STATE OF MICHIGAN

COURT OF APPEALS

NADIA SHUAYTO, Plaintiff-Appellant,	UNPUBLISHED November 29, 2016
v	No. 329520 Oakland Circuit Court
LAWRENCE TECHNOLOGICAL UNIVERSITY, BAHMAN MIRSHAB, and MARIA VAZ, Defendants-Appellees.	LC No. 2014-139389-CD

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Plaintiff filed suit, in relevant part, under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*., alleging that her employer, defendant Lawrence Technological University (LTU), its Provost, defendant Maria Vaz, and the Dean of its College of Management (COM), defendant Bahman Mirshab, discriminated against her by not renewing her employment contract because of her national origin and gender. On September 16, 2015, the trial court entered an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff appeals the order as of right. For the reasons set forth in this opinion, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises out of defendant LTU's decision not to renew plaintiff's employment contract for her position as Assistant Professor of Management in the university's COM in December 2013. Plaintiff is a female of Lebanese descent who became a naturalized American citizen in 1976. She received her Bachelor of Science degree in Business Administration and Master's degree of Business Administration (MBA) from defendant LTU. She then received her Doctorate of Business Administration, with a concentration in marketing, from Nova Southeastern University.

Defendant LTU is a private university located in Southfield, Michigan. It offers technology-oriented education with undergraduate and graduate degrees from its four colleges—Architecture and Design, Arts and Sciences, Engineering, and Management. Defendant Mirshab is the Dean of the COM and was plaintiff's immediate supervisor with the responsibility for her performance evaluations. Defendant Mirshab is male and a naturalized American citizen of

Iranian descent. Defendant Vaz is the Provost of defendant LTU and has responsibility over all academic activities at the university. Defendant Mirshab reports directly to defendant Vaz.

Plaintiff worked as an adjunct professor for defendant LTU from 1996 to 2000. She returned to employment at defendant LTU as a College Professor in 2007. In March 2011, plaintiff was hired as a tenure track Assistant Professor of Management in the COM on a one-year contract. The following February, defendant LTU renewed plaintiff's employment for another academic year. She was reappointed to her job as Assistant Professor and designated the MBA Program Director.

On August 1, 2012, defendant Mirshab was appointed the Dean of the COM. He was hired to secure accreditation for the department with the Association to Advance Collegiate Schools of Business (AACSB). Such accreditation is the "premier accreditation" for colleges offering degrees in business administration and accounting and requires proof, among other things, that a school's faculty is sufficiently qualified to warrant the distinction. It divides faculty into certain categories and requires schools to have certain percentages of faculty qualify as members of these groups. To that end, the institutions determine criteria for satisfying the faculty qualification benchmarks. One such criterion required faculty to have two peer reviewed publications in five years to be professionally qualified.

Shortly after his appointment, defendant Mirshab appointed plaintiff as the Associate Dean of the COM, on a one-year contract. According to defendant Mirshab, he appointed plaintiff on an interim basis because he was unsure of whether he would even need an Associate Dean in his administration. Plaintiff was also appointed to four newly organized committees for improving standards within the department. On October 29, 2012, plaintiff resigned from her position as Associate Dean and focused on her teaching position. According to plaintiff, she was "forced" to resign because of "intolerable" working conditions. Plaintiff maintains that defendant Mirshab refused to give her a written job description, suggested five times that she leave the university, questioned the validity of her doctoral degree in a faculty meeting, and excluded her from meetings regarding the accreditation plan. However, defendants contend that plaintiff resigned of her own accord and that her conflicts with the Dean were of the "basic business" type. That fall, plaintiff was removed from three of the four new committees. She retained her membership in the Curriculum and Standards Committee and later served on the Assessment Committee.

On February 4, 2013, plaintiff's contract with defendant LTU was renewed for the 2013 to 2014 academic year, and she continued in her capacity as Assistant Professor of Management. However, she received an overall rating of "unsatisfactory" on her performance evaluation for the 2012 to 2013 academic year. Specifically, plaintiff received an "unsatisfactory" rating in the scholarship and service areas. It was noted that plaintiff "does not yet meet the minimum research requirements for being classified as Scholarly Academic (SA), the classification required from all full-time faculty of the College to reach the goal of initial accreditation by AACSB." Plaintiff was referred to the new faculty standards, which included the requirement of scholarly publications. Defendant Vaz reaffirmed that plaintiff's rating as unsatisfactory was related to her underperformance in the areas of scholarship and service.

Plaintiff stated that the standards to be used for accreditation with the AACSB were "a work in progress" and should not have been used to evaluate her performance and status for the 2012 to 2013 academic year. Nonetheless, plaintiff believed her overall portfolio satisfied the requirements for her qualification as SA status under the new standards. Plaintiff testified that defendant Mirshab failed to carefully evaluate her service. According to plaintiff, before defendant Mirshab's appointment as Dean, plaintiff received excellent yearly evaluations.

Defendant Mirshab recommended that defendants not renew plaintiff's contract for the following academic year, stating that her academic background, research, and performance did not enhance the COM's ability to obtain AACSB accreditation. In addition, defendants felt that plaintiff had neither been willing to discuss the "next step" nor indicated she was "willing to improve." On December 13, 2013, plaintiff was informed that the university would not be renewing her employment contract for the 2014 to 2015 academic year.

Subsequently, plaintiff filed a complaint, alleging retaliation under Michigan's Whistleblower Protection Act (WPA) (two counts), defamation, national origin discrimination under the ELCRA, gender-based discrimination under the ELCRA, and conspiracy to violate the ELCRA.

Regarding her claim of national origin discrimination, plaintiff alleged that defendant Mirshab, her direct supervisor, discriminated against her because of her Lebanese heritage and used his position to remove her from her faculty positions at defendant LTU and to ultimately terminate her employment with the university. Regarding her claim of gender discrimination, plaintiff alleged that her female gender was "a significant factor" in defendants' decision to discharge her. Plaintiff also alleged that defendants Mirshab and Vaz colluded in terminating her employment despite knowing the reasons stated in her performance evaluation were false. Defendants sought summary disposition pursuant to MCR 2.116(C)(10), arguing plaintiff's claims lacked merit. The trial court granted summary disposition in favor of defendants. Plaintiff appeals the trial court's grant of summary disposition as it relates to her claims of national origin discrimination, gender discrimination, and conspiracy to violate the ELCRA.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10). *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party, *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012), and all reasonable inferences are to be drawn in favor of the nonmoving party, *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). Summary disposition is proper if the evidence fails to establish a genuine issue of 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 leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co Bd of Comm'rs*, 493 Mich 167, 175; 828 NW2d 634 (2013).

B. NATIONAL ORIGIN DISCRIMINATION

On appeal, plaintiff argues that the trial court erred in dismissing her claim of national origin discrimination under the ELCRA. We disagree.

The ELCRA prohibits discrimination regarding employment on the basis of national origin or sex. MCL 37.2202(1)(a) states:

> An employer shall not do any of the following:
>
> (a) 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.

Direct evidence or indirect evidence can be used to demonstrate discriminatory treatment. *Sniecinski v Blue Cross and Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2003). "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." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Prod Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

To prove an allegation of discrimination by indirect or circumstantial evidence, the plaintiff must proceed through the burden-shifting steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001). Under the *McDonnell Douglas* approach a plaintiff may "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." *Id*. at 537-538 (emphasis in original). Here, plaintiff was required to prove that (1) she was a member of a protected class, (2) she suffered an adverse employment decision, (3) she was qualified for the position, and (4) the job was given to another under circumstances creating an inference of unlawful discrimination. *Hazel*, 464 Mich at 463.

Where a presumption of discrimination arises, the employer may still be entitled to summary disposition if it articulates a legitimate, nondiscriminatory reason for its employment decision. *Id*. at 463-464. If the employer makes that articulation, the presumption of a prima facie case "drops away." *Id*. at 465. The plaintiff must then raise a triable issue that the employer's given reason was a pretext for unlawful discrimination. *Id*. at 465-466. In cases of direct and indirect evidence, a plaintiff must prove a causal link between the discriminatory animus and the adverse employment action. *Sniecinski*, 469 Mich at 134-135.

In this case, plaintiff offers examples of comments that she asserts serve as both direct and indirect evidence of defendants' discriminatory motive. Plaintiff believes that defendant Mirshab was seeking to rid the COM of Lebanese people and hire those of Iranian descent. Specifically, plaintiff focuses her national origin discrimination claim on the following purported statements made by defendant Mirshab: (1) defendant Mirshab told her to say hello to Hassan Nasrallah (the leader of Hezbollah) when she was leaving for a teaching conference in Lebanon; (2) he said in her presence that he wanted to "take a match" to all the Arab countries, and "rid us

of all those people"; and (3) he told a student that if the student from Saudi Arabia did not want to date a certain male, his sister would date the male student, and she was "a lot prettier." Plaintiff also asserted that a question by defendant Vaz asking why plaintiff's research was all from the Middle East was also indicative of national origin discrimination.

After review of the record, we conclude that the trial court did not err in ruling that there was no genuine issue of fact regarding the national origin claims where the alleged comments by defendants did not amount to either direct or indirect evidence of discriminatory intent.

In this case, plaintiff did not present any evidence to show a correlation between the isolated statements and her termination to support a claim of direct evidence of discriminatory intent. Generally, isolated or vague statements, remarks made by people who are not decision makers, or remarks made long before the adverse employment decision is made, are not probative of an employer's discriminatory motivation. *Krohn v Sedgwich James of Mich, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001).

In this case, while the allegedly discriminatory comments were made by a decision maker, there was no evidence to support that they were related to any employment decision. First, with respect to the comment regarding Hassan Nasralla, that remark was made in November 2012, *before* defendants reappointed plaintiff for the 2013 to 2014 academic year and a year before defendants did not renew her contract. Moreover, the comment was ambiguous and did not directly link plaintiff to a terrorist group as she alleges. An overall review of the record shows there is also no evidence of a pattern of anti-Lebanese remarks by defendant Mirshab.

Second, the alleged comment about "taking a match" to Arab countries and getting "rid . . . of all those people," although improper, did not show the type of bias plaintiff purports existed since it is not directed at those of non-Persian, or Lebanese, origin such as plaintiff. Moreover, there is no evidence of a nexus between the comment and the adverse employment action. *Sniecinski*, 469 Mich at 134-135. Rather, plaintiff's allegation of a plan by defendant Mirshab to remove Arab employees from the department because of his anti-Lebanese bias is undermined by her testimony confirming that defendant Mirshab offered a position to a Lebanese professor in December 2013, the same month her contract was not renewed and the same month this alleged statement was made.

Third, the comment that defendant Mirshab purportedly made about the Saudi Arabian student also showed no animus toward those of Lebanese descent. Further, it was ambiguous in its connection to any particular nationality. Additionally, any causal connection to the employment decision is lacking.

Similarly, defendant Vaz's question regarding the bulk of plaintiff's research being from the Middle East did not amount to direct evidence of discriminatory intent. The remark was not discriminatory in nature and it did not relate to the employment action at issue in this case. Although plaintiff's unfavorable evaluation was the topic of her discussion with the Provost, defendant Vaz testified that it was defendant Mirshab who made the final decision not to renew plaintiff's contract.

In her brief, plaintiff compares the remarks of defendants to those of the defendant in *Major v Village of Newberry*, ___ Mich App ___, ___; ___ NW2d ___ (2016) (Docket No. 322368); slip op at 8, wherein the defendant commented to the plaintiff about her age being in her 50's and how it related to her ability to climb a pole as an apprentice lineman. This Court held that there was direct evidence of age discrimination because the remark was made by the plaintiff's direct supervisor, was not an isolated remark, was made during the training for the lineman program, and showed a "direct correlation" between the plaintiff's age and ability to perform her job. *Id*. at ___; slip op at 8-9. Unlike the facts in *Major*, none of the remarks of defendants in the instant case refer directly to plaintiff or her ability to perform her work. In addition, there was not sufficient evidence to create a fact issue regarding whether unlawful discrimination, in the form of anti-Lebanese bias, was any type of motivating factor to defendants in their employment decision. Accordingly, plaintiff has failed to establish a jury issue regarding direct evidence of discrimination.

Similarly, plaintiff has failed to establish her claim of discrimination based on indirect evidence. Even assuming that plaintiff presented a prima facie case of discrimination, there was insufficient evidence to create an issue of fact regarding whether defendants' articulated reason for their employment decision was a pretext for discrimination. Here, defendants articulated a legitimate, nondiscriminatory basis for the employment decision. They claimed that plaintiff's contract was not renewed because she failed to meet professional expectations. Specifically, they stated that "her academic background and performance no longer met the rapidly evolving expectations and needs of the COM in its quest to achieve academic accreditation from the premier rating agency for business schools." There was evidence that defendant LTU sought accreditation of the AACSB and that such accreditation required heightened standards of the faculty at the university. In the evaluation before her discharge, plaintiff's overall performance was deemed "unsatisfactory" and her scholarship and service were lacking. It was noted that plaintiff did not yet meet the minimum research requirements for the classification required from all full-time faculty of the university to reach the goal of initial accreditation by AACSB. Defendants claimed this employment action was in accordance with the Faculty Handbook, which provides:

> The short- and long-term needs of the University, changes in programs, requirements for other skills, enrollment trends, individual progress toward tenure, and other factors may all enter into the decision to retain or not to retain a tenure-track faculty member.

Although plaintiff contends it was unfair to evaluate her using the new AACSB criteria, she was aware of the new standards. There was record evidence that defendant LTU was actively requiring heightened standards in order to achieve the accreditation. New definitions for academic categories were adopted in April 2013, but information on faculty qualifications had already been provided. In addition, plaintiff shows nothing in the Handbook prohibiting such a forward-looking evaluation.

In response, plaintiff insists that her academic record shows she would have satisfied the standards for the AACSB accreditation and that defendants' disregard of her performance and scholarship was evidence of their intent to discriminate against her based on her Lebanese background. Plaintiff offered her curriculum vitae and testimony as proof that she was qualified

for her position at the university. She also presented the report of an Associate Professor in the Department of Marketing at Michigan State University, in which he concluded that she "is academically qualified to serve in a university that primarily focuses on its teaching and service missions because she meets the typical research expectations in this type of schools [sic] with her intellectual contributions." He further concluded that she "successfully managed to actively engage in research." However, plaintiff's testimony of her qualifications is subjective, and her expert testified that he did not opine whether her academic contributions satisfied the AACSB standards that the university was seeking.

Even assuming that plaintiff meets the heightened qualifications for the AACSB certification, she failed to show that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. Plaintiff's disagreement with the outcome of her performance evaluation and the nonrenewal of her contract does not necessitate a finding of pretext. A challenge to defendants' professional judgment cannot create a genuine factual dispute on the issue of pretext. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990); see also *Town v Mich Bell Tel Co*, 455 Mich 688, 704; 568 NW2d 64 (1997) ("The 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."). Because plaintiff's argument primarily questions the soundness of defendants' business judgment, we conclude that she did not create an issue of fact regarding whether the defendants' nondiscriminatory explanation for the nonrenewal was a pretext for discrimination. In sum, plaintiff cannot show that the statements of defendants constitute "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462. In sum, the trial court did not err in granting summary disposition as to plaintiff's national origin discrimination claim pursuant to MCR 2.116(C)(10).[1]

C. GENDER DISCRIMINATION

Plaintiff also claims that the trial court erred in dismissing her claim of sex discrimination under the ELCRA. We disagree.

"Michigan Courts have recognized two basic theories for establishing a prima facie case of gender discrimination: showing intentional discrimination or proving disparate treatment." *Lytle v Malady*, 458 Mich 153, 181 n 31; 579 NW2d 906 (1998). "In order to establish a prima facie case of sex discrimination, a woman must show that she was a member of a class entitled to protection under the statute and that, for the same or similar conduct, she was treated differently than a man. The crux of a sex discrimination case is that similarly situated persons have been

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[1] Plaintiff notes that defendants' conduct created a hostile work environment; however, plaintiff did not plead a hostile work environment claim and her argument therefore lacks merit. See *Haynie v State,* 468 Mich. 302, 307-308; 664 NW2d 129 (2003) (setting forth the elements of a hostile work environment claim).

treated differently because of their sex." *Marsh v Dep't of Civil Serv (After Remand)*, 173 Mich App 72, 79; 433 NW2d 820 (1988).

Plaintiff claimed that her gender was at least a motivating factor in defendants' decision not to renew her employment contract with the university. She alleged the following two incidents supported her claim: (1) defendant Mirshab told her that a coworker was "PMSing," and (2) he appointed Dr. Taj, a male, to the position of Chairperson of the MBA programs, replacing her in most of her administrative duties, and gave him a higher salary. Given the record, we do not find error in the trial court's determination that plaintiff failed to offer sufficient evidence to create an issue of fact regarding her gender discrimination claim.

First, the comment that a female coworker was "PMSing" does not rise to the level of direct evidence of sex discrimination. The remark was unsubstantiated and not made about plaintiff. Further, it was isolated and not part of a pattern of comments of a sexual nature from defendant Mirshab. There is no indication that the remark related to the adverse employment decision. Rather, it was stated in October 2012, over a year before defendants decided not to renew plaintiff's contract. The comment did not give rise to a triable issue of fact.

Second, the hiring of a male as Chairperson is not evidence of sex discrimination because the new hire was not similarly situated to plaintiff in relevant aspects. In order to prove disparate treatment, plaintiff must demonstrate that she was replaced by a male who was similarly situated. *Marsh*, 173 Mich App at 79. Plaintiff was appointed to Associate Dean of the COM but maintained her original function as Assistant Professor. The university hired Dr. Taj as Program Director/Chairperson of the Marketing and Management Department. As such, he performed similar administrative duties to plaintiff, but he did not teach courses or replace plaintiff in her academic duties. Because all of the relevant aspects of Dr. Taj's employment situation were not nearly identical to those of plaintiff's employment situation, he is not a comparable employee for establishing disparate treatment.

Notably, defendant Mirshab hired two female assistant professors of marketing to replace plaintiff's academic duties. Plaintiff argued that this fact does not defeat her sex discrimination claim because defendant Mirshab does not feel threatened by females in lesser roles. Rather, he was biased toward plaintiff as a female who was "more of an equal." This argument is unavailing because, at all times since defendant Mirshab was hired, plaintiff was under his leadership. In her amended complaint, plaintiff alleged that defendant Mirshab was her immediate supervisor with the responsibility for her performance evaluations. She might have had more administrative responsibilities than the females who were newly hired, but she still held a subordinate position to the Dean of the department.

Further, defendants offered a legitimate, nondiscriminatory reason for the employment action. Again, plaintiff has failed to offer evidence of a genuine issue of material fact that the decision was merely pretext for discrimination on the basis of her sex. Therefore, plaintiff's two

claims for discrimination fail, and the trial court was correct to have granted summary disposition to defendant on those issues.[2]

III. CONCLUSION

We affirm the trial court's ruling granting summary disposition in favor of defendants and dismissing plaintiff's claims in their entirety. No costs awarded. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello

[2] Plaintiff argues that the court erred in dismissing her claim of conspiracy to violate the ELCRA; however, because that claim was derivative of the other discrimination claims above, and because the court did not err in dismissing those claims, it did not err in dismissing the conspiracy claim. See *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003).