

STATE OF MICHIGAN
COURT OF APPEALS

CHARMA SMITH,

Plaintiff-Appellant,

v

MOSAICA EDUCATION, INC.,

Defendant-Appellee.

UNPUBLISHED

March 6, 2007

No. 269764

Genesee Circuit Court

LC No. 04-078503-CD

Before: Owens, P.J., and Neff and White, JJ

PER CURIAM.

In this action charging unlawful race discrimination under the Elliott-Larsen Civil Rights Act (“ELCRA”), MCL 37.2101 *et seq.*, plaintiff Charma Smith appeals as of right the trial court’s order granting summary disposition in favor of defendant Mosaica Education, Inc. We affirm.

Defendant is a private corporation that operates and manages Center Academy, a charter school in Flint. In August 1999, defendant hired plaintiff, an African-American female, to serve as the Chief Administrative Officer (“CAO”) of Center Academy.¹ According to plaintiff’s direct supervisor, Michael Holmes, her first few months as CAO were “outstanding” and she was a “quality administrator.” However, within months, teachers, staff members, and parents began complaining to Holmes about plaintiff’s performance, her inconsistent methods of disciplining students, and the level of violence in the school.

In May 2000, Holmes asked Dorothy Jordan to observe the operation of Center Academy. Jordan, an African-American female, held a variety of positions at Mosaica since its inception. During Jordan’s visits to Center Academy, she discovered that the building was dirty, plaintiff failed to observe a new teacher within a reasonable amount of time, teacher’s aides did not have a clear sense of their responsibilities, the kindergarten classrooms were cluttered, plaintiff did not mentor new teachers, and parents and staff members had numerous complaints concerning the manner in which plaintiff addressed problems at the school. Jordan provided Holmes with a memorandum summarizing her observations, which read, in part:

¹ A CAO functions as a school principal.

Morale at the school was low. Many parents and staff were upset because they said that they were not treated fairly or consistently by the CAO. Communication with the CAO was a recurring theme throughout all complaints. I must note that when Mrs. Smith went to New York everyone, parents, staff and children, acted differently. The school was a very different place when she was not there. People appeared happy and relaxed.

* * *

Unfortunately as I continued my observations it became apparent that staff and parents continued to feel that their concerns were being ignored by Mrs. Smith and they did not trust her. Mrs. Smith also expressed to me that some parents did not like her attitude but that she did not think that anything was wrong with her attitude.

* * *

It is my observation that Mrs. Smith has the inability to empathize with parents and staff concerns. Mrs. Smith communicates with people in away [sic] that leaves them feeling unimportant, hopeless and frustrated. She has developed some excellent programs with the help of the parents but seems unable to give the credit for their part in the success of the program. She also appears intolerant of criticism from people she perceives as not her equal.

At the May 2000 school board meeting, Holmes, the school board members, and defendant's attorneys discussed the complaints that they received from parents regarding plaintiff's performance. On June 30, 2000, Holmes presented plaintiff with a second written performance review, indicating that Holmes and the school board received complaints about plaintiff from staff members and parents and that "the situation at the building [had] gotten worse as the year progressed." The performance review also indicated that (1) the staff believed that plaintiff's supervision was erratic, superficial, and belligerent, (2) the staff did not trust plaintiff, (3) plaintiff's administration of the school was disappointing and there was a lack of organization in the office, (4) plaintiff failed to complete reports on time, (5) plaintiff's discipline of students was inconsistent and she improperly suspended a student without engaging in direct contact with the student's parents, (6) plaintiff was hostile toward parents and staff, and (7) plaintiff lacked the necessary communication skills and leadership qualities to adequately fulfill the position of CAO. Holmes recommended that plaintiff not return as the CAO of Center Academy for the following school year.

That day, plaintiff tendered a letter of resignation to Holmes. Defendant thereafter hired Dan Henry, a Caucasian male, to replace plaintiff as the CAO of Center Academy. In March 2001, plaintiff filed a complaint with the Michigan Department of Civil Rights charging unlawful race discrimination under the ELCRA. In April 2001, Henry resigned from his position as CAO of Charter Academy to pursue an opportunity at another school. The school board hired Jordan as the new CAO. In March 2004, plaintiff initiated this action against defendant, alleging that it unlawfully terminated her employment because of her race.

Defendant moved for summary disposition of plaintiff's race discrimination claim under MCR 2.116(C)(10), arguing that she failed to establish a prima facie case of race discrimination, that there were legitimate, non-discriminatory reasons for its decision to seek plaintiff's resignation, and that plaintiff failed to establish that the proffered reasons were a pretext for unlawful discrimination. The trial court granted defendant's motion for summary disposition, concluding that there was "no showing by plaintiff that defendant's reasons were motivated by discriminatory animus, and there's no showing that the reasons for termination were pretextual."

Plaintiff contends on appeal that the trial court erroneously granted summary disposition to defendant because she established a prima facie case of race discrimination, meeting her burden of demonstrating that defendant's proffered reasons for its adverse employment action against her were a mere pretext for unlawful discrimination. We disagree.

"We review de novo a trial court's decision on a motion for summary disposition." *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support of a claim. After reviewing the evidence in a light most favorable to the nonmoving party, a trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. [*Id.*]

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The ELCRA prohibits an employer from failing or refusing 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 race. MCL 37.2202(1)(a). When a plaintiff cannot produce direct evidence of racial bias, the plaintiff must follow the approach for presenting a prima facie case of race discrimination set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle, supra* at 462. In the present case, plaintiff relies on circumstantial evidence of racial discrimination. Thus, she "is constrained to rely on the *McDonnell Douglas* framework." *Id.* at 463. See also *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

Under the *McDonnell Douglas* approach, a plaintiff must first offer a "prima facie case" of discrimination. *Hazle, supra* at 463. To establish a prima facie case of discrimination, plaintiff must present evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) she was discharged (and the position given to another person) under circumstances giving rise to an inference of unlawful discrimination. *Id.* See also *Lyle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). "Once plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises." *Lyle, supra* at 173.

Defendant argues that plaintiff failed to establish the fourth element of a *McDonnell Douglas* prima facie case. Specifically, defendant argues, plaintiff failed to show that she was discharged under circumstances giving rise to an inference of unlawful discrimination. A

plaintiff establishes the fourth element of the *McDonnell Douglas* prima facie case when, for example, the plaintiff has presented proof that either the job was given to someone under circumstances giving rise to an inference of unlawful discrimination or that the defendant treated the plaintiff differently from persons of a different class for the same or similar conduct. *Hazle, supra* at 468; *Meagher v Wayne State Univ*, 222 Mich App 700, 716; 565 NW2d 401 (1997). In this case, plaintiff failed to establish that the CAO position was given to someone under circumstances creating an inference of unlawful discrimination. The mere fact that defendant hired Henry, a Caucasian male, to replace plaintiff as the CAO is not sufficient to establish a prima facie showing of the fourth element. Plaintiff failed to present evidence from which a reasonable jury, even if unaware of defendant's proffered reasons for seeking plaintiff's resignation, could infer unlawful discrimination in this case. Holmes presented plaintiff with a positive performance review during her first semester at Center Academy. Later, defendant hired Jordan, an African-American female, who had extensive experience working for defendant, to observe the operation of the school and to evaluate plaintiff's performance as CAO. After plaintiff resigned from her position as CAO, defendant hired Henry, a Caucasian male, to replace her. Less than one year later, defendant hired Jordan to replace Henry. In July 2004, Jordan was still serving as the CAO of Center Academy. In addition, defendant employed another African-American female as the CAO of a different school during the 1999-2000 school year, the same year that plaintiff was employed by defendant. These facts, by themselves, do not suggest an unlawful purpose.

Furthermore, plaintiff failed to present proof that she was treated differently from persons of a different class for the same or similar conduct. Plaintiff alleged that defendant paid Henry, a Caucasian male, an annual salary of \$74,000, which was higher than plaintiff's annual salary of \$72,500. However, plaintiff failed to present documentary evidence to support her allegation. Plaintiff also alleged that the CAO of defendant's Saginaw school, who was Caucasian, was allowed to retain her position as CAO for five years, despite "a mob of disgruntled parents and media attention" and "an unusual staff turnover rate of approximately 90%." However, to show disparate treatment, plaintiff was required to show that she and a coworker "were similarly situated, i.e., 'all of the relevant aspects' of [the plaintiff's] employment situation were 'nearly identical' to those of [a coworker's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). Center Academy and the Saginaw school were neither comparable in size nor comparable in the number of school administrators employed. Thus, plaintiff failed to establish that all the relevant aspects of her employment situation were nearly identical with those of Howe's employment situation. Further, she failed to present documentary evidence to support her assertion that defendant disciplined or treated her and Howe differently although they were engaged in the same conduct. Evidence regarding a defendant's alleged disparate discipline of its employees cannot establish disparate treatment for purposes of the *McDonnell Douglas* prima facie test if the employees were not engaged in the same conduct and, therefore, were not similarly situated when they were disciplined. *Id.*

On the record, plaintiff failed to establish a prima facie case of race discrimination under *McDonnell Douglas, supra*. She failed to make a prima facie showing that the circumstances surrounding and leading to her resignation and the hiring of a new CAO created an inference of unlawful discrimination. Further, there is no evidence to suggest that defendant treated

differently a nonminority employee who was similarly situated to plaintiff. Thus, the trial court properly granted summary disposition in favor of defendant.

In light of this analysis, we need not reach plaintiff's argument that she met her burden of establishing that defendant's proffered reason for seeking her resignation was a pretext for unlawful discrimination. However, we wish to note that, even if plaintiff had established a prima facie case of discrimination, defendant would still have been entitled to summary disposition in this case. Defendant offered legitimate, non-discriminatory reasons for its decision to seek plaintiff's resignation and plaintiff failed to establish that defendant's proffered reasons were a pretext for unlawful discrimination. The *Hazle* Court noted:

[T]he fact that a plaintiff has established a prima facie case of discrimination under *McDonnell Douglas* does not necessarily preclude summary disposition in the defendant's favor. . . . In other words, the *McDonnell Douglas* prima facie case does not describe the plaintiff's burden of production, but merely establishes a rebuttable presumption.

Thus, once a plaintiff establishes 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. The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. "Thus, the defendant cannot meet its burden merely through an answer to the complaint or by argument of counsel." If the employer makes such an articulation, the presumption created by the *McDonnell Douglas* prima facie case drops away.

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." [*Hazle, supra* at 463-465 (citations omitted).]

The evidence in this case establishes that Holmes and Jordan identified several problems and concerns regarding plaintiff's supervision, administration, and communication skills, as well as problems concerning the climate of the school. The problems that Holmes and Jordan identified included the following: (1) plaintiff was hostile and belligerent; (2) the staff did not trust plaintiff; (3) the staff's morale improved when plaintiff was out of town; (4) the school lacked organization; (5) plaintiff failed to ensure that writings and pencil marks were removed from the school's walls; (6) plaintiff hired her husband's company to provide janitorial services at the school, in violation of defendant's nepotism policy; (7) plaintiff was routinely late completing reports; (8) plaintiff was seemingly incapable of meeting her administrative demands and pushed her responsibilities on others; (8) when confronted with issues regarding her conduct, plaintiff merely offered excuses for her conduct; (9) Center Academy ranked last among all Mosaica academies in a parent satisfaction survey regarding student discipline; (10) plaintiff created an "extremely negative" climate at the school; (11) plaintiff was unable to effectively communicate with Holmes, the staff, and the students' parents; (12) a number of teachers and

staff indicated that they did not have confidence in plaintiff's abilities as a CAO and that they intended to leave the school; (13) plaintiff's leadership style was dictatorial in nature, her interpersonal leadership skills were lacking, and her organizational skills were far from adequate to meet the job requirements of CAO; (14) by the end of the school year, the school lost approximately 30 students; and (15) Holmes believed that the negativity in the community surrounding the school would impede the school's success and growth.

After considering the concerns that Holmes and Jordan identified and documented regarding plaintiff's performance as the CAO, we conclude that defendant made a sufficient showing that it had legitimate, nondiscriminatory reasons for terminating plaintiff. Defendant also made a sufficient showing that these problems were the basis for its decision to seek plaintiff's resignation. "This means that the presumption of discrimination created by plaintiff's prima facie case dropped away, and the burden of production returned to plaintiff to show the existence of evidence '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.'" *Hazle, supra* at 473, quoting *Lytle, supra* at 176. In other words, once defendant articulated legitimate, non-discriminatory reasons for its decision to seek plaintiff's resignation, plaintiff had the burden of establishing that defendant's proffered reasons were a pretext for unlawful discrimination. *Hazle, supra* at 465-466.

A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. [*Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998).]

On appeal, plaintiff asserts that the reasons offered by defendant in support of its employment decision were false. She then argues that, because she established that the reasons were false, she met her burden of establishing that defendant's proffered reasons were a pretext for unlawful discrimination under federal case law. Specifically, plaintiff maintains that the evidence that she presented to rebut defendant's proffered reasons was sufficient to support a finding of liability for intentional discrimination under *Reeves v Sanderson Plumbing Products, Inc*, 530 US 133, 147; 120 S Ct 2097; 147 L Ed 2d 105 (2000). We disagree.

In analyzing discrimination claims under the ELCRA, "Michigan courts have often resorted to federal precedent for guidance." *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999).

We are many times guided in our interpretation of the Michigan Civil Rights Act by federal court interpretations of its counterpart federal statute. However, we have generally been careful to make it clear that we are not compelled to follow those federal interpretations. [*Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) (citations omitted).]

In *Reeves, supra*, the United States Supreme Court held that a plaintiff could meet her burden of showing pretext by producing evidence that the defendant's proffered reason for taking the adverse employment action against the plaintiff was false. "That is, the plaintiff may

attempt to establish that he was the victim of intentional discrimination ‘by showing that the employer’s proffered explanation is unworthy of credence.’” *Id.* at 143, quoting *Texas Dep’t of Community Affairs v Burdine*, 450 US 248, 256; 101 S Ct 1089; 67 L Ed 2d 207 (1981). In *Reeves*, the plaintiff pursued an age discrimination claim against the defendant employer. *Id.* at 137. The defendant asserted that it fired the plaintiff because he failed to maintain accurate attendance records, and not because of his age. *Id.* at 138. The case went to trial and a jury found in favor of the plaintiff. *Id.* at 139. The *Reeves* Court upheld the jury verdict, holding that the defendant was not entitled to judgment as a matter of law because the plaintiff established a prima facie case of discrimination, introduced sufficient evidence for the jury to reject the defendant’s proffered explanation, and produced additional evidence of age-based animus. *Id.* at 151. Thus, there was sufficient evidence for the jury to find that the defendant had intentionally discriminated against the plaintiff. *Id.* at 153-154.

Plaintiff failed to present sufficient evidence to establish that defendant’s proffered reasons were false. At most, plaintiff merely raised questions concerning the soundness of defendant’s business judgment. We will not second-guess defendant’s business judgment concerning whether plaintiff met defendant’s expectations in her position as the CAO of Center Academy. “The soundness of an employer’s business judgment . . . may not be questioned as a means of showing pretext.” *Dubey v Stroh Brewery Co*, 185 Mich App 561, 566; 462 NW2d 758 (1990).

“[T]he plaintiff cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.” [*Hazle, supra* at 476, quoting *Town, supra* at 704 (citation omitted).]

Moreover, even if plaintiff presented evidence establishing a triable issue of fact regarding whether the concerns of Holmes, Jordan, the staff members, and the parents were legitimate, she nevertheless failed to establish that discriminatory animus was a motivating factor underlying the adverse employment action. The United States Supreme Court acknowledged that a plaintiff cannot always meet her burden of showing pretext simply by producing evidence that the defendant’s proffered reason for taking the adverse employment action against the plaintiff was false. See *Reeves, supra* at 148. The *Reeves* Court noted,

Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory. For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer’s decision, or if the plaintiff created only a weak issue of fact as to whether the employer’s reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred. [*Id.*]

Indeed, whether summary disposition is appropriate in a particular case depends on a number of factors, including “the strength of the plaintiff’s prima facie case, the probative value of the proof that the employer’s explanation is false, and any other evidence that supports the employer’s case and that properly may be considered on a motion for judgment as a matter of law.” *Id.* at 148-149.

In *Lytle, supra* at 175, our Supreme Court explained that “disproof of an employer’s articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer’s adverse action.” Our Supreme Court also noted:

[W]hen viewed in the light most favorable to the plaintiff, the evidence must create a material issue of fact on which reasonable minds could conclude that the employer’s stated reason is a pretext for discrimination for summary judgment to be precluded. Thus, plaintiff will not *always* present a triable issue of fact merely by rebutting the employer’s stated reason(s); “put differently, that there may be a triable issue of *falsity* does not necessarily mean that there is a triable question of discrimination.” [*Town, supra* at 698 (citation omitted; emphasis in original).]

The evidence in this case concerning defendant’s decision to seek plaintiff’s resignation would not enable a reasonable factfinder to infer that discriminatory animus was a motivating factor underlying the decision. Plaintiff failed to establish that defendant’s proffered reasons for dismissing her were a pretext for unlawful discrimination. Thus, the trial court properly granted summary disposition in favor of defendant.

Finally, we find no merit to plaintiff’s argument that violations of the Open Meetings Act, MCL 15.268, and of MCL 380.1229(2) are evidence of discriminatory animus. Plaintiff failed to establish that a discriminatory animus was a motivating factor underlying any failure to comply with MCL 15.268 or MCL 380.1229(2).

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff