STATE OF MICHIGAN

COURT OF APPEALS

BARBARA WILLIAMS,

Plaintiff-Appellant,

v

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
April 10, 1998

No. 194429
Ingham Circuit Court
LC No. 95-079453 NZ

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this employment discrimination action brought under the Civil Rights Act, MCL 27.2202, *et seq.*; MSA 3.548(202), *et seq*. We affirm.

Plaintiff argues that the circuit court erred in granting defendant's motion for summary disposition because she presented enough evidence of pretext to create a genuine issue of material fact. We review this issue de novo, *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 650; 513 NW2d 441 (1994), and conclude that plaintiff did not present sufficient evidence to raise a triable issue of fact regarding pretext.

The Civil Rights Act, MCL 37.2202; MSA 3.548(202), provides, in pertinent part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

The term "sex" is defined in the CRA as including pregnancy and childbirth. MCL 37.2201(d); MSA 3.548(201)[d]; *Dep't of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 436; 431 NW2d 65 (1988). Because pregnancy is a condition unique to women, Michigan courts have recognized that any distinction drawn on the basis of pregnancy denies women valuable rights solely because of sex. See *Brighton Area Schools, supra* at 437, and cases cited at n 2.

Absent direct evidence of discrimination, a plaintiff may establish a prima facie case of employment discrimination by showing 1) that he or she was a member of a protected class; 2) that an adverse employment action was taken against him or her; 3) that he or she was qualified for the position; and 4) that he or she was replaced by a nongroup member. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986).

Defendant argued below that in order to establish a prima facie case plaintiff had to show either 1) that she was a member of a protected class, 2) that she was discharged, and 3) that defendant was predisposed to discriminate against females and acted on that predisposition when employment decisions were made; or that 1) she was a member of a protected class, 2) was discharged, and 3) that for the same or similar conduct she was treated differently than nongroup employees. These are alternate methods of establishing a prima facie case recognized in a number of Michigan cases. See *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994); *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991).

Plaintiff established both that she was a member of a protected class based on her gender and that she was discharged by defendant. Neither party addressed whether plaintiff was replaced. Defendant asserted below that plaintiff was unable to establish a prima facie case because she could not show either that defendant was predisposed to discriminate or that she was treated differently than similarly situated employees. However, the real thrust of defendant's motion was plaintiff's inability to establish pretext. The issue of pretext comes into play only after a prima facie case is established. We thus will assume, without deciding, that plaintiff established a prima facie case.

Once a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason(s) for the adverse employment action. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 358; 486 NW2d 352 (1992). If the defendant rebuts the plaintiff's prima facie case by coming forward with legitimate, nondiscriminatory reasons for its action, the plaintiff then has the burden of showing that the defendant's reasons are a mere pretext for discrimination. *Id.* Pretext may be established by: (1) showing that the defendant's articulated reasons have no basis in fact; (2) showing that they were not the actual factors motivating the decision; or (3) showing that the reasons were jointly insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Plaintiff does not dispute that defendant articulated legitimate, nondiscriminatory reasons for discharging her. The record indicates that one of plaintiff's performance evaluations in the year preceding her termination included unsatisfactory scores in the areas of attendance, attitude, and "working with others." Plaintiff's last evaluation, conducted in November 1993 and before defendant learned that plaintiff was trying to become pregnant, stated under the category "attitude": "very

argumentative, negative comments. No appreciation of management or company recognition efforts." Under "weaknesses," the evaluation stated that plaintiff "is weak in product knowledge. Analysis and testing need improvement. Barb's attitude toward the company and management is very detrimental to our team concept of working." Under "Areas for improvement," the evaluation stated "Attitude toward management must improve." Plaintiff did not dispute below defendant's assertion that she had had problems in these areas, although she did claim that her attendance was improving. Since plaintiff did not contest defendant's assertions that she had problems working with others and with attitude, plaintiff did not demonstrate that the reasons articulated by defendant had no basis in fact or that the reasons were not sufficient to warrant discharge. See *Dubey, supra,* 185 Mich App 565-566.

Plaintiff argued that her performance problems were not the real reason for her termination. In support of this argument, plaintiff argued that one of her co-workers, Donna, who was not pregnant or trying to become pregnant, was not discharged even though she had performance problems similar to plaintiff's.

Although plaintiff presented evidence that Donna had deficiencies in technical skills similar to plaintiff's, plaintiff failed to show that Donna had similar attendance, attitude, and communications problems. Thus, plaintiff failed to establish that she was treated less favorably than similarly situated individuals who were not in plaintiff's protected group.

Plaintiff also argued that she was discharged within two weeks of announcing that she was going to take fertility pills to become pregnant, and that another female employee, Tammy Henderson, was discharged within thirty days of announcing that she was taking fertility pills. In support, plaintiff attached to her response to defendant's motion a copy of the sworn complaint filed by Ms. Henderson, who also was represented by plaintiff's counsel, and a MESC form requesting information from defendant regarding why Ms. Henderson was terminated. Henderson's complaint alleged that defendant had "a pattern/history of terminating female employees who attempt to become pregnant based upon fraudulent charges of excessive absenteeism, including but not limited to former employee Barbara Williams." The MESC form, stated that Ms. Henderson's last day of work was June 10, 1993 and that she was terminated due to attendance and excessive absenteeism problems.

Defendant argues that this is insufficient evidence to establish pretext and notes that Henderson's case was dismissed summarily in the circuit court and, on appeal, was dismissed for the plaintiff's failure to prosecute.

Plaintiff presented no evidence showing how many female employees defendant employed; how many female employees had become pregnant while employed by defendant; how many retained their positions during and after their pregnancies; or how many were subject to adverse employment actions. Further, plaintiff did not dispute that defendant had a maternity leave policy, and did not dispute that she had taken a maternity leave several years earlier. Under these circumstances, we conclude that plaintiff's remaining evidence, that plaintiff and Henderson were discharged several weeks or months[1] after defendant learned that they were trying to become pregnant was insufficient to raise a triable issue of fact on the question of pretext.[2] See e.g., *Dixon v W W Grainger, Inc,* 168 Mich App 107, 116-117; 423 NW2d 580 (1987). [3]

Plaintiff also argues that the circuit court erred in allowing defendant to present a new and unsupported theory at oral argument. Defendant argued that plaintiff's claim must fail because she did not offer evidence of pretext beyond that offered to support her prima facie case. We decline to address this argument because even if there was error, defendant was entitled to summary disposition for the reasons stated above.

Plaintiff further argues that the circuit court erred in granting summary disposition under MCR 2.116(C)(10), because defendant's motion was brought under MCR 2.116(C)(8). This claim is not supported by the record. Defendant's motion for summary disposition stated that it was based on MCR 2.116(C)(8) and MCR 2.116(C)(10); a section of defendant's brief in support of its motion is devoted to standards for motions under MCR 2.116(C)(10); and defendant's brief clearly argued matters beyond the pleadings and had over twenty exhibits attached, including plaintiff's performance evaluations and several affidavits. Plaintiff's brief in response to defendant's motion for summary disposition also attached plaintiff's performance evaluations, as well as various other documents that went beyond the pleadings. We find no error.

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] While plaintiff contends Henderson was discharged within thirty days of defendant's learning of her intentions, Henderson's own complaint states the time involved as "within three months." The MESC form supports the three-month period.

[2] This is especially so where defendant established that before defendant knew of plaintiff's 1993 pregnancy or desire to become pregnant, plaintiff was offered a transfer due to her communication problems with her supervisor and her technical difficulties, and also produced evidence that plaintiff had several absences shortly before her termination.

[3] Plaintiff's remaining arguments regarding pretext are unsupported by the record.