

STATE OF MICHIGAN  
COURT OF APPEALS

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LINDA HUDSON,

Plaintiff-Appellant,

v

LOST LAKE WOODS CLUB and LINDA  
MCMILLAN,

Defendants-Appellees.

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UNPUBLISHED

May 23, 2013

No. 311315

Alcona Circuit Court

LC No. 11-001803-NZ

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

In this wrongful termination case, plaintiff, Linda Hudson, appeals as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) in favor of defendants, Lost Lake Woods Club and Linda McMillan. Because we conclude that plaintiff failed to demonstrate any genuine issue of material fact regarding defendants' legitimate, nondiscriminatory reasons for discharging plaintiff, we affirm.

Plaintiff was hired as a payables and payroll clerk at the Lost Lake Woods Club in March 2002, and she was terminated effective August 13, 2010. Plaintiff was 60 years old when she was terminated. On October 17, 2011, plaintiff filed a complaint against defendants alleging age discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.* (CRA). On April 17, 2012, defendants moved for summary disposition pursuant to MCR 2.116(C)(10). In their motion, defendants argued that discovery had been completed and plaintiff had failed to demonstrate a prima facie case of age discrimination; thus, they were entitled to summary disposition. Plaintiff responded, and a hearing on defendants' motion was held on June 12, 2012. The parties submitted several exhibits to the trial court to support their respective positions, including depositions, emails, memorandums to plaintiff regarding her work performance, plaintiff's employee performance evaluation, and plaintiff's affidavit. After hearing arguments from both parties, the trial court concluded that there was no evidence that defendants terminated plaintiff because of her age, and that defendants had "set forth legitimate nondiscriminatory reasons" for plaintiff's termination. Accordingly, the trial court granted defendants' motion for summary disposition.

On appeal, plaintiff argues that the trial court erred by granting summary disposition in favor of defendants. Specifically, plaintiff maintains that the evidence demonstrates that she was

qualified for her job, was terminated when she was 60 years old and replaced by a 38 year old. In light of these facts, plaintiff argues that summary disposition was inappropriate because she established a prima facie case of age discrimination. She also maintains that there is a genuine issue of material fact in regard to whether defendants' stated reasons for terminating her were a pretext because defendants changed their stated reason for her termination over time.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim based on the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties. *Id.* The evidence is viewed in the light most favorable to the nonmoving party. *Id.* at 567-568. "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to a judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

The CRA provides that an employer shall not

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. [MCL 37.2202(1)(a).]

Because no direct evidence was offered, plaintiff was required to follow the approach described in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under the *McDonnell Douglas* framework, a plaintiff may "present a rebuttable prima facie case on the basis of proofs from which a fact finder could infer that the plaintiff was the victim of unlawful discrimination." *Id.*, quoting *Debrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001). Where the plaintiff asserts that her replacement by a younger person was evidence of discrimination, the plaintiff must "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." *Hazle*, 464 Mich at 463 (citations omitted). If the plaintiff establishes a prima facie case, then a presumption of discrimination arises. *Id.*, citing *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The defendant then may "articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case." *Hazle*, 464 Mich at 464. If the defendant is able to demonstrate a legitimate, nondiscriminatory reason, then the presumption of discrimination is suspended, and the plaintiff must offer evidence from which the fact-finder could infer that the allegedly legitimate, nondiscriminatory reasons were a mere pretext for the unlawful discrimination. *Id.* at 465-466 (citations omitted).

In this case, the first three elements necessary to prove a prima facie case of discrimination are not disputed by defendants and are arguably satisfied by plaintiff. Plaintiff belongs to a protected class because she was aged 60 at the time of her termination and MCL 37.2202(1)(a) includes age in its list of protected classes. Plaintiff suffered an adverse employment action because she was terminated. Plaintiff demonstrated that she was qualified for her position by submitting evidence that she had been employed by defendant in a similar

position since March 2002 and by testifying that her manager informed her that she had an impeccable work record. See *Feick v Monroe Co*, 229 Mich App 335, 338; 582 NW2d 207 (1998). However, defendants maintain that plaintiff has not satisfied the final element of her prima facie case because she has not demonstrated that her job “was given to another person under circumstances giving rise to an inference of unlawful discrimination.” *Hazle*, 464 Mich at 463.

Plaintiff maintains that she has demonstrated that her job was given to another person under circumstances giving rise to an inference of unlawful discrimination by submitting evidence that she was replaced by a 38-year-old part-time employee. In *Lytle*, 458 Mich at 177, our Supreme Court identified the replacement theory as one way to establish the final element of a prima facie case of discrimination. Accordingly, plaintiff can prove a prima facie case of discrimination if she can demonstrate that she was replaced by a younger person. The Court in *Lytle* explained that “a person is not replaced when another employee is assigned to perform the plaintiff’s duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work.” *Lytle*, 458 Mich at 178 n 27, quoting *Barnes v GenCorp Inc*, 896 F 2d 1457, 1465 (CA 6, 1990). On appeal, plaintiff maintains that her duties were “one-hundred percent taken over by [the] 38-year-old” employee, and were not absorbed by multiple employees. In contrast, defendants maintain that it is “undisputed that the plaintiff’s duties were assumed by multiple employees, including the younger employee.” Accordingly, defendants argue that plaintiff was not replaced; rather, her duties were merely redistributed among other employees and thus, she was not replaced under *Lytle*. Neither party cites to the record to support their respective assertions. Because the parties present contrary versions of the facts on appeal, and neither party supports their version with citation to the record, we conclude that there exists a question of fact in regard to whether plaintiff was replaced by a younger employee. Therefore, summary disposition in regard to whether plaintiff presented a prima facie case of discrimination was inappropriate.

Nevertheless, even assuming plaintiff demonstrated a prima facie case of discrimination, summary disposition in favor of defendants was appropriate because there is no genuine issue of material fact regarding whether defendants rebutted the presumption of discrimination by proffering legitimate, nondiscriminatory reasons for plaintiff’s discharge. While the trial court first determined that plaintiff failed to demonstrate a prima facie case when it granted defendants’ motion for summary disposition, it also relied on the fact that defendants presented evidence of documented, legitimate reasons for plaintiff’s termination and plaintiff failed to offer any evidence that these reasons were merely a pretext for unlawful discrimination.

On appeal, plaintiff maintains that summary disposition in favor of defendants was inappropriate because she offered evidence to prove defendants’ reasons for her discharge were merely a pretext. Plaintiff relies on the reasoning set forth in *Cicero v Borg-Warner Auto, Inc*, 280 F3d 579 (CA 6, 2001).<sup>1</sup> In *Cicero*, the plaintiff appealed the district court’s order granting

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<sup>1</sup> “Decisions from lower federal courts are not binding but may be considered persuasive.” *Truel v City of Dearborn*, 291 Mich App 125, 136 n 3; 804 NW2d 744 (2010). We note that this Court

summary judgment to the defendant on his age discrimination claim. Relevant to plaintiff's argument in this case, the court determined that the district court erred by granting summary disposition because the plaintiff offered enough evidence to create a genuine issue of material fact regarding whether the defendant's reason for firing him was a pretext for discrimination. *Id.* at 593-594. The court concluded that the plaintiff established pretext because the evidence showed that the plaintiff was qualified for his job and his performance was not criticized at the time the events that the defendant claimed led to his termination occurred; rather, the defendant raised criticisms of the plaintiff's performance only after the lawsuit was initiated. *Id.* at 589. Moreover, the defendant gave the plaintiff numerous performance-based bonuses during the time that the plaintiff's performance was allegedly inadequate. *Id.* at 590. The court also concluded that the plaintiff demonstrated that the defendant's alleged nondiscriminatory reasons for his termination were a pretext on the basis of the defendant's shifting justifications for the plaintiff's termination, reasoning that "[s]hifting justifications over time calls the credibility of those justifications into question." *Id.* at 592.

In this case, plaintiff argues that just like the circumstances in *Cicero*, her alleged "string of incidents" never occurred and she received no contemporaneous criticism and that defendants' justification for discharging her changed over time. Thus, plaintiff maintains that defendants' failure to contemporaneously criticize her performance and their "shifting justification" for her termination is evidence of pretext.

While we need not apply *Cicero* because it is not binding precedent, we conclude that even under the analysis set forth by *Cicero*, plaintiff has failed to demonstrate any genuine issue of material fact in regard to whether defendants' proffered reasons for her termination were a pretext. First, unlike the plaintiff in *Cicero*, plaintiff in this case received numerous written warnings from defendants regarding the problems with her job performance and attitude. Plaintiff's 2007 performance evaluation indicated that she showed resistance to change, struggled to adjust to new situations, and needed to improve her ability to adapt to new situations "without becoming frazzled." Next, between 2007 and 2008, plaintiff was sent three written memorandums regarding work performance problems or her poor attitude. One of the memorandums, issued in January 2008 warned plaintiff that if her attitude did not improve disciplinary action such as time off without pay or even termination of her employment would be taken. In September 2008 plaintiff was required to take two days off without pay because of her unprofessional behavior.

Finally, in an August 13, 2010 email to plaintiff's supervisor, defendant McMillan reported being contacted at her home by plaintiff a few days earlier when plaintiff could not figure out the payroll system. The email indicated that plaintiff argued with her on the telephone regarding the problem and was unable to resolve the issue. The email concludes that plaintiff would be put on "permanent layoff" and that McMillan was "not willing to bring [plaintiff] back" because she cannot "trust" plaintiff to complete tasks and that the recent payroll incident was "one of a string of incidents where [plaintiff] cannot be left alone without having a meltdown." The email further detailed plaintiff's attitude issues and refusal to change. In light has not adopted or applied the reasoning set forth in *Cicero* in a published opinion; our Supreme Court has similarly never cited *Cicero*.

of the above-referenced evidence, it is clear that plaintiff did receive contemporaneous criticism and that her “string of incidents” was well documented.

To support her shifting justifications argument, plaintiff cites four specific justifications made by defendants regarding her termination that she claims constitute “shifting justifications” that support the conclusion that defendants’ proffered reasons for her discharge were merely a pretext. First, plaintiff claims that she was verbally told by McMillan on August 13, 2010 that she was fired for failing to finish payroll. Second, plaintiff claims that on December 14, 2011 in an answer to her discovery request defendants produced the email that McMillan sent to her supervisor on August 13, 2010, and that this email indicated that she was fired because she could not be trusted to complete payroll, and due to a string of incidents and her attitude. Third, plaintiff claims that on March 8, 2012, both her supervisor and McMillan admitted during their depositions that plaintiff’s failure to finish the payroll was not a factor in her termination and that the real reason was several incidents involving her attitude. Finally, plaintiff maintains that at the summary disposition motion hearing defendants stated that plaintiff was terminated for ongoing problems in the workplace including failure to complete the payroll.

We disagree with plaintiff’s characterization of defendants’ justification for her termination. The email from McMillan to plaintiff’s supervisor that was sent on August 13, 2010, is the first documented piece of evidence demonstrating defendants’ decision to terminate plaintiff and defendants’ reasons for that termination. All of the reasons for plaintiff’s termination that were articulated after the fact were supported by the original email, which included complaints regarding plaintiff’s failure to complete the payroll, plaintiff’s attitude, and plaintiff’s past workplace incidents, which were documented by the memorandums sent to plaintiff throughout her employment with defendant. Moreover, McMillan’s email indicating that plaintiff would be terminated makes clear that while plaintiff’s failure to complete payroll was an issue, the real problem was not that she failed to complete the payroll but the way she handled herself when confronted with a problem in connection with her duty to complete the payroll. Thus, when McMillan and plaintiff’s supervisor stated in their depositions that plaintiff was not fired for failing to complete payroll but rather, for her attitude and inability to handle situations, it is clear that previous and subsequent statements about plaintiff’s failure to complete payroll encompassed those reasons. Therefore, we conclude that the record does not support plaintiff’s claim that defendants changed their justification for her termination over time. Accordingly, the trial court did not err by granting summary disposition in favor of defendants because there is no genuine issue of material fact in regard to whether defendants’ discharged plaintiff for a proper, non-discriminatory reason.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Michael J. Talbot  
/s/ Kurtis T. Wilder