# STATE OF MICHIGAN

# COURT OF APPEALS

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EDITH M. DERUSHA,

Plaintiff-Appellant,

v

ROLLINS HUDIG HALL OF MICHIGAN, INC., and JAMES W. WEBB,

Defendant-Appellees.

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UNPUBLISHED
October 25, 1996

No. 177829
LC No. 93-326236-CZ

Before: Corrigan, P.J., and MacKenzie, and P.J. Clulo*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

Plaintiff began working for Rollins Burdick Hunter (RHB) in May of 1991 as an Assistant Vice President/Claims Manager. According to plaintiff, her employment with defendant RHB was without incident, and she performed her duties in a manner which met or exceeded her employer's expectations. In November 1992, RBH merged with Frank B. Hall to form a new company, Rollins Hudig Hall of Michigan (RHHOM).

RHHOM conducted employee interviews to determine which positions and employees would be retained. On November 5, 1992, plaintiff was interviewed for a position by defendant Webb, who was President and Chief Executive Officer, and by Joe Diamond. Plaintiff alleged that during the course of her interview, Webb produced a copy of Penthouse Magazine, held it up, and stated that women were very beautiful without their clothing Plaintiff objected to those comments and other sexually offensive remarks made by Webb during the interview, and informed him that what he had done was inappropriate and unprofessional. Plaintiff alleged that she informed William McCaffrey, RHHOM's Chairman, of Webb's conduct during the interview and was advised to document the behavior.

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

Plaintiff's complaint alleged that, despite the fact that she was qualified for several positions within RHHOM, her employment was terminated on January 8, 1993, in retaliation for her opposition to Webb's conduct. Count II of plaintiff's complaint alleged disparate treatment in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the motion, finding that the Webb incident was brief and did not give rise to a sexual discrimination claim. The trial court reasoned that the candidate chosen was more qualified in that he had twice as many years of experience as plaintiff and was a college graduate, and the fact that he happened to be male was insufficient, by itself, to establish sex discrimination.

Plaintiff first argues that the trial court improperly granted summary disposition in favor of defendants because there were questions of fact for the jury to resolve under the Elliot-Larsen Civil Rights Act, *supra*. We disagree.

To avoid summary disposition of a claim of sex discrimination, a plaintiff must demonstrate the existence of a genuine issue of material fact regarding whether a prima facie case of discrimination exists. *York v Fiftieth District Court*, 212 Mich App 345, 349; 536 NW2d 891 (1995); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). A prima facie case of discrimination is established when a plaintiff produces evidence that she was a member of a protected class, applied and was qualified for a position, but was rejected under circumstances giving rise to an inference of unlawful discrimination. *York, supra*, pp 349-350. Where, in response to a prima facie case of discrimination, a defendant puts forth a legitimate nondiscriminatory reason for its actions, the plaintiff has the burden of showing that the proffered reason was merely a pretext. *Id.*, p 350. There are three ways a plaintiff can establish that a defendant's stated legitimate, nondiscriminatory reasons are pretexts: (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1991).

In this case, plaintiff was unable to establish that for the same conduct or performance, she was treated differently than a man. While plaintiff may have been qualified for the position for which she was applying, the record below clearly established that defendants' ultimate choice for the position, Joe Aubin, was more qualified. Plaintiff was unable to show that Aubin was equally or less qualified than she. She was further unable to show that Aubin's qualifications were not the true reason that he got the job. Because plaintiff was unable to establish that she was treated differently on the basis of her gender, the trial court properly concluded that she failed to establish a prima facie case of discrimination.

Plaintiff's claim that she was not considered for other positions in violation of the Michigan Civil Rights Act is also without merit. Plaintiff was unable to establish that there were, in fact, other positions available for which she would have qualified. The party opposing summary disposition may not rest upon mere allegations or denials in the pleadings, but must, by affidavit or other documentary evidence,

set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). As such, plaintiff's argument fails.

Plaintiff next argues that the trial court improperly granted summary disposition in favor of defendants where she brought forth sufficient evidence that defendants' decision to fire her was in retaliation for plaintiff's decision to file a complaint against defendant Webb. Again, we disagree.

Under Michigan law, in a case alleging discharge in retaliation of a civil rights claim, as in other protected activity or suspect category cases, the plaintiff has the initial burden of presenting a prima facie case of discriminatory discharge which the employer can rebut by a showing that there were valid reasons for the discharge. *Polk v Yellow Freight System, Inc*, 876 F2d 527, 530-531 (CA 6, 1989); *Taylor v General Motors Corp*, 826 F2d 452, 456 (CA 6, 1987). See also *McLemore c Detroit Receiving Hosp & Univ Medical Center*, 196 Mich App 391, 399-400; 493 NW2d 441 (1992). The plaintiff must then come forward with evidence that the employer's proffered reason was pretexual. *Taylor, supra*. However, the ultimate burden of proof rests with the plaintiff at all times. *McLemore, supra*.

In order to make out a prima facie case of retaliatory discharge, the plaintiff has to prove that (1) she engaged in a protected activity, (2) that this was known to the defendant, (3) that the defendant took an employment action adverse to her. See *McLemore, supra*. Plaintiff, however, offered no proof that the complaint she lodged was known to the committee members or to defendant Webb when the adverse action was taken. Plaintiff presented no more than a mere allegation that she was terminated as the result of the complaint. Defendants, on the other hand, submitted Webb's affidavit that neither he nor the members of the executive committee making the hiring decision, made any reference to plaintiff, nor knew that she had lodged a complaint concerning defendant Webb's behavior during the interview. Because there remained no genuine issue of material fact, summary disposition was properly granted.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Paul J. Clulo