STATE OF MICHIGAN

COURT OF APPEALS

MICHELLE HOWARD,

Plaintiff-Appellee,

v

FAMILY INDEPENDENCE AGENCY,

Defendant-Appellant,

and

RICHARD HOLMES, JAN KUIRSKY, MICHAEL J. MASTERNAK and CHILDREN'S PROTECTIVE SERVICES,

Defendants.

UNPUBLISHED
February 10, 2004

No. 243973
Wayne Circuit Court
LC No. 01-127586-CZ

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant Family Independence Agency (FIA) appeals by leave granted the trial court's order denying its motion for summary disposition. We reverse and remand for entry of judgment in favor of defendant.

I. Facts and Procedure

Plaintiff was a Children's Protective Services (CPS) worker for the FIA, as well as being a Pentecostal Christian and licensed missionary. As a CPS worker, plaintiff had never been cited for violating an FIA employment rule, but had been given two or three informal warnings.[1] As part of her duties, plaintiff was assigned to client A.P., who had contacted CPS when her live-in boyfriend expressed an intention to kill their six-year-old adopted son.

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[1] One of these warnings was for preaching religion to a client, and the other warning was for using a state printer to print church bulletins.

One day, plaintiff made an unannounced visit to A.P.'s home. According to plaintiff's report, A.P. had been drinking alcohol when she arrived. Plaintiff learned that plaintiff was prone to seizures and that doctors had given her a prescription to prevent them, but A.P. had not filled the prescription. Plaintiff also learned that that drinking alcohol enhanced A.P.'s susceptibility to seizures. Plaintiff's report went on to state that, during the visit, plaintiff and A.P. discussed how church counseling and prayer could help A.P. and her relationship with her boyfriend. During this discussion, A.P. began to convulse and go into a seizure. Plaintiff believed A.P.'s behavior to be demonic in nature rather than medically related, so she prayed for A.P. during her seizure. In her deposition, plaintiff stated that when A.P. went into the seizure, she began to speak a different language and "come up off the floor." Plaintiff admitted praying for A.P. during the seizure and pouring water on A.P.'s mouth. Plaintiff testified that she poured water on A.P.'s mouth to prevent her from swallowing her tongue, but later stated that she did not hold A.P.'s mouth open because A.P. did not appeared to be in any danger of swallowing her tongue. Plaintiff admitted that while she was sprinkling water on A.P.'s mouth, she stated, "Lord help her in the name of Jesus, bind everything that's not like you, Satan the Lord rebuke you, loose your hold now." The seizure lasted for approximately twenty to twenty-five minutes, during which time A.P.'s son periodically entered the room and plaintiff assured him that his mother would be fine. After A.P.'s seizure ended, plaintiff explained to her that her behavior appeared to be demonic and that she should pray about the situation.

Approximately one week later, A.P. contacted the CPS office and told plaintiff's supervisor, Jan Kuirsky, that plaintiff had performed religious acts on her. During the course of several conversations with Kuirsky, A.P. complained that during her seizure, plaintiff laid her on the floor, pushed on her stomach, threw up on her, sprinkled water on her face, and told her that she had to drive the demons out of her. A.P. said that, after the seizure, plaintiff told her that she would return another time to finish driving out the demons. A.P. indicated that she had not given plaintiff permission to touch her or pray for her and that her son was terrified because of the incident. A.P.'s son told Kuirsky that he had given plaintiff water and a paper towel while plaintiff was trying to drive the demons out of his mother. In plaintiff's answers to interrogatories, she denied that A.P. threw up or that plaintiff pushed on A.P.'s stomach and threw up on her. Plaintiff also denied telling A.P. that she would come back at another time to finish driving the demons out of her.

In response to A.P.'s complaint, Kuirsky initiated an investigation to determine if plaintiff had violated FIA employment rules. During the investigation, Kuirsky contacted one of plaintiff's other clients, who told Kuirsky that plaintiff had quoted scripture to her, including the "Our Father" prayer, and told her to be more submissive to her husband. As part of the investigation, Kuirsky also asked plaintiff to describe her visit to A.P.'s home. Kuirsky's stated that plaintiff told her that "A.P. became emotional and slid to the floor, where she began to seize, snarl, convulse and levitate off the floor." Plaintiff described how she placed her hand on A.P.'s stomach and prayed, and when A.P. began coughing and spitting up, plaintiff encouraged her to get it out and continued praying. Because A.P. did not have any anointing oil, plaintiff had A.P.'s son bring her some water, which she used to sprinkle on A.P.'s mouth and anoint her. Following the seizure, plaintiff told A.P. that she had had demonic convulsions, that she was "straddling the fence with one foot in the church and one foot in the world," and that "fornication is a sin if you are not married." According to Kuirsky, plaintiff explained that she did not call

911 for help because she did not think emergency help could get there in time and did not want A.P. to die. Instead, she felt that she could offer immediate assistance with prayer.

Ultimately, Kuirsky concluded that plaintiff's behavior with A.P. was a violation of three FIA rules and that plaintiff inappropriately brought religion into the performance of her duties. After Kuirsky's investigation, a disciplinary conference was held regarding plaintiff's violation of three FIA employment rules. After the conference, plaintiff was given notice that her employment was terminated. Plaintiff filed a complaint against defendant, CPS, and three supervising FIA employees,[2] alleging that they violated the Elliot-Larsen Civil Rights Act (the "ELCRA"), MCL 37.2101 *et seq.*, by terminating her employment because of her religious beliefs. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that plaintiff failed to establish a prima facie case of discrimination or retaliation and, even if she did establish a prima facie case, she failed to rebut defendant's legitimate non-discriminatory reasons for its actions. The trial court denied defendant's motion without explanation.

II. Analysis

Defendant argues that the trial court should have granted its motion for summary disposition of plaintiff's ELCRA discrimination claim under MCR 2.116(C)(10).

> We review de novo a trial court's decision on a motion for summary disposition. 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. *Smith v Globe Life Ins Co*, 460 Mich 446, 453; 597 NW2d 28 (1999). [*Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).]

Plaintiff claims that defendant discriminated against her based on her religion in violation of the ELCRA, which provides, in pertinent part:

> (1) An employer shall not do any of the following:
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> (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 . . . . [MCL 37.2202.]

"A claim of intentional religious discrimination can be proven by direct and circumstantial evidence. Where direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* [*v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973)] framework, and the case should proceed as an ordinary civil matter."

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[2] The trial court dismissed plaintiff's claims against CPS and the individual defendants.

DeBrow v Century 21 Great Lakes, Inc (After Remand), 463 Mich 534, 539-540; 620 NW2d 836 (2001) (citations omitted). "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, supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

> In a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. Whatever the nature of the challenged employment action, the plaintiff must establish proof that the discriminatory animus was causally related to the decisionmaker's action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 713 (1999) (citations omitted).]

Here, Kuirsky's Investigation Summary contained the following conclusion:

> [T]he matter with [A.P.], as well as the report of Ms. Stoian, demonstrate that [Plaintiff] brings faith and religion into the performance of her duties. This is seen as evidence of an aggravating circumstance. [Plaintiff's] actions indicate that she cannot appropriately perform her duties as an employee of the Family Independence Agency.

Additionally, plaintiff presented deposition testimony of Richard Holmes, an FIA manager, where he acknowledged that plaintiff was discharged in part because she brought religion into the performance of her duties and that, had she not engaged in religious activity at A.P.'s house, she might not have been terminated. Plaintiff also points to evidence that she was warned for using a state printer to print religious bulletins. Viewing this evidence in a light most favorable to plaintiff, we conclude that this evidence does not amount to direct evidence of discrimination. The warning for printing religious bulletins was not directed toward the religious content of the bulletins, but toward plaintiff's violation of FIA policy by using a state printer for personal use. The evidence that plaintiff was terminated because she brought religion *into the performance of her duties* does not show that plaintiff was terminated because of her religious beliefs or even because she practiced her religion in the workplace. Plaintiff was required to perform her job as a CPS worker according to FIA rules, and failure to properly perform these duties, because of her religion or any other factor, was grounds for her termination. FIA supervisors found that, through plaintiff's religious acts during her meeting with A.P., plaintiff violated FIA rules and acted inappropriately in light of her duties as a CPS worker. Because the evidence presented by plaintiff does not *require* a conclusion that religious discrimination was a motivating factor in the decision to terminate plaintiff, there is no direct evidence of illegal discrimination.

Where no direct evidence of impermissible bias is available, the plaintiff must present a prima facie case by proceeding through the steps set for in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle, supra* at 462-463. In order to

establish a prima facie case of discrimination under the *McDonnell Douglas* test, a plaintiff must present evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he was treated less favorably than a similarly situated individual outside his protected class. *Hazle, supra* at 463.[3] Defendant argues that plaintiff failed to establish a prima facie case of unlawful discrimination by failing to show that she was treated less favorably than a similarly situated individual outside her protected class. Employees are similarly situated where all of the relevant aspects of their employment situations are nearly identical. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (Brickley, J., plurality), citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994).

Here, plaintiff has not presented any evidence that a similarly situated CPS worker with different religious beliefs would not have been terminated if he had engaged in conduct similar to plaintiff's. There is no evidence that plaintiff was discharged because her conduct at A.P.'s home was specifically Pentecostal Christian in nature. Instead, plaintiff was terminated for violating three FIA employment rules through her conduct in A.P.'s home. Kuirsky explained in her Investigation Summary that plaintiff violated FIA Work Rule #13 ("Relating to the public in a manner which arouses justifiable criticism of the employee, the agency or the state") by behaving unacceptably when confronted by a possible medical emergency involving a client. Kuirsky stated that, "Instead of seeking help for a possible seizure, [plaintiff] relied upon her religious beliefs in identifying the client's condition as demonic behavior." Kuirsky concluded that plaintiff's actions of laying her hands on A.P. and having A.P.'s son bring her water to anoint A.P. were inappropriate and enough to arouse justifiable criticism of her, the state, and the FIA.

Kuirsky also found that plaintiff violated FIA Work Rule #28 ("Engaging in a course of conduct which would cause another individual to feel terrorized, intimidated, harassed or molested") by performing religious rites to drive the demons out of A.P. and informing her that she would return at another time to finish getting the demons out of A.P.. According to Kuirsky, A.P. reported that both she and her son were terrified of plaintiff and were afraid of plaintiff's return to their home. Kuirsky noted that it was plaintiff's duty to protect and improve the quality of life for children and to strengthen families, not to engage in religious acts. Finally, Kuirsky found that plaintiff had violated FIA Work Rule #25 ("Any behavior which is physically assaultive") by laying her hands on A.P.'s stomach and sprinkling water on A.P.'s face without her permission. Plaintiff was ultimately terminated because she brought religion into the performance of her duties and her actions violated these three FIA employment rules.

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[3] Once a plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises. *Hazle, supra* at 463. The defendant may rebut this presumption by producing evidence that it had a legitimate, nondiscriminatory reason for its employment decision. *Id.* at 464. Upon such a showing, the burden again shifts to the plaintiff to demonstrate that the defendant's reason for its employment decision was a pretext for unlawful discrimination. *Id.* at 465-466.

As evidence that she was treated differently than similarly situated FIA employees, plaintiff presented evidence that other FIA employees were permitted to pray in the workplace and were not discharged for this activity. Holmes stated in his deposition that prayer and other religious practices were allowed in the workplace as long as they did not interfere with the performance of the employees' duties. There are no FIA rules or policies which state that an employee will be terminated for bringing religion into the workplace. However, plaintiff was not terminated for merely praying at the office or bringing her religion into the workplace. Plaintiff was terminated because her practice of religion with a client caused her to violate several employment rules. Instead of calling for medical help when A.P. was having a seizure, plaintiff relied on religion to deal with A.P.'s seizure. Plaintiff's ignorance of or disregard for basic medical facts and emergency procedures in favor of supernatural explanations and "treatment" suggests that the FIA negligently hires CPS workers who do not know how to properly deal with emergency medical situations and might expose her and the FIA to justifiable criticism. Without permission from A.P., plaintiff laid her hand on A.P.'s stomach, sprinkled water on her mouth, and prayed for Satan to loose his hold on her. This activity was offensive to A.P. and caused her and her son to be terrified of plaintiff's return. Plaintiff was terminated because her religious activity interfered with the performance of her employment duties and caused her to violate several employment rules, not because she merely engaged in religious activity at work or maintained particular religious beliefs. Plaintiff has not shown that an employee with different religious beliefs would not have been discharged had he engaged in similar activity with a client. Because plaintiff has not established a genuine issue of material fact regarding whether she was treated differently than a similarly situated employee outside his protected class, she has failed to establish a prima facie case of illegal discrimination based on religion.

Defendant also argues that the trial court should have granted its motion for summary disposition of plaintiff's ELCRA retaliation claim under MCR 2.116(C)(8) and (C)(10). Plaintiff concedes that she did not state a claim for retaliation.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra