STATE OF MICHIGAN

COURT OF APPEALS

DORIS HILL,

Plaintiff-Appellant,

v

DAYTON HUDSON CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 23, 1997

No. 191711
Wayne Circuit Court
LC No. 95-504361 CZ

Before: Holbrook, Jr., P.J., and MacKenzie and Murphy, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of summary disposition, entered in favor of defendant pursuant to MCR 2.116(C)(10), in this employment discrimination case. We affirm.

Plaintiff first argues that the trial court erred in finding an absence of any genuine issue of material fact with regard to her race discrimination claim. We disagree. To establish a claim of race discrimination under the disparate treatment theory, a plaintiff must show: (1) that she was a member of a class entitled to protection, and (2) that she was treated differently than persons of a different class for the same or similar conduct. *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). Once a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to articulate some nondiscriminatory reasons for the discharge. If the defendant is able to meet this burden, the plaintiff must have the chance to prove that the reasons offered by the defendant were a pretext for discrimination. *Id.* at 539.

Plaintiff is African-American and is therefore a member of a protected class. *Dixon v W W Grainger, Inc*, 168 Mich App 107, 115; 423 NW2d 580 (1987). In support of her claim, plaintiff raises evidence of her violation of defendant's policy requiring the return of a cash bag to defendant's Sales Audit Office following the conclusion of a work shift. Plaintiff argues that upon violating this policy, she received a final warning, whereas a Caucasian employee who also violated this policy was not disciplined by defendant. Upon review of the lower court record, however, we conclude that the two incidences relied upon by plaintiff were dissimilar in nature and hence do not support her claim.

Moreover, plaintiff's deposition testimony clearly shows that she was uncertain as to whether her race was a factor in defendant's decision to terminate her employment. The documentary evidence provided to the trial court therefore did not show that defendant treated plaintiff and non-minority employees differently for the same or similar conduct, and plaintiff has failed to present a prima facie case of discrimination. *Reisman, supra* at 538. Defendant was entitled to summary disposition as a matter of law pursuant to MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in finding an absence of any genuine issue of material fact with regard to her retaliation claim. Again, we disagree. A review of the record establishes that defendant did not initiate its investigation of plaintiff and her fellow employees in response to any complaint by plaintiff of disparate treatment in contravention of the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Rather, the investigation was triggered by routine, computer-generated loss prevention reports that showed unusual merchandise return activity in plaintiff's department and by plaintiff specifically. Because plaintiff was discharged as a consequence of her failure to follow defendant's policies and procedures, as revealed by defendant's investigation, defendant did not terminate plaintiff's employment in retaliation for her allegedly having expressed concern to defendant about possible discrimination. *McLemore v Detroit Receiving Hosp & University Medical Center,* 196 Mich App 391, 395-396; 493 NW2d 441 (1992). Defendant was entitled to summary disposition as a matter of law. MCR 2.116(C)(10).

Plaintiff finally argues that the trial court erred in finding an absence of any genuine issue of material fact with regard to her age discrimination claim. This claim is also without merit. To establish a prima facie case of age discrimination in the termination of employment, the plaintiff must show that she was a member of the protected class, she was discharged, she was qualified for the position, and age was a determining factor in the employer's decision to discharge the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986); *Lytle v Malady*, 209 Mich App 179, 186 n 2; 530 NW2d 135 (1995), lv gtd 451 Mich 920 (1996). Once established, a prima facie case of age discrimination creates a rebuttable presumption of disparate treatment and the burden of production shifts to the defendant employer to rebut the presumption by articulating some legitimate, nondiscriminatory purpose for the employment decision. *Lytle, supra* at 187. If the defendant carries its burden of production and rebuts the presumption, the burden shifts back to the plaintiff to prove that the proffered explanation was mere pretext and that illegal discrimination was more likely the defendant's true motivation in discharging the plaintiff. *Id.*

In this case, plaintiff was over forty years of age at the time of discharge and was therefore a member of a protected class. *Id*. Moreover, plaintiff provided the trial court with documentary evidence showing that she was qualified for the position of defendant's sales associate. However, defendant's evidence showed that plaintiff's age was not a factor in the decision to terminate her employment; rather, the decision was based on plaintiff's violations of defendant's policies regarding the processing of merchandise transactions. Because plaintiff failed to show that this

explanation was mere pretext and that illegal discrimination was more likely defendant's true motivation in discharging her, *Lytle, supra* at 187, defendant was entitled to summary disposition as a matter of law. MCR 2.116(C)(10).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ William B. Murphy