STATE OF MICHIGAN

COURT OF APPEALS

MARY ANN BAXTER,

Plaintiff-Appellant,

v

LAPEER HEALTH SERVICES CORPORATION, LAPEER REGIONAL HOSPITAL, LAPEER HEALTH MANAGEMENT, INC., and FIRST COAST GREAT LAKES, Inc.,

Defendants-Appellees.

UNPUBLISHED
July 19, 1996

No. 175482
LC No. 92-17948-NO

Before: O'Connell, P.J., and Reilly and D.E. Shelton,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an April 25, 1994 order of the Lapeer County Circuit Court granting summary disposition in favor of defendant and dismissing plaintiff's claims for sexual discrimination, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) and retaliation, MCL 37.2701(a); MSA 3.548(701)(a).[1] We reverse.

Plaintiff alleged in her complaint that she was discriminated against on the basis of gender when she was replaced by a man as the Chief Information Officer (CIO) of Lapeer Regional Hospital in June of 1991. Plaintiff stated she was hired on October 31, 1988 as the director of information services at the hospital. She claims that she was promoted to the position of vice president, *and* CIO, on October 31, 1989. In May of 1990, she received an outstanding performance evaluation rating and an increase in salary from $58,000 to over $67,000, plus a 16 percent corporate bonus. Plaintiff offered this information to establish that she was not terminated based on her performance. Stan Jonas, interim CEO of the hospital at the time of plaintiff's departure, admitted that the decision to terminate plaintiff from the position as vice-president of information services had nothing to do with her performance.

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* Circuit judge, sitting on the Court of Appeals by assignment.

In October of 1990, plaintiff and then CEO, Tom Keesling, worked together to develop a computer software project known as the First Coast Great Lakes Project. A subsidiary called "First Coast Great Lakes" was formed and funded by the hospital. In December of 1990, Dan Witmer was hired as vice-president of client services and facilities management for First Coast Great Lakes. He was not interviewed for this position by plaintiff, although she alleged that she was responsible for receiving applications for the position and had interviewed several other applicants. Witmer began working at the hospital on December 10, 1990 at a salary of $86,500. Plaintiff, who had been at the hospital since 1988, was paid $79,527 at the time Witmer was hired.

In May of 1991, Jonas was named interim CEO of the hospital, replacing Keesling. Defendants claim that Jonas decided that the hospital and its related organizations did not need the 11 executives it employed because it was losing money. Jonas also decided that the hospital should not make as large a financial commitment to First Coast Great Lakes as it had in the past. With the approval of the hospital's board of directors, Jonas sought to eliminate four vice-president positions, consolidating some of the responsibilities of the positions into newly created positions. The four positions were held by two females and two males. One male vice-president of marketing was terminated outright after his position was eliminated. A second vice-president position, held by a female, was consolidated with another position and the female retained her job. The remaining two vice-president positions were both in the information services area. The positions of vice-president of information services, held by plaintiff, and vice-president of systems implementation, held by Witmer, were eliminated and combined into a single Chief Information Officer (CIO) position.

Defendants claim that plaintiff and Witmer were invited to "bid" against each other for the newly created position. The hospital established a selection committee comprised of two males and two females to make the choice. The committee recommended that Witmer be hired for the CIO position and he was.

Plaintiff claims that the stated economic basis for the consolidation of the CIO position was a pretext which the hospital used to hire a man in her place. She claimed that a very different factual situation existed. While acknowledging that there was no evidence that the independent selection committee's actions were discriminatory, plaintiff asserted that there should never have been a selection committee. She claimed that at the time the vice president positions held by herself and Witmer were consolidated into a single CIO position, she already held the CIO position. There is a significant dispute regarding this issue. Plaintiff averred in her affidavit that, although she was never "officially" given the position, she was treated as the CIO by the defendants. Plaintiff asserts that Witmer should have been terminated or moved to another position when First Coast Great Lakes was eliminated. Defendants disputed that allegation and submitted factual support for their version of plaintiff's prior position.

Plaintiff claims that the real motivation for the hospital's actions was to replace her with a man. She presented evidence that Jonas and Witmer were actually friends and that Witmer was not originally hired through normal hospital personnel procedures. She stated in her affidavit that Witmer clearly stated that he would refuse to report to a female executive. Witmer denied making such a statement but

admitted that he would not take any job at the hospital in which he was a "number two person." Plaintiff claims the hospital constructed a mechanism by which Jonas could assure that his male friend was installed to replace the existing female CIO.

Plaintiff also offered "pattern" evidence which she contends buttresses her contention that the hospital preferred a man in the CIO position. She presented evidence that, after a merger of McLaren Hospital with Lapeer, the defendants replaced the female McLaren CIO with Witmer. Plaintiff asserts that this replacement took place under circumstances "virtually identical" to those that led to her departure from Lapeer.

As further support for her position that the defendants' contention that it made structural changes in the corporation for economic reasons was a pretext, plaintiff offered evidence that after her departure, the hospital hired new employees in Witmer's department and spent $55,000 in consulting fees. Defendants denied these factual claims and contended that the two new employees and the consultant were hired as part of a plan in existence before Ms. Baxter's departure.

Against this backdrop, the trial court granted summary disposition in favor of the defendants, finding that there was no genuine issue of material fact and that defendants were entitled to judgment as a matter of law. We disagree and remand to the trial court for trial on plaintiff's discrimination claim.

In *Naubacher v Globe Furniture Rentals, Inc.*, 205 Mich App 418; 522 NW2d 335 (1994), we said:

> A motion for summary disposition under MCR 2.116(c)(10) tests whether there is factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Ward v Frank's Nursery & Crafts, Inc.* 186 Mich App 120, 134; 463 NW2d 442 (1990), lv den 437 Mich 1033 (1991). The party opposing the motion then has the burden of showing that a genuine issue of disputed facts exists. *Pantely v Garris, a P.C*, 180 Mich App 768, 773; 447 NW2d 864 (1989), lv den 434 Mich 871 (1990). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must have documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCarty J Walter Thompson USA, Inc*, 437 Mich 109; 115; 469 NW2d 284 (1991).

Where the credibility of the parties or witnesses is placed in issue, summary disposition is not proper, as the Supreme Court said in *McCarty J Walter Thompson*, 437 Mich 109; 469 NW2d 284 (1991):

> Summary disposition is not appropriate when the moving party's factual assertions depend on the credibility of a witness. The United States Supreme Court has

said, in this context, that an affiant who, like Bowen, was an officer of the moving party was "clearly an interested witness" requiring "'the credibility of his testimony to be submitted to the jury as a question of fact.'" *Sartor v Arkansas Natural Gas Corp*, 321 US 620, 624, 628; 64 S Ct 724; 88 L Ed 967 (1944). MCR 2.116(C)(10), "no genuine issue as to any material fact," is derived word for word from corresponding F R Civ P 56. The advisory committee on the federal rule stated:

> "Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate."

In this case, there was a substantial dispute regarding credibility. Most striking is the direct confrontation between plaintiff and Witmer concerning whether Witmer made it known that he would not work for a female superior or whether he, as he claimed, would not work for anyone else, male or female. That dispute is clearly a material one. If the trier of fact finds that Witmer made the statement and made it known to his friend, that is certainly supportive of plaintiff's claim of pretext.

Of similar significance is the credibility dispute regarding plaintiff's position prior to the "bidding" process. Plaintiff claims she was already functioning as the CIO and the defendants flatly deny that assertion. If the jury finds that plaintiff was already the functioning CIO, that is also supportive of plaintiff's position that the entire committee process was a pretext to oust her in favor of a male.

The parties did not dispute a number of facts regarding plaintiff's employment but there are vast differences in the conclusions they ask the jury to draw from those facts. Where there is a dispute among the logical inferences that may be drawn from the same facts, summary disposition is not proper. As the Supreme Court said in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986):

> Even where there is no material factual dispute, a motion for summary disposition (as well as directed verdict and judgmetn notwithstanding the verdict) should not be granted if the facts can support conflicting inferences. 73 Am Jur 2d, Summary Judgment, Sec 27, p 754.

In this case, for example, the parties agree about such facts as Jonas' friendship with Witmer, the replacement of the McLaren female CIO, and the hiring of new employees and a consultant after plaintiff was replaced. They each have different explanations for those facts, with plaintiff contending that they show discrimination and pretext, and defendant contending that they are examples of business judgment. A jury could reasonably draw either inference from these facts.

Parties who have a material dispute about the facts and circumstances of their dispute, or a legitimate dispute about the inferences and conclusions to be drawn from those facts, are entitled to have those difference resolved by a jury. A trial judge may not substitute his or her judgment for that of a jury and must not resolve factual differences by means of summary disposition.

The order of the trial court granting summary disposition of plaintiff's discrimination claim is reversed and remanded to the trial court for trial.

/s/ Peter D. O'Connell
/s/ Maureen Pulte Reilly
/s/ Donald E. Shelton

[1] At oral argument, plaintiff conceded that the trial court correctly dismissed her retaliation claim and we, therefore, do not address that claim in this appeal.