would be interviewed, Lumetta herself would not have been permitted to even participate in this process. The applicant pre-screen form indicates that only those "applications/resumes . . . that clearly meet the minimal qualifications for the position" are to be forwarded to the "Hiring Manager." Contrary to Lumetta's contention, the consideration of

applications by U.S. Foodservice of those individuals who might qualify for the position or be capable of performing the job responsibilities of an accounts payable clerk demonstrates not an attempt to "stack the deck" but, rather, an effort to permit a broad and diverse group of individuals with varying backgrounds, credentials and attributes an opportunity to procure employment.

The trial court correctly granted summary disposition in favor of defendants based on the inability of Lumetta to establish a prima facie case of reverse racial discrimination in employment because she failed to demonstrate she was qualified for the accounts payable clerk position. Lumetta mistakenly focuses on the qualifications of Sorrells rather than her own lack of experience and education to meet the criteria required for the position. Lumetta has also failed to demonstrate that the reasons put forth by U.S. Foodservice for its selection of another candidate for the position of accounts payable clerk comprised mere pretext. Sorrells was better qualified for the position based on her experience and educational background. Lumetta's assertion that the hiring decision was made by human resources is without evidentiary support as both Arnold and Neal averred that the ultimate decision regarding which candidate to hire rested with them and not human resources. Lumetta's reliance on anecdotal information regarding previous hiring practices concerning the promotion of internal candidates and the recent decline in the number of African-American employees retained by U.S. Foodservice is insufficient to support an inference of unlawful discrimination in hiring.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause