STATE OF MICHIGAN

COURT OF APPEALS

MARIANNE GRISTY,

Plaintiff-Appellant,

v

MAY DEPARTMENT STORES COMPANY d/b/a LORD & TAYLOR, and LYNDA CAMPBELL,

Defendants-Appellees.

UNPUBLISHED
February 11, 1997

No. 185734
Macomb Circuit Court
LC No. 93-005025-NZ

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a May 5, 1995, order of the Macomb Circuit Court granting defendants summary disposition pursuant to MCR 2.116(C)(10) (no genuine issue regarding any material fact and moving party entitled to judgment as a matter of law). We affirm the grant of summary disposition with regard to the claim of retaliatory discharge, reverse the grant of summary disposition with regard to the claim of age discrimination, and remand for further proceedings.

I

Plaintiff worked for defendant Lord & Taylor from September 28, 1991 to October 8, 1992, when she was terminated. She was born on December 31, 1934, and received a bachelor of arts degree in public relations and marketing in 1980. Plaintiff interviewed with Lynda Campbell, then general manager of the Lord & Taylor store located at the Twelve Oaks Mall in Novi. During her second interview with Campbell, plaintiff was offered an executive position as the area sales manager in shoes, handbags, accessories, and jewelry. Plaintiff testified at her deposition that Campbell expressed concerns about plaintiff's age at the second interview and informed plaintiff that "if it was up to her [Campbell], she wouldn't hire" plaintiff. However, plaintiff began working on September 28, 1991. Campbell testified that plaintiff was the only manager over the age of fifty at the Novi store, and that

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

during Campbell's ten-year career at Lord & Taylor, plaintiff was the only person over the age of fifty that she hired into a salaried position.

Plaintiff stated that she began to experience problems from the beginning of her employment. Plaintiff stated that she was told to "write up" two older workers, Helen Bowen (late sixties) and Ann Collins (late fifties). Plaintiff testified that she was instructed to give Bowen more work to do in an effort to force her to retire. Plaintiff also testified that Campbell told plaintiff that she wanted to discharge Bowen because of her age on more than one occasion. Plaintiff further testified that she was told that Collins may have Alzheimer's disease and that Campbell wanted Collins to retire as well. Campbell admitted to calling Collins a member of the "Alzheimer's club." Three other managers also told plaintiff to give Bowen more stock work to do in the hope that she would retire or quit. One manager told plaintiff that they were trying to get rid of Bowen because she was "too old."

Defendants also presented evidence that there were problems with plaintiff's employment relationship. Plaintiff's supervisor expressed concern that plaintiff was struggling with her job. When the 1991 holiday season was finished, the store conducted an inventory, and the inventory in plaintiff's department went well. However, in February 1992, the store conducted reviews of its managers and plaintiff was on the bottom of the list with respect to numerical ranking. Plaintiff was put on probation for thirty days, and the probationary period was later extended to sixty days.

During the probationary period, plaintiff sent a letter to Virginia Demchak, the regional human resources manager, complaining that she was being discriminated against because of her age and religion (citing a Jewish "joke" told by Campbell). A meeting took place between Demchak, Campbell, and plaintiff, but Campbell denied making any statements about plaintiff's age.

Plaintiff completed her probation in May 1992 and received an effective (good) review. Plaintiff was also given a pay raise of $1,000. By the middle of June 1992, however, plaintiff's new supervisor, Marla Wald, began complaining about plaintiff's performance. Wald told Campbell that plaintiff was not getting merchandise onto the floor on time and plaintiff was not maintaining merchandise presentation or housekeeping presentation. Shortly thereafter, it was discovered that some merchandise had not been included in the most recent inventory, but was behind a backdrop in plaintiff's department. On July 8, 1992, plaintiff was given a final warning because of her decision to not inform management about the merchandise. On July 9, 1992, plaintiff's operational audit resulted in a 41.4% rating, which defendants claimed was unsatisfactory. Another audit done on August 9, 1992, was again unacceptable to defendants. Defendants contend that plaintiff's performance continued to be deficient and on September 23, 1992, a memorandum setting forth plaintiff's deficiencies was sent to an executive in New York. On September 25, 1992, plaintiff's termination was approved by the senior vice-president of human resources. Campbell told plaintiff that her termination was due to her failure to keep her performance at an effective or better level. Plaintiff's former stock clerk, Theresa Smith, then twenty-eight years old, replaced her.

II

A motion for summary disposition is reviewed de novo on appeal. *Plieth v St. Raymond Church*, 210 Mich App 568, 571; 534 NW2d 164 (1995). The factual support of a plaintiff's claim is tested on a motion for summary disposition filed under MCR 2.116(C)(10). *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The court must consider the affidavits, pleadings, depositions, admissions, and any other documentary evidence presented to it. MCR 2.116(G)(5). The court is not permitted to assess credibility or to determine facts on a motion for summary disposition. *Skinner, supra*, p 161. Rather, the court's task is to review the record evidence, and all reasonable inferences drawn from it, and determine whether a genuine issue of any material fact exists to warrant a trial. *Id.*

III

A

Plaintiff alleges that she was discharged on the basis on her age in violation of the Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). Plaintiff's claim is premised on a disparate treatment theory which requires a showing of either a pattern of intentional discrimination against protected employees, or against an individual plaintiff. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), lv gtd 451 Mich 920 (1996). A plaintiff can establish a claim of age discrimination under ordinary principles of proof by any direct or indirect evidence relevant to and probative of the issue without resort to any judicially created presumptions or inferences related to the evidence. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). However, "an employer is rarely so blatant as to announce its illegal motives." *Lytle, supra*, p 185. Rather, the usual case must be proved by indirect evidence and special rules of proof have been created in employment discrimination cases[1]. *Id.*

A prima facie case of age discrimination in a non-reduction-in-workforce claim, such as this, requires the plaintiff to show (1) she was a member of a protected class; (2) she was discharged; (3) she was qualified for the position; and (4) she was replaced by a younger person. *Matras, supra*, p 683; see also *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973)[2]. Once established, a prima facie case creates a rebuttable presumption of disparate treatment. *Lytle, supra*, p 186. The burden of production then shifts to the defendant to rebut the presumption by articulating some legitimate, nondiscriminatory reason for the adverse employment decision against the plaintiff. *Id.*, pp 186-187. If the defendant carries its burden of production, the presumption of discrimination is dispelled, and the factual inquiry proceeds to a new level of specificity. In order for a plaintiff to survive a motion for summary disposition, she must next tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's proffered reasons are a pretext for age discrimination. *Id.*, p 188. Therefore, plaintiff must establish, directly or indirectly, the existence of a genuine issue of material fact that the defendant's proffered reasons are unworthy of credence, and that illegal age discrimination was more likely the defendant's true motivation in discharging her. *Id.*

B

We find that plaintiff has established a prima facie case of age discrimination under a disparate treatment theory. Plaintiff was a member of a protected class (age forty to seventy) because she was fifty-seven when she was discharged. Second, there is no question in this case that plaintiff was discharged by defendant; that is, plaintiff did not voluntarily resign. Further, plaintiff was qualified for the position because she had a bachelor of arts degree in public relations and marketing and eight years of experience in retail management positions. Moreover, Demchak testified that plaintiff was qualified for the position when she interviewed plaintiff. The trial court's conclusion that plaintiff was not qualified for the position because she did not perform her job competently is erroneous because an employee's qualification for a job is much different than competency while on the job and a trial court is not permitted to make such a factual determination when deciding a motion for summary disposition under MCR 2.116(C)(10). Further, a prima facie case here does not require plaintiff to prove that she was performing the job at a level which met her employer's expectations. Plaintiff has shown that she was qualified for the position. Finally, plaintiff has also shown that she was replaced by a younger employee, as Smith was twenty-eight years old.

Next, because plaintiff established her prima facie case of age discrimination, the burden of production shifted to defendants to articulate some legitimate, nondiscriminatory reason for the discharge. Defendants have met this burden by stating that plaintiff was discharged because of poor job performance. Thus, in order to survive the motion for summary disposition, plaintiff must show specific factual evidence that could lead a reasonable jury to conclude that defendants' proffered reason for discharge are a mere pretext for age discrimination. We believe that plaintiff has alleged such factual evidence.

Plaintiff testified that Campbell told her at her second interview that if it was up to her, she would not hire plaintiff and that she had concerns about plaintiff's age. Campbell admitted that in her ten years at Lord & Taylor, plaintiff was the only person over forty hired into a salaried position. Campbell also admitted that she referred to Collins as part of an "Alzheimer's club." Plaintiff further testified that Campbell wanted to discharge Bowen because of her age. Plaintiff has also rebutted defendants' proffered reason for discharge because she demonstrated through documents that her sales figures for the first two quarters of 1992 were better than the company had planned. Further, plaintiff successfully completed her probationary period and received a good review. Plaintiff also received a pay increase two months before her discharge. Plaintiff also set forth documentary evidence that her replacement received a performance appraisal approximately equal to plaintiff, but Smith was never placed on probation or discharged.

Accordingly, the evidence, taken in a light most favorable to plaintiff, is sufficient to establish the existence of a material factual dispute that defendants' proffered reason is unworthy of credence, and that illegal age discrimination was more likely defendants' true motivation in discharging plaintiff. The trial court erred in granting summary disposition to defendants regarding the age discrimination claim.

IV

Plaintiff next contends that the trial court erred in dismissing her claim of retaliatory discharge. Plaintiff contends that she was discharged as well because she complained about age discrimination as it related to Bowen, Collins, and herself. Under the Civil Rights Act, an employer cannot retaliate against an employee for opposing a violation of the act or making a charge or complaint of discrimination. MCL 37.2701; MSA 3.548(701).

In order to establish a prima facie case of unlawful retaliation under the "opposition clause" of the Civil Rights Act, plaintiff must set forth facts showing (1) that she has opposed violations of the act, and (2) that the opposition was a significant factor in an adverse employment decision. *Johnson v Honeywell Information Systems, Inc*, 955 F2d 409, 415 (CA 6, 1992); see also *Goins v Ford Motor Co*, 131 Mich App 185, 198; 347 NW2d 184 (1983) (where the plaintiff claimed that he was unlawfully discharged for filing a worker's compensation claim, the trial court correctly instructed the jury that the plaintiff had the burden of proving that the filing of the worker's compensation claim was a significant factor in the defendant's decision to discharge the plaintiff).

A review of the record indicates that plaintiff never informed any of her supervisors about the discrimination against Bowen or Collins, nor did she inform anyone that she was unwilling to engage in discrimination against them. Although plaintiff argues that she refused to unfairly document any performance deficiencies, this was never relayed to defendant. Because there is no evidence that defendants were aware that plaintiff believed that Bowen and Collins were being discriminated against, she cannot establish that her opposition to the discrimination was a significant factor in the decision to discharge her. Therefore, plaintiff has failed to establish a prima facie case of retaliatory discharge with respect to her alleged opposition to the treatment of Bowen and Collins at work.

Plaintiff, however, also alleges that she informed management that she believed that she was being discriminated against and that she was discharged as a result of this complaint. During the period while plaintiff was on probation, she sent a letter to Demchak complaining that she was being discriminated against because of her age, citing the comments made to her at her second interview, and because of her religion, citing a Jewish "joke" told by Campbell. Although we agree that plaintiff has met the first element of the prima facie case of retaliation, we are unable to conclude that plaintiff has set forth any evidence demonstrating that her complaint was a significant factor in her discharge.

In this case, the letter was sent while plaintiff was on probation. Further, a meeting was held with Demchak and Campbell regarding plaintiff's concerns. Plaintiff was taken off probation after the meeting, having completed it successfully, and she received a pay increase. Also, at the time that plaintiff completed probation, she received a good review. When plaintiff was discharged, approximately six months after she wrote the letter, there is no indication that she was discharged because of her complaint of discrimination. Plaintiff must prove that the complaint of discrimination was a significant factor in the decision to discharge her, however, plaintiff has not set forth any circumstantial or direct evidence tending to show this.

Accordingly, we conclude that the trial court did not err in granting summary disposition to defendants with respect to the retaliation claim.

Affirmed in part, reversed in part, and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick

[1] Plaintiff argues that resort to the special burden-shifting rules of proof in employment discrimination cases need not be done because there is direct evidence of discrimination. We do not agree with plaintiff's contention in this regard because, although plaintiff testified that Campbell made direct remarks of discrimination, Campbell denied making the remarks. Therefore, this presents a credibility issue that a trier of fact will have to resolve.

[2] The United States Supreme Court has recently held that the fact that a plaintiff bringing a claim under the Age Discrimination in Employment Act was replaced by a person outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case. *O'Connor v Consolidated Coin Caterers Corp,* ___ US ___; ___ S Ct ___; ___ L Ed 2d ___; 64 USLW 4243 (April 1, 1996). In this case, because plaintiff was replaced by a person who is not a member of the protected class, we note, like the Supreme Court, that the fact that the replacement was substantially younger than plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.