

STATE OF MICHIGAN
COURT OF APPEALS

ELIZABETH A. STACY and RONALD G.
STACY, JR.,

UNPUBLISHED
April 19, 2005

Plaintiffs-Appellants,

v

TISCH INVESTMENT ADVISORY, INC. and
ROBERT TISCH,

No. 251525
Washtenaw Circuit Court
LC No. 02-001046-CZ

Defendants-Appellees.

Before: Kelly, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant Tisch Investment Advisory, Inc., pursuant to MCR 2.116(C)(10).¹ We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff alleges that defendant denied her a promotion and subsequently terminated her employment on the basis of her sex, contrary to the Michigan Civil Rights Act (“CRA”), MCL 27.2101 *et seq.* Specifically, plaintiff claims that defendant discriminated against her because she became pregnant and had two young children.

The CRA prohibits employment discrimination on the basis of sex. MCL 37.2202(1)(a). Discrimination based on pregnancy is a subset of sex discrimination and is prohibited under the CRA. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 130; 666 NW2d 186 (2003). For purposes of this analysis, we assume without deciding that discrimination based on a plaintiff’s “maternal status” is also a subset of unlawful sex discrimination.

¹ Plaintiffs voluntarily dismissed their claim against defendant Robert Tisch. Therefore, the singular term “defendant” is used to refer to defendant Tisch Investment Advisory, Inc. Because plaintiff Ronald Stacy’s claims are derivative of plaintiff Elizabeth Stacy’s claims, the singular term “plaintiff” is used to refer to Elizabeth Stacy only.

A plaintiff claiming employment discrimination may prove her claim through either direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Proof by direct evidence means that the evidence, if believed, “requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.*, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). If there is no direct evidence of impermissible bias, the plaintiff can avoid summary disposition only by proceeding “through the familiar steps set forth in *McDonnell Douglas [Corp v Green]*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973).” *Hazle, supra* at 462. As our Supreme Court explained in *Hazle, supra* at 463:

Under *McDonnell Douglas*, a plaintiff must first offer a “prima facie case” of discrimination. Here, plaintiff was required to present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. . . . [Citations omitted.]

Once the plaintiff has established a prima facie case of discrimination, “the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff’s prima facie case.” *Id.* at 464. If the employer satisfies this burden, “the presumption created by the *McDonnell Douglas* prima facie case drops away” and the burden shifts back to the plaintiff:

At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff’s favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. . . . [A] plaintiff must not merely raise a triable issue that the employer’s proffered reason was pretextual, but that it was a pretext for unlawful discrimination. [*Id.* at 465-466 (citations and internal quotations omitted).]

Here, plaintiff claims that she raised sufficient direct evidence of discrimination to withstand summary disposition without satisfying the *McDonnell-Douglas* requirements. Plaintiff claims that, shortly after she announced her pregnancy, Robert Tisch decided against assigning her duties as a securities trader, explaining that defendant needed someone who would be at work more often. This does not constitute direct evidence of discriminatory intent. Plaintiff acknowledged at her deposition that Tisch did not make any reference to her pregnancy or her family responsibilities during this conversation. Plaintiff’s subjective belief that Tisch was implying that her pregnancy and added family responsibilities made her a poor choice for the assignment does not require the conclusion that unlawful discrimination was a motivating factor in his decision. *Hazle, supra* at 462. Tisch’s explanation is too vague to prove discrimination to an objective interpreter of this exchange.

Plaintiff also testified at her deposition that when Tisch terminated her employment, he referred to her “little one at home,” and commented on how busy she must be working all day and then going home to care for her family. These statements similarly do not compel a conclusion that plaintiff’s gender was a motivating factor in the decision to terminate her

employment. Tisch made these comments in the context of discussing plaintiff's work errors. In this context, the comments indicate that Tisch was considering the reasons why plaintiff was not producing satisfactory work, rather than attributing his decision to plaintiff's family responsibilities. This does not mean that Tisch terminated plaintiff because she was a mother and the primary caregiver in her family, or because he discriminated against mothers as a class, but rather because plaintiff, as an individual, was not fulfilling her work responsibilities. Tisch's suggestion that plaintiff was too taxed by her family responsibilities to work effectively does not mean that he dismissed her because of her gender rather than her performance deficiencies.

With respect to plaintiff's attempt to prove discrimination through indirect evidence, the trial court determined that plaintiff established a prima facie case, but that defendant adequately rebutted the prima facie case by articulating nondiscriminatory reasons for plaintiff's termination. Accordingly, the principal question on appeal is whether plaintiff successfully raised a triable issue that defendant's proffered reasons were a pretext for unlawful discrimination. *Hazle, supra* at 466.

Plaintiff argues that Tisch's reasons were pretextual because other employees who made similar errors were not terminated, because she was never given a performance review or other notice that her work was unsatisfactory, and because Tisch wrote her a favorable letter of recommendation. The trial court found that these reasons were not pretextual for unlawful discrimination because defendant hired plaintiff when she had a young child, it continued to employ her for approximately six months after her second child was born, and it employed other women who had children.

We conclude that plaintiff failed to create a jury triable issue with regard to her reliance on the letter of recommendation or other employees who allegedly committed errors. The purpose of the letter was to help plaintiff find other employment, not to make a record of plaintiff's work performance for defendant. Further, plaintiff failed to produce sufficient information about the other employees' alleged errors to permit an inference that they were equivalent to plaintiff's pattern of errors and overall unsatisfactory performance. Defendant's failure to give plaintiff prior warnings that her work was unsatisfactory does not establish that defendant's proffered reasons were a pretext for discrimination. *Hazle, supra* at 466. We agree with the trial court that, because the submitted evidence demonstrated that defendant employed other women with children, that defendant hired plaintiff when she already had a child, and that defendant continued to employ plaintiff throughout her pregnancy and for six months thereafter before terminating her, a trier of fact could not find that plaintiff was terminated because of her membership in the class of women with children.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Kurtis T. Wilder