

STATE OF MICHIGAN
COURT OF APPEALS

PEARLENE SULLIVAN,

Plaintiff-Appellant,

v

FIFTEENTH DISTRICT COURT,

Defendant-Appellee.

UNPUBLISHED

December 17, 1996

No. 177447

Washtenaw County

LC No. 93-793-NZ

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, a 56-year-old African American female, had worked for defendant for 36 years when defendant reorganized in 1993, and was the supervisor of two employees in the criminal division of the clerk's office. As part of the reorganization, defendant placed plaintiff in a nonsupervisory position where she had little contact with people, but received the same pay and benefits. The supervisory duties of plaintiff and another supervisor, who was also moved in the reorganization, were reassigned to a 27-year-old white female. Plaintiff filed suit against defendant, alleging race and age discrimination. Defendant moved for summary disposition, conceding, for purposes of the motion, that plaintiff presented a prima facie case of age and race discrimination. As the reason for moving plaintiff to a nonsupervisory position, defendant presented evidence of a history of complaints about plaintiff from the public and other employees at the court. Plaintiff submitted an affidavit attempting to prove that the reason given by defendant was merely a pretext for age and race discrimination. The trial court, however, found that plaintiff did not present evidence sufficient to raise a factual question regarding whether defendant's justification for the reorganization was merely a pretext. Accordingly, the court granted defendant's motion for summary disposition.

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

On appeal, plaintiff claims that the trial court erred in granting summary disposition in favor of defendant. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184-185; 468 NW2d 498 (1991). A court reviewing such a motion, therefore, must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the party opposing the motion, and grant the benefit of any reasonable doubt to the opposing party. *Radtke, supra*, p 374. The party opposing the motion has the burden of showing that a genuine issue of disputed fact exists, and the disputed factual issue is material to the dispositive legal claims. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994). The nonmovant may not rest upon mere allegations or denial, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

In a discrimination case, the burden of proof is allocated as follows:

(1) the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination; (2) if the plaintiff is successful in proving a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions; and (3) The plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. [*Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993)].

In this case, it was assumed that plaintiff could present a prima facie case of discrimination. Moreover, defendant presented proof of several incidents establishing a legitimate business reason for plaintiff's reassignment. The only question was, therefore, did plaintiff present sufficient evidence to raise an issue of material fact as to whether defendant's proffered reason for reassigning plaintiff was merely a pretext.

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. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext. [*Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).]

Plaintiff contends that her affidavit established that the reasons articulated by defendant for her reassignment to a position involving attention to detail rather than personal contact were not true and, therefore, were a mere pretext for age and race discrimination. We disagree. There was no dispute that plaintiff received at least four complaints from the public for being rude, and a bar association poll found that her entire department was rude and unhelpful. Additionally, there was no dispute that plaintiff

left work early on one occasion, and did not return to work after a seminar on another occasion. There is also no dispute that plaintiff wrote a memo to the chief of police without the permission of the chief judge or her supervisor. Further, there was no dispute that plaintiff would not follow a direct order from her supervisor when he asked her to change a sweatshirt he found inappropriate. Although plaintiff characterizes many of these incidents as unfair, this characterization does not create a factual question as to whether the incidents in fact happened. Plaintiff only disputes one allegation that she was not helpful, one allegation that she criticized her staff in front of others, and one allegation that she had spread a rumor concerning the police chief's marital infidelity. In light of the overwhelming evidence that plaintiff does not challenge, it cannot be said that there is a legitimate issue as to whether the incidents proffered by defendant as the legitimate business reason for her reassignment were true. *Dubey, supra*. Because plaintiff has not raised a genuine issue concerning the legitimacy of defendant's purpose in reassigning her, she has not met the burden necessary to proceed with her race and age discrimination claims.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Jane E. Markey

/s/ James M. Batzer