STATE OF MICHIGAN

COURT OF APPEALS

SANDRA SWARTZ,

Plaintiff-Appellant,

v

BERRIEN SPRINGS PUBLIC SCHOOL DISTRICT, ROGER ELOWSKY, JAMES BERMINGHAM, MARJORIE HALQUIST, DAVID PAGEL, and ROBERT IRVIN,

Defendants-Appellees.

UNPUBLISHED
November 24, 2009

No. 286285
Berrien Circuit Court
LC No. 2007-000011-CD

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Plaintiff appeals by right from the trial court's May 7, 2008, order granting defendants summary disposition on discrimination claims based on age, sex, and marital status. We affirm.

In this case, plaintiff, who was unmarried and without children to support, was the director of transportation and Roger Elowsky was the building and grounds supervisor for the Berrien Springs Public School District. To control the budget, district officials decided that plaintiff's and Elowsky's positions would be combined into a new one entitled the director of operations. Both plaintiff's and Elowsky's former positions were eliminated. Elowsky was then chosen to become the new director of operations. Plaintiff retired and temporarily became his assistant on an independent contractor basis through an outside company. The following year, plaintiff's contract was terminated, and this lawsuit subsequently ensued.

On appeal, plaintiff argues that the trial court misread *Plieth v St Raymond Church*, 210 Mich App 568; 534 NW2d 164 (1995), giving it an overbroad interpretation. In addition, plaintiff argues that a reasonable jury might find that defendants' statements and actions create a strong inference that her age was a motivating factor in Elowsky's being chosen for the director of operations instead of plaintiff. Plaintiff also alleges on appeal that the trial court did not

properly allocate the burden of proof on her age discrimination claim, and the trial court's analysis was at odds with *Meacham v Knolls Atomic Power Laboratory*, 554 US ___; 128 S Ct 2395; 171 L Ed 2d 283 (2008).[1] Further, plaintiff argues that because statements were made that, unlike Elowsky, plaintiff was not the head of household and did not have a family to support, defendants discriminated against her based on marital status because "family" includes one's spouse and the phrase "head of household" connotes a partner in a marriage. Thus, the trial court erred in failing to find a jury question on her marital status discrimination claim. Moreover, plaintiff argues that because statements were made that plaintiff was not the "head of household," unlike Elowsky, and "head of household" again carries a connotation, i.e., that a "head of household" is a man, the trial court erred in failing to find a jury question regarding sex discrimination.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). In evaluating a motion for summary disposition brought under this subsection, we consider affidavits, pleadings, depositions, admissions and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion, *Coblentz*, *supra* at 567-568. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10) and (G)(4); *Maiden*, *supra* at 120.

Section 202(1)(a) of the Civil Rights Act, MCL 37.2101 *et seq*., directs that an employer shall not "[f]ail 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).

"In some discrimination cases, the plaintiff is able to produce direct evidence" of discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "Direct evidence" has been defined as "'evidence which, 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 direct evidence of discrimination, "the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle*, *supra*. But not all discrimination cases may be established by direct evidence. Accordingly,

> [t]he *McDonnell Douglas* [*Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)] approach was adopted because many plaintiffs in employment-discrimination cases can cite no direct evidence of unlawful discrimination. The

[1] Plaintiff withdrew this aspect of her claim during the November 4, 2009, oral argument.

> courts therefore allow a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination. [*DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-538; 620 NW2d 836 (2001).]

Under the *McDonnell Douglas* approach, the plaintiff must show the following to establish a prima facie case of discrimination: (1) membership in a protected class, (2) an adverse employment action, (3) that the plaintiff was qualified for the position, and (4) that the job was given to another under circumstances that give rise to an inference of discrimination. *Hazle*, *supra* at 467; *Hall v McRea Corp*, 238 Mich App 361, 370; 605 NW2d 354 (1999), remanded 465 Mich 919 (2001). In *Hall*, *supra* at 370-371 (citations omitted), this Court stated:

> The plaintiff must prove the elements by a preponderance of the evidence. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the discharge. At this stage, defendant does not need to persuade the court that it was actually motivated by the proferred [sic] reasons. It is sufficient for defendant's evidence to raise a genuine issue of fact with respect to whether it discriminated against the plaintiff. The defendant must set forth, through admissible evidence, the reasons for the adverse employment decision. The explanation must be legally sufficient to justify judgment for the defendant. If the defendant satisfies this burden of production, the presumption raised by the prima facie case is rebutted. The burden of proof then shifts back to the plaintiff, who must show "that there was a triable issue of fact that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination." Our Supreme Court [in *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998)] . . . adopted the "intermediate position" for determining the proper summary disposition standard for discrimination claims under the Civil Rights Act:
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> > Under this position, 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*. In other words, *plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age or sex discrimination*. Therefore, we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, 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. [*Id*., at 175-176.]

In this case, Marjorie Halquist, the supervisor of plaintiff and Elowsky, testified that she was present during some of the meetings between plaintiff and Robert Irvin,[2] who was the superintendent for the school district when plaintiff's eligibility for the new position was discussed. Halquist indicated:

> *Q*. Okay. And it was at those meetings that her eligibility for retirement was discussed, correct?
>
> *A*. Correct.
>
> *Q*. And her eligibility for continued health insurance, correct?
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> *A*. Correct.
>
> *Q*. And also at those meetings there was discussion of the fact that Mr. Elowsky had a family to support, correct?
>
> *A*. He was head of the household, yes.
>
> *Q*. Okay. And that he was not eligible for retirement, correct?
>
> *A*. Correct.
>
> *Q*. And that he would not be eligible for health benefits, correct, if he didn't have a position with the board -- with the school district the following --
>
> *A*. Correct.

Plaintiff admitted, however, that she was never told that Elowsky was getting the position because he was younger than she. Rather, it was because he was not yet old enough to get his retirement. She further admitted that she was never told that Elowsky was selected for the position because he had a family to support, and plaintiff, as a single person, did not. Rather, plaintiff testified that she was told that Elowsky had a family to support. In addition, plaintiff was never told that Elowsky was getting the position because he was a male. Rather, plaintiff testified that she was simply told that Elowsky was the head of household, and she was not. Further, David Pagel, the president of the board of education, indicated that the board did not vote to put Elowsky in the position because he was younger than plaintiff, because he was a male as opposed to a female, or because he had a family to support and plaintiff did not. Based on the foregoing record, there is no direct evidence that the decision to give Elowsky the director of operations position instead of plaintiff was based on age, sex, or marital status. *Hazle*, *supra* at 462. Therefore, because there is no direct evidence of discrimination, the *McDonnell Douglas* factors must be considered. *De Brow*, *supra* at 537-538.

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[2] Robert Irvin died before this lawsuit commenced.

In this case, plaintiff was in a protected class based on her age, sex and marital status. MCL 37.2202(1)(a); *Hall*, *supra* at 370-371; see also *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984).

Plaintiff also suffered an adverse employment action because Elowsky was selected director of operations instead of plaintiff. "[I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) there must be some objective basis for demonstrating that the change is adverse . . . ." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999) (citations omitted). There is no comprehensive list of adverse employment actions, but "typically it takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003) (citation omitted). In this case, plaintiff clearly suffered an adverse employment action when she was not selected to be the director of operations. A result of her not being selected, she became an assistant to rather than becoming the director of transportation. Thus, she subsequently held a less distinguished title. *Id*. Further, plaintiff's employment with the school district was terminated, and she became an independent contractor without any healthcare or other benefits through the school district. So, she also suffered a termination in employment and a material loss of benefits. *Id*. Consequently, based on the foregoing, plaintiff suffered an adverse employment action when Elowsky, and not she, was selected to be the director of operations.

Plaintiff also appears to have been qualified for the position. Pagel's comments indicate that Elowsky "was more qualified" and that Elowsky was "the most qualified candidate." Thus, Pagel does not indicate that plaintiff was not qualified for the position. "[A] plaintiff cannot be *required* to offer evidence that he is at least as qualified as the successful candidate in order to establish a prima facie case under *McDonnell Douglas*." *Hazel*, *supra* at 469.

Still, plaintiff has not proven by a preponderance of the evidence that she was not chosen for the position of director of operations under circumstances that give rise to an inference of discrimination based on her age and sex. *Hall*, *supra*. As the Court in *Plieth*, *supra* at 573 noted, consideration of an employee's seniority or pension status, although empirically correlated with age, does not result in an inference of age discrimination. Consequently, although comments were made regarding plaintiff's eligibility for retirement, we see no inference of age discrimination rising from those comments. *Id*. In addition, although comments were made regarding plaintiff's not being a head of household and that Elowsky was, the term "head of household" does not create an inference of sex discrimination because a woman could be the head of the household as well as a man. See *Hartle v Keefer's Estate*, 260 Mich 188, 191; 244 NW 443 (1932), and *Ridky v Ridky*, 226 Mich 459, 465; 198 NW 229 (1924). And considering the fact that many heads of household are not married, a rational fact-finder could not conclude that the head of household comment had any negative connotation as to plaintiff's unmarried status. Based on the foregoing, plaintiff has not established a prima facie case of age and sex discrimination because she has failed to prove by a preponderance of the evidence element four of the *McDonnell Douglas* test.

But regardless of whether plaintiff established a prima facie case of discrimination, defendants set forth legitimate reasons for the adverse employment decision: they indicated that Elowsky was more or the most qualified and that the skills that Elowsky would need to acquire to effectively perform the transportation aspects of the position would be much easier to acquire than the skills that plaintiff would need to acquire to effectively perform the building and grounds aspects of the position. *Hall, supra* at 371. In fact, although plaintiff obviously was more than capable of handling the transportation aspects of the position, she appears to have not been nearly as qualified to handle the building and grounds aspects of the position. Plaintiff possessed no specialized training or education regarding electricity, mechanics, heating and cooling, plumbing, and construction. Based on the record, it is very clear that there was a great deal of specialized knowledge and training involved with the building and grounds aspects of the position. In addition, Elowsky testified that he was able to assume all of plaintiff's duties supervising the transportation area without significant difficulty because the duties required no specialized knowledge beyond organizational skills and common sense.

Furthermore, in *Town v Mich Bell Tel Co*, 455 Mich 688, 702-704; 568 NW2d 64 (1997), the Court indicated that overall reduction in workforce, an employer's belief that a coemployee's marketing skills were superior to those of the plaintiff, and the employer's belief that the employee took too long developing her staff and not enough time visiting customers, were legitimate nondiscriminatory reasons for transferring the plaintiff. Similarly, in this case, the reason why the two positions were consolidated was because of budget and financial concerns. School officials also believed that Elowsky was more qualified for the position. Consequently, we find, similar to the Court's finding in *Town*, that the budget and financial concerns that were the impetus for consolidating the positions and the belief that Elowsky was more qualified for the position than plaintiff, were legitimate, nondiscriminatory reasons for giving Elowsky the position of director of operations and transforming plaintiff's position to one of independent contractor.

Thus, because there were legitimate reasons for the adverse employment decision, plaintiff had the burden of showing that there was a triable issue of fact that defendants proffered reasons were not true reasons, but were instead a mere pretext for discrimination. *Hall, supra* at 370-371. Because the overwhelming evidence indicates that Elowsky was more qualified for the job, that Elowsky was able to easily acquire the skills to perform the transportation aspects of the job and that plaintiff would have more difficulty acquiring the skills needed to perform the building and grounds aspects of the job, defendants reasons for the adverse employment decision do not appear to be reasons that were not true. Moreover, plaintiff has not presented any evidence to indicate that the adverse employment decision was, in fact, a pretext for discrimination. An employer's honest belief in a proffered reason for a challenged employment decision will be upheld against a charge of pretext as long as the employer can identify particularized facts for its honest belief. *Nizami v Pfizer, Inc*, 107 F Supp 2d 791, 803-804 (ED Mich, 2000). Pagel provided particularized facts regarding Elowsky being the most qualified for the job based on the fact that Pagel indicated that Elowsky possessed specific skills relating to maintenance and operations. Pagel also indicated that Elowsky possessed some experience in transportation. Pagel testified that he thought that Elowsky would have an easier time acquiring the skills needed for the transportation aspects of the job than plaintiff would have acquiring the

skills for the building and grounds aspects of the job. So again, there was evidence that school officials held an honest belief that Elowsky was clearly the most qualified person for the position. *Id*. Based on the foregoing, the trial court did not err in finding insufficient evidence of age, sex or marital status discrimination.

Finally, because plaintiff has withdrawn his argument that the trial court improperly shifted the burden of persuasion, under *Meacham*, *supra* at 2406, we need not address it. Moreover, the issue in *Meacham* was one alleging disparate impact discrimination, rather than disparate treatment discrimination, which is the case here. Here, the trial court properly allocated the parties' burdens.

We affirm. As the prevailing party, defendants may tax costs. MCR 7.219.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey