STATE OF MICHIGAN

COURT OF APPEALS

PAULA DUMAS, WILLIE ABRAM, and TAMARA WILLIAMS,

Plaintiffs-Appellants,

v

PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendant-Appellee.

UNPUBLISHED
December 22, 2009

No. 286806
Oakland Circuit Court
LC No. 2007-081647-NZ

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting defendant's motion for summary disposition and dismissing their employment discrimination claims. Although the trial court erred when it found that plaintiffs had established prima facie cases of discrimination, because the trial court properly granted summary disposition in favor of defendant on the pretext issue, we affirm.

Plaintiffs were all employees of defendant at a time when it merged with St. John Health. Each was fired, and each was over fifty years old at the time. Plaintiffs Dumas and Williams are African-American. Abram was a pastry chef who was fired on January 7, 2005, after being caught on surveillance video taking cake boxes from the hospital and loading them into his van for his personal use. Dumas and Williams were both Health Unit Coordinators. The same person fired them on the same day, March 24, 2006: Dumas for falsifying a hospital medical record and Williams for sleeping or appearing to sleep while attending a daily meeting. Plaintiffs asserted that these reasons were really pretexts and that defendant has engaged in a pattern of firing older workers, especially African-Americans. Plaintiffs provided a list of employees, including names, positions, races, and birthdates, as support for their claims. In addition to the employment discrimination counts here at issue, plaintiffs' complaint included counts for breach of contract and intentional infliction of emotional distress and one for race discrimination raised by Abram. However, plaintiffs did not answer defendant's summary disposition motion as to those counts and they do not challenge the trial court's dismissal of them on appeal.

The trial court found that plaintiffs had established prima facie cases of age discrimination and that Dumas and Williams established prima facie cases of race

discrimination. Dumas and Williams provided evidence that defendant replaced them with much younger women and that defendant was targeting African-American women. The trial court provided no explanation for why it found Abram established a prima facie case. However, the trial court then found that none of the plaintiffs provided any actual evidence showing that defendant's reasons for firing them were mere pretexts and granted summary disposition in favor of defendant.

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*.

The seminal explanation of the elements and burden-shifting analysis of an employment discrimination case is set forth in *Hazle, supra*. If the plaintiff is able to produce direct evidence of an impermissible bias, "the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle, supra* at 462. Direct evidence is that which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Id*. In the absence of direct evidence, a plaintiff must present a rebuttable prima facie case supported by proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Id*. When presenting a prima facie case, a plaintiff must present evidence that he or she (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Circumstances give rise to an inference of discrimination when the plaintiff "was treated differently than persons of a different class for the same or similar conduct." *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991); see also *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 361; 597 NW2d 250 (1999). If the plaintiff sufficiently establishes a prima facie case, a presumption of discrimination arises. *Lytle, supra* at 173.

Plaintiffs have no direct, admissible evidence that they were discharged under circumstances that gave rise to an inference of unlawful discrimination. *Lytle, supra* at 172-173. In regard to the age-based claims of both Dumas and Williams, they only presented evidence to the trial court that defendant filled their positions with younger employees. With regard to the race-based claims of Dumas and Williams, they presented only unsupported assertions defendant was targeting African-American women. And as for Abram, he presented no direct, admissible evidence that he was discharged under circumstances that gave rise to an inference of unlawful age discrimination.

In support of their claims, plaintiffs rely heavily on "statistics" purporting to show a pattern of discrimination, however, there are *no* statistics in the record. There is a single sheet of unanalyzed data of unidentified origin. To be probative, statistics must be correctly done, based on correct assumptions, and supported by a sufficient sample size. See, e.g., *Lopez v Laborers Int'l Union Local #18*, 987 F2d 1210, 1215-1216 (CA 5, 1993); *Morgan v UPS*, 380 F3d 459, 465 (CA 8, 2004); *Simpson v Midland-Ross Corp*, 823 F2d 937, 944 (CA 6, 1987). Only then will a statistically significant disparity be shown between the favored and disfavored classes.

Because plaintiffs have provided no data on the age and racial makeup of the remaining employees, it is impossible to tell whether those fired and those remaining were treated differently because of age or race. Thus, plaintiffs presented no evidence, other than bald and unsupported allegations, that defendant engaged in a pattern of discriminatory conduct.

This being the case, in order to proceed, plaintiffs must show that their own individual firings were due to discrimination. Plaintiffs' deposition testimonies were based either on unfounded hearsay or on their own subjective beliefs, simply because they were older and two of them were African-American. They therefore must satisfy the *Lytle* elements. The first three elements are, as plaintiffs state, unchallenged. As for the fourth, there was no evidence that non-African-Americans were treated more favorably than plaintiffs: both Williams and Dumas were replaced by African-American women and Abram's job duties were taken over by an African-American employee, so there is no inference of racial discrimination. While Williams had undisputed evidence that could give rise to an inference of age discrimination because she was replaced directly by a much younger woman, she does not have any evidence that younger employees who were caught sleeping on the job were not treated similarly. Similarly, although defendant points to its answers to interrogatories where it stated Dumas's position was first offered to a 50-year-old, African-American woman, the clinical nurse manager testified that Dumas was replaced by a younger woman. While this factual dispute could be said to give rise to a prima facie case of age discrimination, Dumas presents no evidence that younger employees who falsified medical records were treated differently. With regard to Abram, the evidence is simply, "I was old and you fired me." This is insufficient to establish a prima facie case and the trial court erred in finding to the contrary. The court also erred in finding plaintiffs' unsubstantiated testimony that defendant was targeting older, African-American women sufficient to establish a prima facie case. There was no evidence that this was so.

Our review of the evidence presented by all three plaintiffs calls into question the trial court's initial ruling that plaintiffs had established prima facie cases of discrimination. Again, circumstances give rise to an inference of discrimination when the plaintiff "was treated differently than persons of a different class for the same or similar conduct." *Reisman, supra* at 538; see also *Wilcoxon, supra* at 361. Plaintiffs have presented no evidence whatsoever that defendant treated others similarly situated differently. Abram admitted to taking a cake for his personal use when defendant had a zero-tolerance policy for stealing. Abram has presented no evidence that defendant treated another employee differently after violating defendant's anti-theft policy. Evidence shows that defendant terminated Dumas for falsifying a medical record. Although Dumas believed what she did was a minor infraction, she too has presented no evidence that defendant treated another employee differently after falsifying a medical record. In fact, there was evidence that defendant had also fired a non-African-American woman for similar circumstances involving fraud. Williams was observed apparently sleeping at a meeting. Williams presented evidence that she had heard about another employee who was caught sleeping on the job but does not provide details. The record indicates that defendant indeed suspended another employee for violating its anti-sleeping policy. The record also shows that during defendant's investigation of that incident, the employee resigned while on suspension. After reviewing the record, we disagree with the court's ruling that the three plaintiffs established prima facie cases of discrimination. *Id.* While we find no record evidence in support of the trial court's findings that any of the plaintiffs presented evidence sufficient to establish prima facie cases of age or race discrimination, we will further analyze the issue in accordance

with the trial court holding, presuming prima facie cases, and employ the *Hazle* burden-shifting analysis with regard to pretext.

After a plaintiff has sufficiently established a prima facie case of illegal 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. *Hazle, supra* at 464. That is, the defendant has the burden of producing *evidence* that its employment actions were taken for a legitimate, nondiscriminatory reason. *Id*. Allegations or argument are not sufficient. *Id*. at 464-465. If the employer makes such an articulation, the presumption created by the 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." *Lytle, supra* at 176. 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 175-176. Said another way, to survive a motion for summary disposition at this point, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination and that discrimination was a motivating factor in the employer's decision. *Id*. at 174; *Hazle, supra* at 466.[1] A plaintiff can establish pretext in three ways: by showing that the defendant's reasons for the adverse employment action 1) had no basis in fact, or 2) if they had a basis in fact, by showing they were not the actual factors motivating the decision, or 3) if they were factors, by showing that they were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Even had plaintiffs established prima facie cases of discrimination, which they did not, their arguments also fail on this issue. A review of the trial court record shows overwhelming support for defendant's assertion that there were legitimate reasons for firing all three plaintiffs. Although Abram argues there was no factual basis for the charge he had stolen a cake, there was video evidence of him taking property that did not belong to him. In fact, Abram admitted to taking it without obtaining permission. The records of termination for theft indicate a zero-tolerance policy. While violations like absenteeism were disciplined with warnings, every incidence of theft ended with immediate termination, even for amounts under $10. Abram presented no admissible evidence of other factors in the decision to fire him, and although he expresses disbelief that he should have been fired "over a Fifteen ($15.00) Dollar cake," that is, apparently, defendant's policy.

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[1] The Michigan Supreme Court noted in *Town v Michigan Bell Telephone Co*, 455 Mich 688; 568 NW2d 64 (1997), "'that there may be a triable question of *falsity* does not necessarily mean that there is a triable question of discrimination.'" *Id*. at 698, quoting 1 Lindemann & Grossman, Employment Discrimination Law (3rd ed), p 26. "'[E]vidence sufficient to discredit a defendant's proffered nondiscriminatory reasons for its actions, taken together with the plaintiff's prima facie case, (may be) sufficient to support (but not require) a finding of discrimination.'" *Id*., quoting *Combs v Plantation Patterns*, 106 F3d 1519, 1535 (CA 11, 1997).

Dumas also admitted to violating hospital policy by filling out a note and signing the nurse's name to it. She simply thought there would not be a problem with her conduct. However, defendant classifies this as a "major" violation of policy, which is disciplined by suspension or discharge. Like Abram, Dumas presents no admissible evidence there was any other motivation for firing her, and no evidence that this reason was insufficient on its own. The nurse manager testified that she had also fired a non-African-American woman for fraud in clocking in.

Williams could not name any of the individuals she said she saw sleeping, and there is no evidence that employees had been caught sleeping by a supervisor and not disciplined. Williams admitted to having heard about someone terminated for sleeping, most likely another employee whom the record indicates defendant suspended for violating this policy; that employee resigned while on suspension.

In sum, plaintiffs all admitted to committing the offenses for which they were fired. Whether they thought they were justified in so acting, or that defendant overreacted by firing them, does not take away from the fact that termination for these violations was within defendant's policies. Defendant provided evidence that other people outside of plaintiffs' protected class were treated similarly. There is no evidence of a pattern of illegal discrimination because plaintiffs do not show that people who were treated favorably were any different in race or age than plaintiffs themselves. In fact, regarding race discrimination, the evidence establishes the opposite.

Although the trial court erred in finding that plaintiffs had established prima facie cases of age discrimination and that Dumas and Williams established prima facie cases of race discrimination, the error was harmless because the court ultimately ruled in favor of defendant, granting its motion for summary disposition on the pretext issue.

Affirmed. Costs to defendant.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens