STATE OF MICHIGAN

COURT OF APPEALS

MARY CARMEN GRECH-BERRY and CLYDE BERRY, Plaintiffs-Appellants, v WAY BAKERIES, INC., PERFECTION BAKERIES, INC., and ALLEN J. SHORTZ, Defendants-Appellees.	UNPUBLISHED February 22, 2005 No. 248841 Jackson Circuit Court LC No. 02-001075-NO

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the circuit court's order dismissing Mary Carmen Grech-Berry's claims of age, gender and height discrimination[1] against her former employer, Way Bakeries, Inc., a division of Perfection Bakeries, Inc., and former bakery manager Allen[2] J. Shortz, who fired plaintiff during her probationary employment period, within sixty working days of her hiring date. We affirm.

I

Plaintiff first contends that the circuit court erred by dismissing Shortz, the man who hired and fired her, from the action, especially before she ever had the opportunity to depose him. We review de novo the circuit court's summary disposition ruling. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court evaluates a summary disposition motion premised on MCR 2.116(C)(10) by considering in the light most favorable to the nonmoving party all relevant and substantively admissible affidavits, pleadings, depositions, admissions and other evidence submitted by the parties to determine whether any genuine issue of material fact warrants a trial. *Id*. at 120-121.

[1] Because Clyde Berry alleges only loss of consortium derivative of the claims of his wife, future references in this opinion to "plaintiff" will refer solely to Mary Carmen Grech-Berry.

[2] In his affidavit, Shortz spelled his first name "Alan."

The circuit court granted Shortz's motion for summary disposition in reliance on this Court's decision in *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 485; 652 NW2d 503 (2002), in which this Court held that Michigan's Civil Rights Act (CRA), MCL 37.2101 *et seq*., "provides solely for employer liability, and [that] a supervisor engaging in activity prohibited by the CRA may not be held individually liable for violating a plaintiff's civil rights." Plaintiff asserts that the circuit court misapplied *Jager*, and that *Jager* does not apply to this case because in *Jager* the case was dismissed after full discovery, and the trial court dismissed the plaintiff's actions against her individual supervisor only after the court first had dismissed the claims against the plaintiff's institutional employer. We do not agree.

Our review of this Court's decision in *Jager* reveals no suggestion that the Court hinged its analysis of the claims against the individual defendant on the existence of claims against the plaintiff's employer. To the contrary, in addition to the above-quoted holding, this Court broadly stated, without reference to employer liability, (1) "[T]he question before us is whether Wilkerson, who is employed in a supervisory capacity, can be held individually liable, separate from his employer, for actions toward an employee under his supervision that violate the prohibition of the CRA against sexual harassment. We hold that he cannot," *id*. at 478, and (2) "Read as a whole, the CRA envisions, in our opinion, employer liability for civil rights violations that result from the acts of its employees who have the authority to act on the employer's behalf rather than individual liability for those civil rights violations," *id*. at 485.[3] Consequently, we find that the circuit court properly applied this Court's decision in *Jager* by granting summary disposition of plaintiff's claims of age, gender and height discrimination against Shortz in his individual capacity.

Plaintiff further challenges the circuit court's summary disposition ruling as premature because defendant's avoidance tactics had precluded her from deposing Shortz, a witness integral to the maintenance of her case. But in light of the circuit court's correct application of *Jager*, which as a matter of law prohibits any action under the CRA, MCL 37.2202, seeking to impose liability on a supervisor in his individual capacity, the fact that plaintiff had not yet deposed Shortz has no bearing or effect on the propriety of the court's dismissal of the claims against Shortz in his individual capacity.

To the extent that plaintiff suggests that defendants impeded her efforts to depose Shortz, who still had vital information relative to her claim against the bakery defendants, our review of the record in this case substantiates no misconduct by defendants that precluded a deposition of Shortz. On May 30, 2002 and May 31, 2002, the parties first exchanged letters with respect to scheduling Shortz's deposition. Defense counsel wrote an August 21, 2002 letter requesting that opposing counsel dismiss Shortz from the lawsuit in light of the recent *Jager* decision, and on

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[3] We note that in *Rymal v Baergen*, 262 Mich App 274, 296; 686 NW2d 241 (2004), this Court found that an individual employee can be held liable under the antiretaliation provision of the CRA, but here the claims only involved antidiscrimination claims under the CRA as in *Jager*.

August 27, 2002 plaintiff's counsel filed a notice of intent to depose Shortz, three days before Shortz filed his motion for summary disposition.

On September 20, 2002, the circuit court heard Shortz's motion for summary disposition, together with plaintiff's motion to compel a deposition of Shortz in Michigan, instead of New York where he currently resided. In response to plaintiff's counsel's expression of concern that no deposition of Shortz would occur if the court dismissed him from the action, defense counsel reassured the court that he felt amenable to an arrangement of Shortz's deposition in New York, and that even if the court dismissed Shortz, defense counsel still intended to depose Shortz if plaintiff's counsel did not. After the court indicated it would grant Shortz's motion, the parties discussed the scheduling of Shortz's deposition as follows:

> *The Court*: Mr. Shortz will be deposed. The Court will issue an order that he's being deposed. He will be deposed in New York and it will be up to you to set it up, however.
>
> *Plaintiff's counsel*: Okay.
>
> *The Court*: I can't make them set it up since he's not a party.
>
> *Plaintiff's counsel*: I just want it to be clear on the record that [defense counsel]'s not going to come back and say we have no control over him, I'm not going to give you his address, you have to seek service in New York, which I have no problem going to New York. It's that the . . . Michigan courts don't have jurisdiction over a . . . non-party in New York. These are all the issues that I contemplate being—
>
> *The Court*: Sure. I'm sure they'll come up.
>
> Do you have an address for him, [defense counsel] that you could provide?
>
> *Defense counsel*: I've . . . already provided his address in our witness list.
>
> *Plaintiff's counsel*: Oh, is it in the witness list?
>
> *Defense counsel*: It's in the witness list. I will say this much, though. I personally want an additional address because that's his work address. I want his home address, and as soon as I get it, I will provide it.
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> * * *
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> Because . . . I know the difficulties involved . . . in trying to serve someone at work.
>
> *The Court*: All right. I anticipate the cooperation. And, if not, you're certainly welcome to return, and the Court will assist you in whatever way we can.

Plaintiff's counsel: Thank you very much.

The record contains a November 13, 2002 letter of defense counsel advising plaintiff's counsel of a second New York address for Shortz. Although discovery continued through March 2003, the record contains no indication that plaintiff sought the circuit court's assistance in arranging a deposition of Shortz.

The parties do not dispute that only Shortz participated in discharging plaintiff from her employment with the bakery, and Shortz's actions theoretically may afford plaintiff a cause of action under the CRA against the corporate defendants, notwithstanding his dismissal from the action. However, Shortz was still subject to deposition after his dismissal, and the record does not reflect that plaintiff pursued all avenues to obtain his deposition only to be stymied by defendants. We thus reject plaintiff's suggestion that Shortz's dismissal irreparably derailed her case against the corporate defendants.

II

Plaintiff also argues that the circuit court improperly granted defendants' motion for summary disposition of her age, gender and height discrimination claims pursuant to subrule (C)(10), in the face of direct and circumstantial evidence that defendants engaged in all three types of discrimination. We again review de novo the circuit court's summary disposition rulings. *Maiden*, *supra* at 118.

In the absence of direct evidence of discrimination, a plaintiff establishes a prima facie case of discrimination under the CRA by showing through circumstantial evidence that she 1) is a member of a protected class, 2) suffered an adverse employment action, 3) had the requisite job qualifications, and 4) her discharge occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co,* 464 Mich 456, 463; 628 NW2d 515 (2001); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173 (opinion by Weaver, J.), 185 (concurring opinion by Brickley, J.), 185-186 (concurring opinion by Mallett, C.J.); 579 NW2d 906 (1998). Once a plaintiff establishes a prima facie case, the defendant must articulate a legitimate, nondiscriminatory reason supporting the adverse employment action. *Hazle*, *supra* at 464. If the employer does so, the burden shifts back to the plaintiff to raise a triable issue that the articulated reason constitutes a pretext for unlawful discrimination. *Id.* at 465-466.

If a plaintiff presents direct evidence of discrimination, the burden shifting analysis does not apply. *Hazle*, *supra* at 462. "In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Id.* Direct evidence of discrimination consists of "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).

A

With respect to plaintiff's age and gender discrimination claims, plaintiff presented no evidence of any comment or remark made by Shortz, who undisputedly was the only person involved in the ultimate decision to terminate plaintiff's employment, referring to her age or gender. Our careful review of the voluminous deposition testimony and other documentary

evidence submitted by the parties reveals absolutely no evidence tying Shortz to (1) the stray comments made by other, nonmanagement employees of the bakery regarding females, including alleged remarks that women generally did not hold jobs with defendant for long, or (2) any disparate treatment of plaintiff or other employees on the basis of age or gender.[4] We conclude that the circuit court properly granted defendants summary disposition of the age and gender discrimination claims because plaintiff failed to present admissible evidence supporting a reasonable inference that age or gender qualified as a motivating factor in Shortz's decision to terminate her employment. *Hazle*, *supra* at 463-466; *Lytle*, *supra* at 172-177.

B

Regarding height discrimination, plaintiff testified that when Shortz terminated her employment, he advised her "he was terminating [her] because [her] height was a problem." This would appear to be direct evidence that unlawful discrimination on the basis of height was a motivating factor in Shortz's decision to terminate plaintiff's employment. *Hazle*, *supra* at 462; see also *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001) (characterizing as direct evidence of unlawful discrimination the plaintiff's supervisor's remark at the time of his firing that the plaintiff was "getting too old for this shit"). However, it is also undisputed that plaintiff's height affected her ability to perform certain tasks and gave rise to safety concerns. Plaintiff testified that Shortz mentioned her inability to reach certain areas, and two bakery employees testified that plaintiff's height caused a safety concern because she was unable to reach safely over the conveyors, and caused problems because she could not reach the ties to change the dates. Plaintiff does not claim that she did not have these difficulties; rather, she claims that these reasons were pretextual, because it made no sense for defendant to hire her knowing that she was too short to do the job safely. She also points out that another employee was the same height, but was not terminated. We fail to see how these arguments establish that defendant's concerns over plaintiff's ability to do the job, coupled with her attendance problems and other problems leading to co-worker complaints, were pretextual. Plaintiff failed to establish a genuine issue regarding whether her employment was terminated because of her height, per se, rather than her job performance.

III

Because we affirm the circuit court's grant of summary disposition dismissing plaintiff's claims, we do not address plaintiff's remaining argument that the circuit court erroneously granted defendants' motion for partial summary disposition with respect to the issue of front pay economic damages.

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[4] Plaintiff failed to make a prima facie showing of disparate treatment of any others similarly situated and outside the protected classes of age and gender; plaintiff did not substantiate that any other bakery employees who were not discharged shared all the relevant aspects of her employment situation. *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448-449; 622 NW2d 337 (2000). Plaintiff similarly failed to show with any specificity that her expert had determined that defendants disproportionately discharged employees similarly situated to plaintiff. *Id*.; *Cosgrove v Sears, Roebuck & Co*, 9 F3d 1033, 1041 (CA 2, 1993).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Kirsten Frank Kelly