STATE OF MICHIGAN

COURT OF APPEALS

MELVENE TARDY,

Plaintiff-Appellant,

v

DIESEL TECHNOLOGY COMPANY,

Defendant-Appellee.

UNPUBLISHED
October 9, 1998

No. 205504
Kent Circuit Court
LC No. 96-04019 NZ

Before: Smolenski, P.J., and McDonald and Saad, JJ.

PER CURIAM.

Plaintiff alleged that defendant discharged her from her position in its human resources department on the basis of her race in violation of MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has appealed, and we affirm.

We review de novo the trial court's order granting summary disposition. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482; 509 NW2d 772 (1994). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). The nonmoving party must come forward with admissible evidence demonstrating the existence of a genuine issue of material fact in support of the claim presented. *Id*. Giving the nonmoving party every reasonable benefit of doubt, the trial court must determine whether the record leaves open an issue about which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

The Michigan Elliott-Larsen Civil Rights Act prohibits racial discrimination in employment. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The order and allocation of the burdens of proof in cases filed under the act are as follows:

> First, the [employee] has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Second, if the [employee] is successful in proving a prima facie case, the burden shifts to the [employer] to articulate some legitimate, nondiscriminatory reason for [the discharge]. Third, if the [employer] meets this burden, the [employee] then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the [employer] was merely a pretext [for discrimination]. [*Featherly, supra* at 358 (citing *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981)); see also *Lytle v Malady (On Rehearing)*, 458 Mich 153,173; 579 NW2d 906 (1998) (opinion by Weaver, J.)]

Summary disposition in favor of the employer is proper when the employee fails to demonstrate a genuine issue of material fact to support either (1) a prima facie case of racial discrimination or (2) that the reasons the employer offered for the discharge were a mere pretext for discrimination. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565; 462 NW2d 758 (1991). Here, plaintiff lacks evidentiary support for both (1) and (2).

To establish a prima facie case of discriminatory discharge under the disparate treatment theory, an employee must show that (1) she is a member of a protected class, (2) she was discharged, (3) she was qualified for the position, and (4) the employer did not discharge similarly situated employees outside the protected class for the same or similar conduct. *Meagher v Wayne State University*, 222 Mich App 700, 716; 565 NW2d 401 (1997). Plaintiff has not shown a genuine issue of material fact under the last prong of the test.

Plaintiff alleged that defendant offered white employees with performance problems alternatives to discharge and, ultimately, severance pay. Plaintiff's argument ignores defendant's unrebutted evidence that it previously offered her an alternative to discharge when it transferred plaintiff from human resources to accounting after she repeatedly erred in splitting timecards. Plaintiff asserts that defendant permitted Paula Gleason-Zeef and Kari Gernaat to transfer to other departments after it discovered that they had committed significant financial errors. According to plaintiff, defendant eventually discharged Gleason-Zeef, but offered her severance pay.[1] She also asserts that defendant permitted Brian Becker, Mike Dennis, and Jim VerWys to transfer to other departments after it became dissatisfied with unspecified performance problems. Plaintiff also claims that Jan Sutton, Ken Policha, Jim Wirtz, and Jamie Zywicki each received severance pay. However, this information apparently came from the evidence plaintiff stated in her motion for reconsideration that she neglected to submit previously to the trial court.

Plaintiff failed to submit to the trial court documentary evidence to support her claim that defendant permitted the aforementioned employees to transfer to other departments because of performance issues. She merely submitted an affidavit which stated: "the information contained in this brief [came] from a summary of [her] review of the personnel records." See *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (mere allegations and unsupported assertions

are insufficient to satisfy the nonmoving party's burden of demonstrating the existence of a factual dispute). Moreover, plaintiff failed to rebut defendant's evidence that none of these employees ever reported to James Hagene, the supervisor who discharged plaintiff. Indeed, the evidence shows that defendant transferred Gleason-Zeef, Gernaat, and Becker, respectively, in 1989, 1991, and 1992 -- two to four years before it even hired Hagene.

Plaintiff argues, however, that the trial court erroneously limited her disparate treatment proofs to the records of employees who reported to Hagene. We disagree. The Michigan Supreme Court recently held that disparate treatment analysis requires *all relevant aspects* of the employment situation to be nearly identical. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997). According to the United Stated Court of Appeals for the Sixth Circuit,

> to be deemed "similarly situated," the individuals with whom the plaintiff seeks to compare his/her treatment *must have dealt with the same supervisor*, have been subject to the same standards[,] and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. [*Mitchell v Toledo Hospital*, 964 F2d 577, 583 (CA 6, 1992) (emphasis added)]

Also, in *Lytle, supra*, the plurality held that Lytle failed to submit facts sufficient to establish disparate treatment, in part, because the supervisor who eliminated her position did not hire the employees with whom she sought to compare her treatment. *Id.* at 179.

Furthermore, the disparate treatment analysis developed to obviate an employee's burden to prove intentional discrimination with direct evidence of racial animus. *Meagher*, *supra* at 709. Disparate treatment is simply an indirect route by which an employee can establish intentional discrimination. *Id*. The conduct of one supervisor cannot logically create an issue of fact about the intent of another supervisor. Accordingly, we conclude that the trial court did not err when it held that plaintiff could only show disparate treatment by reference to employees who reported to Hagene. Although plaintiff contends that this is merely one aspect for the jury to consider, dissimilarity as to any relevant aspect of the employment situation is fatal to the prima facie case. *Town*, *supra* at 700.

Plaintiff contends that defendant failed to discipline white employees responsible for similar errors. She asserts that Hagene declined to discharge Marva Casler for committing errors identical to hers. The evidence shows, however, that Casler made only a fraction of the mistakes plaintiff made when she processed the sickness and accident files. See *Town*, *supra*, 700 (plaintiff failed to establish disparate treatment because his performance level was proportionately lower than that of the employee with whom he sought to compare his treatment). Plaintiff also asserts that Hagene declined to determine whether Kurtycz made a significant number of errors in processing sickness and accident files. Plaintiff ignores, however, defendant's unrebutted evidence that Hagene did not limit the audit of its files to those that plaintiff processed. Moreover, plaintiff is not aware that Kurtycz made any mistakes. See

Meagher, *supra* at 716 (proof that a similarly situated employee committed similar errors is part of the employee's prima facie case).

Furthermore, we find the record devoid of any evidence that would indicate whether Casler or Kurtycz was similarly situated to plaintiff. Plaintiff failed to present any evidence that Casler or Kurtycz possessed the same or similar history or performed the same or similar functions as plaintiff. Although plaintiff correctly states that whether an employee is similarly situated is normally a question of fact for the jury, *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 652; 513 NW2d 441 (1994), the employee bears the burden of first coming forward with evidence to establish a similar situation. *Lytle*, *supra* 178 n 28 (citing *Sargent v Int'l Brotherhood of Teamsters, Local Union No 337*, 713 F Supp 999, 1015 (ED Mich, 1989). Accordingly, the trial court correctly held that plaintiff failed to present evidence sufficient to demonstrate a triable issue of fact in support of her prima facie case of disparate treatment.

Plaintiff also failed to demonstrate a question of fact in support of her claim that defendant's proferred reasons for her discharge were a pretext for discrimination. Once an employer produces evidence of a legitimate, nondiscriminatory reasons for its adverse decision, the employee must submit evidence that the employer's explanation for its conduct was a pretext for discrimination. *Town*, *supra* at 695-697. An employee may demonstrate pretext through evidence of how the employer treated similarly situated employees outside the protected class. *Lytle*, *supra*, 178. Alternatively, an employee may demonstrate pretext by showing that the reasons the employer offered for the adverse treatment (1) had no basis in fact, (2) did not actually motivate the adverse treatment, or (3) was insufficient to justify the adverse treatment. *Meagher*, *supra* at 712; *Dubey*, *supra* at 565-566. Even under this alternative route, however, the employee must still present evidence that unlawful discrimination was the employer's true motive in making the adverse employment decision. *Town*, *supra* at 696-697.

Plaintiff first argues that defendant's proffered reasons for her discharge were pretextual because Hagene assigned to her a disproportionately large share of the departmental workload. After Hagene assumed responsibility for human resources, he divided the department into separate units, each of which he dedicated to a different aspect of defendant's business. Hagene then assigned plaintiff to the DDC/EMD business support unit, which was approximately six times larger than the new business unit, the next largest unit. Because of the size differential, plaintiff handled a larger share of employee files than did the white personnel assigned to the new business unit. We find that plaintiff failed to present any evidence that Hagene assigned her to the DDC/EMD business support unit because of her race. What is more important, plaintiff failed to present any evidence that white employees assigned to the DDC/EMD business support unit handled a smaller share of the overall workload than she did. Although plaintiff and her coworkers opined that Hagene could have structured the department differently, an employee may not challenge the employer's business judgment as a means of establishing pretext. *Meagher*, *supra* at 712; *Dubey*, *supra* at 566.

Plaintiff next argues that defendant's proffered reasons for her discharge were pretextual because Hagene exaggerated the number and cost of the errors she committed, thereby blaming her for

errors committed by white employees. Plaintiff has not submitted any evidence to show that he exaggerated the number of errors she committed. Hagene originally concluded that thirty of the 158 files reviewed contained errors in the calculation of benefits. However, after he and Casler reviewed the files with plaintiff, he determined that eight of those files involved an interpretation of the collective bargaining agreement over which reasonable minds might differ. Of the remaining twenty-two, Hagene eventually determined that plaintiff processed nineteen. Plaintiff failed to present any evidence that she did not process all nineteen of these files.[2]

Plaintiff also failed to present any evidence to support her claim that Hagene inflated the cost of the errors. Apparently, Hagene initially calculated the loss from the twenty-two files at $7,000 and "extrapolating to all the [sickness and accident] files ever processed, . . . [subsequently] concluded that [plaintiff] made mistakes totaling $28,000. . ." Plaintiff contends that a portion of all the files ever processed were processed before she joined the department. Additionally, she maintains that defendant did not subsequently seek to recover the overpayments. Even if these allegations are true, they do not establish that overpayments did not occur or that they were insufficient to justify the decision to discharge her.

Plaintiff also argues that defendant's proffered reasons for her discharge were pretextual because Hagene summarily discharged her in derogation of company policy favoring alternatives to discharge. However, plaintiff failed to submit any evidence that such a policy exists. According to defendant's president, Derek Kaufman, the decision to discharge an employee lies within the sound discretion of the individual manager. Moreover, plaintiff's argument ignores defendant's unrebutted evidence that Hagene and Casler alternately considered and rejected various alternatives to discharge, including reassignment. Finally, Hagene's refusal to transfer plaintiff to another department in lieu of discharging her is irrelevant in the absence of evidence that he permitted similarly situated white employees, with similar histories of errors, to transfer to other departments. Plaintiff presented no such evidence.

Plaintiff finally argues that the reasons defendant offered for her discharge were pretextual because Hagene "falsified" them. Plaintiff maintains that Hagene fabricated her work record to make it appear that she could not do any job that might have been available when he discharged her. Defendant presented evidence that Hagene discharged plaintiff after an audit of its employee sickness and accident benefit files revealed that she had committed a number of errors when calculating the benefits. Defendant also presented evidence that an earlier audit Victoria Dawson conducted when plaintiff worked in the accounting department revealed that she had committed similar mistakes when splitting timecards. Hagene claimed that this evidence led him to believe that plaintiff was incapable of consistently performing complex clerical tasks. We find, however, that plaintiff presented evidence indicating that Hagene did not consult Dawson about her performance in accounting until after plaintiff filed her discrimination suit. Plaintiff further believes that Hagene could not have reviewed her work history and concluded that she was "untrainable." Although two of the five employee performance evaluations plaintiff submitted indicated that plaintiff needed to work on improving the accuracy of her work, overall the evaluations were fairly positive.

Moreover, plaintiff maintains that Hagene fabricated a new reason for her discharge after she filed her discrimination suit. Hagene claimed that, along with her work history, he also considered that plaintiff continually criticized the structure of the department, complained about her workload, and disliked working with her two supervisors when he made the decision to discharge her. It does not appear to us that plaintiff disputes the factual basis of this assertion. Rather, she maintains that Hagene never mentioned her attitude as a basis for her discharge in his conversation with her before he discharged her, or in his correspondence to her after he discharged her.

Even if this evidence creates an issue of fact as to whether plaintiff's work history and attitude were actually factors in the decision to discharge her, plaintiff still has not established that these proffered reasons were a pretext *for discrimination*. It is not sufficient to establish that a proferred reason was false; plaintiff must also establish that discrimination was the real reason. *Lytle*, *supra*, 182. Plaintiff has failed to do so.

Plaintiff maintains that Hagene's reference to her as untrainable proves a discriminatory motive. She avers that the word "untrainable" is a "code word" used to disguise and communicate supervisors' racial bias. Even construed most favorably to plaintiff, however, we conclude that the term "untrainable" alone is insufficient evidence that Hagene acted with any racial animus, particularly when Hagene also discharged seven white employees. Plaintiff also alleges that she witnessed Hagene and other supervisors celebrate after a black employee was discharged, but she failed to present admissible evidence to support this allegation. Plaintiff further argues that whether defendant's reasons for discharge were credible or a mere pretext for discrimination turns on Hagene's credibility, which is an issue of fact for the jury. However, defendant does need to persuade the court that Hagene was actually motivated by the proffered reasons. *Lytle*, *supra* 173-174. Rather, plaintiff must present evidence sufficient to establish an issue of fact as to whether unlawful discrimination was Mr. Hagene's true motive. *Id*., 182; *Town*, *supra* at 697. "That there may be a triable question of *falsity* does not necessarily mean that there is a triable question of discrimination" *Id*. at 706 (emphasis in original) (quoting 1 Lindemann & Grossman, Employment Discrimination Law [3d ed] p 26, n 12). In sum, the trial court correctly held that plaintiff failed to establish a triable issue of fact as to whether defendant's proferred reasons for her discharge were pretextual.

II

Plaintiff contends that the trial court abused its discretion when it denied her motion for reconsideration. We review the court's decision for abuse of discretion. MCR 2.119(F)(3); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1989). MCR 2.119(F)(3) provides that

> [g]enerally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must

> present palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

Here, plaintiff failed to establish a "palpable error". In *Gibson v Bronson Methodist Hosp*, 197 Mich App 67, 74; 495 NW2d 162 (1992), rev'd on other grounds 445 Mich 331; 517 NW2d 736 (1994), we held that the plaintiff's position that she would have proceeded differently had she known the trial court was going to reject her theory and dismiss her case was insufficient to establish abuse of discretion for failing to grant her motion for reconsideration. Similarly, plaintiff's position, in this case, that she would have produced different evidence had she known the trial court was going to accept defendant's same supervisor theory and dismiss her case is insufficient to establish that the trial court abused its discretion when denied her motion for reconsideration.[3] We find no grounds for reversal.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Henry William Saad

[1] Plaintiff claims that Gernaat also received severance pay, but apparently, she resigned.

[2] Plaintiff claims that Casler processed five of the twenty-two files originally attributed to her. However, plaintiff submitted no documentary support for this claim. Even if we were to accept this claim, that leaves seventeen files undisputedly processed by plaintiff.

[3] Although plaintiff sought reconsideration on the basis of new evidence to challenge the veracity of defendant's, she failed to demonstrate that this evidence was not available to her at the time she responded to defendant's summary disposition motion. Moreover, the "new" evidence the plaintiff sought to offer does not suggest that defendant misrepresented the facts by presenting evidence that Hagene fired eight employees, seven of whom were white.