STATE OF MICHIGAN

COURT OF APPEALS

LINDA PEARCE, Plaintiff-Appellee,	UNPUBLISHED June 26, 2012
v	No. 302621 Genesee Circuit Court
RADIOSHACK CORPORATION, JEFF BOWRON, and DAVID GRAHAM, Defendants-Appellants.	LC No. 09-091937-NO

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendants, RadioShack Corporation, Jeff Bowron, and David Graham, appeal by leave granted the grant of plaintiff Linda Pearce's motion for reconsideration in this employment discrimination and retaliatory discharge case brought pursuant to the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* We reverse and remand.

This case arises out of Pearce's termination from her position as the manager of a RadioShack store in Flint, Michigan. Graham became Pearce's district manager and supervisor in April 2009. Bowron served as a regional manager and functioned as Graham's supervisor. Pearce began working for RadioShack in 1996 as a sales associate and was promoted to management in 1999. Pearce's transfer to a different store in 2004 was considered a demotion despite the retention of her title as manager. During the lower court proceedings, Pearce acknowledged documents evidencing that her performance was unsatisfactory and her pay reduced. Bowron asserted that Pearce received a performance appraisal in 2008 from a different district manager indicating her poor or unsatisfactory performance. The following year, RadioShack implemented a 12-week program titled the "Perfect Store Project," which involved timelines for meeting criteria established for specific areas of a store. Concurrently, RadioShack had effectuated Non-Negotiable Standards comprising weekly checklists, which had been in place since 2007.

Pearce stated that she perceived Graham as being "very condescending" toward her at their first store meeting. Graham disciplined Pearce on May 22, 2009, for an incident involving the failure to follow proper procedures in the sale of cellular telephones, resulting in monetary loss to the store. Pearce acknowledged she was not in compliance and having difficulty with implementing RadioShack programs when, on June 5, 2009, Graham visited her store to review

her performance/compliance. Shortly thereafter, Graham issued a Corrective Action Record to Pearce. On his next visit on July 15, 2009, Graham purportedly tore apart the back room of the store and then terminated Pearce's employment. Pearce acknowledged that her store was not in full compliance with either the Perfect Store Project or Non-Negotiable Standards at the time of her discharge.

Pearce reported that one to two months before Graham became the district manager, he instructed Pearce that she needed a "stronger male presence" in her store. Graham purportedly made this statement following his discussion with Pearce of the need to replace two female employees going on maternity leave. Pearce responded by informing Graham that she had worked with a number of female employees and had not experienced any problems and that "they were fully capable of doing anything that needed to be done in the store." Graham instructed Pearce that all future hires must be cleared through him as he wished to conduct a second interview before offering employment to any new hires. Pearce asserted that Graham "reacted very negatively" and was condescending to her in response to her comment regarding the competency of female employees. Pearce contended that Graham responded in this manner on several occasions, including the day of her termination, which occurred approximately one month after she had made the comment regarding female employees.

Pearce was replaced by a female. Graham testified that Pearce was terminated based on her failure to meet performance requirements and that, on the day she was terminated, he had planned to cite her for poor performance. Graham denied being angry when he terminated Pearce's employment but acknowledged that he did pull items off of a shelf in a back room. Graham did not believe that he ever told Pearce that she needed a stronger male presence in the store. Rather, he testified that during his store visit in May 2009, he found a security guard uniform, and he believed it was actually Pearce who indicated a need for a stronger male presence when she explained that various employees wore the uniform as a safety measure. Graham did not specifically recall any comment by Pearce regarding the ability of female employees to perform any job and asserted that his conducting of second interviews of new hires was a policy he followed with all store managers. Bowron confirmed that several store managers were terminated for their failure to comply with the various programs in place and recalled that, despite the cellular telephone problem that cost RadioShack monies, Graham had argued to permit Pearce to have an opportunity to redeem herself.

Pearce initially filed a complaint alleging age discrimination under the CRA, MCL 37.2101 *et seq.* She subsequently filed an amended complaint alleging discrimination based on her age and/or gender. Defendants filed a motion for summary disposition, which the trial court granted. In the interim, Pearce filed a motion seeking leave to file a second amended complaint to include a retaliation claim, which the trial court granted. Defendants once again filed a motion for summary disposition arguing that Pearce had failed to demonstrate that her "purported protected activity was a significant factor in her termination" and that she could not show pretext as previously determined by the trial court in its initial grant of summary disposition in favor of defendants. The trial court initially granted defendants' motion for summary disposition.

Pearce filed a motion for reconsideration. The trial court granted reconsideration based on its determination that Pearce had alleged a mixed motive case that required submission to the jury. The trial court denied defendants' request for a stay pending appeal. Following submission

of defendants' application for leave to appeal to this Court, they also filed a motion to stay and a motion for peremptory reversal. We granted defendants' motion for stay but denied the motion for peremptory reversal.

"A trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(10) is reviewed de novo to ascertain whether the movant is entitled to judgment as a matter of law." *Titan Ins Co v State Farm Mut Auto Ins (After Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301214, issued March 27, 2012), slip op at 4. "We review the record in a light most favorable to the nonmoving party to determine whether the evidence established the existence of a genuine issue of material fact for trial." *Id.* In addition, we review a trial court's ruling on a motion for reconsideration pursuant to an abuse of discretion standard. *Tinman v Blue Cross & Blue Shield of Mich*, 264 Mich App 546, 556-557; 692 NW2d 58 (2004). We will reverse a trial court's ruling on a reconsideration motion only if the decision falls outside the range of principled outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

Pursuant to the CRA, MCL 37.2202(1):

> 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.

The provision of the CRA pertaining to retaliation provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a change, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act. [MCL 37.2701.]

Our Supreme Court has determined that to establish a prima facie case of retaliation, a plaintiff is required to demonstrate:

> (1) that [s]he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (citation omitted).]

The plaintiff must bear the initial burden of establishing a prima facie case of retaliatory discharge. *Roulston v Tendercare (Michigan), Inc*, 239 Mich App 270, 280-281; 608 NW2d 525 (2000). Only factor (3) regarding the taking of an adverse employment action is undisputed.

We conclude that Pearce is unable to establish the first necessary element in her claim of retaliation—her engagement in a protected activity. A protected activity under the CRA consists of "oppos[ing] a violation of th[e] act, or . . . mak[ing] a charge, fil[ing] a complaint, testif[ying], assist[ing], or participat[ing] in an investigation, proceeding, or hearing under th[e] act." MCL 37.2701(a); see also *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001). Because there is no evidence or allegation to suggest that Pearce made a charge, filed a complaint, or in some manner was involved in an investigation or proceeding under the CRA, her claim of retaliation must be premised on her alleged opposition to a violation of the act. Specifically, Pearce's statement to Graham regarding the capability of women employees, which she allegedly made in response to his assertion or observation regarding the need for increased male presence at her store, appears to be the basis for her assertion of involvement in a protected activity.

Specifically, Pearce contends that she engaged in the protected activity of opposing Graham's violation of the CRA by ordering her to hire males based on her comment regarding the capability of female employees. Such a contention is insufficient for several reasons. First, Graham's ordering Pearce to hire males to fill store positions does not constitute direct evidence of retaliation because it occurred before the alleged protected activity and was not made in the context of her termination. "[S]tatements by decision makers that are unrelated to the employment decision at issue do not constitute direct evidence that unlawful discrimination was a determining factor in the employer's decision." *Millner v DTE Energy Co*, 285 F Supp 2d 950, 966 (ED Mich, 2003). "Rather, to qualify as direct evidence of discrimination, such remarks must relate to the employment decision at issue." *Id.* "Comments that are isolated or ambiguous or remote in time in relation to the employment decision at issue generally have been held not to constitute direct evidence." *Id.* Second, Graham's alleged expression of anger, verbal condescension, and requirement that Pearce send all applicants to him for a second interview do not comprise direct evidence of retaliation. Graham's requirement that all candidates for employment be submitted to him for a second interview occurred on the day of the alleged protected activity and was not in any manner connected to Pearce's discharge. See *id.* Contrary to Pearce's allegation, there was evidence that Graham imposed this requirement on all managers. Pearce also alleged that Graham was condescending to her before she engaged in the alleged protected activity and in other communications pertaining to her performance. Graham's purported anger on the day of her discharge could likely be traced to her failure to comply with the standards imposed, particularly given the absence of any reference to her alleged protected activity at the time of her termination. In fact, we find it significant that there was no statement serving to connect Pearce's alleged protected activity to her discharge. Thus, the evidence provided by Pearce does not "require[] the conclusion" that her alleged protected activity was "a motivating factor" in her termination. *Shaw v City of Ecorse*, 283 Mich App 1, 14; 770 NW2d 31 (2009).

In addition, Pearce has failed to demonstrate that she actually engaged in any form of opposition to Graham's alleged discriminatory hiring preferences. As previously recognized by this Court, although "[a]n employee need not specifically cite the CRA when making a charge under the act[,] . . . [t]he employee must do more than generally assert unfair treatment." *Barrett*, 245 Mich App at 318-319. "The employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim . . . pursuant to the CRA." *Id.* at 319. Pearce's response regarding the competence of female employees to Graham's statement of

the need for a greater male presence in the store failed to suggest that Pearce considered Graham's statement to be discriminatory or in violation of the CRA. Thus, her response cannot be construed as "clearly convey[ing] to . . . [the] employer . . . the specter of a claim . . . pursuant to the CRA." *Id.* This is particularly true as Pearce's own testimony demonstrated her ambivalence regarding her behavior suggesting, "I don't know if I questioned him 100 percent." Further, Pearce's behavior in conceding to Graham's request of interviewing and hiring male employees to fill vacancies in the store is contrary to her assertion that she was engaged in opposing his alleged violation of the CRA. Rather than opposing any alleged discriminatory hiring practices based on gender, Pearce's actions indicate compliance and facilitation.

Based on our determination that Pearce has failed to establish a prima facie case of retaliation, we conclude that the trial court erred in construing her claim as constituting mixed motive and the necessity of submission to a jury. Consequently, we do not need to address claims of pretext or undertake a burden-shifting analysis. *Roulston*, 239 Mich App at 280-281. Our determination of Pearce's failure to demonstrate that she was engaged in a protected activity precludes the necessity of our reviewing this appeal in light of *White v Baxter Healthcare Corp*, 533 F3d 381 (CA 6, 2008), as suggested by Pearce.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Riordan

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MURRAY, P.J. (*concurring*).

I concur in the result and rationale set forth in the majority opinion, but write separately to briefly address plaintiff's argument that the federal summary judgment standard articulated in *White v Baxter Healthcare Corp*, 533 F3d 381 (CA 6, 2008), should be applied in Michigan. For several reasons *White's* rationale does not apply to this case.

First, *White's* summary judgment standard for "mixed motive" cases was based on the United States Supreme Court's decision in *Desert Palace Inc v Costa*, 539 US 90; 123 SCt 2148; 156 LEd2d 84 (2003), see *White*, 533 F3d at 398-399. The *Desert Palace* holding was, in turn, premised upon the 1991 amendments to Title VII of the Civil Rights Act of 1964 that specifically set forth a new and specific standard for mixed motive cases. 42 USC § 2000e-2(m). *Desert Palace*, 539 US at 101. Michigan's civil rights act does *not* contain language similar to that contained in 42 USC § 2000e-2(m), and so the foundation for the *Desert Palace* holding (and thus the *White* standard) does not exist under Michigan law.[1]

[1] Although Michigan case law generally follows federal cases addressing analogous federal civil rights statutes, as recognized by Judge ROSEN in *Millner v DTE Energy Co*, 285 F Supp2d 950, 967 n 18 (ED Mich, 2003), this is a general rule not always followed by Michigan courts. Deviation from this general rule most often appears where the statutes have significantly different language. And, here in particular, not only is the language relied upon by the *Desert Palace* Court not within our state anti-discrimination laws, but there is other language within the 1991 amendments to Title VII that several courts have found evidence a legislative trade-off to

Second, even if the *White/Desert Palace* standard did generally apply in Michigan, it would not apply in this case. Numerous courts, if not all the federal circuit courts of appeal, have held that the *Desert Palace* standard does not apply in a retaliation case because those claims were not affected by the 1991 amendments, which, again, were what *Desert Palace* was premised upon. See *Porter v Natsios*, 414 F3d at 19, and *Pennington v City of Huntsville*, 261 F3d 1262, 1269 (CA 11, 2001). Consequently, because plaintiff is only pursuing a retaliation claim, even if we applied the federal summary judgment standard from *White*, it is not at all clear that it would apply here.

/s/ Christopher M. Murray

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the "more lenient" mixed motive standard contained in 42 USC § 2000e-2(m). See *Spees v James Marine Inc*, 617 F3d 380, 390 (CA 6, 2010) and *Porter v Natsios*, 414 F3d 13, 18-19 (CADC, 2005). Again, because Michigan law does not contain language like that in the 1991 Title VII amendments, there was also no legislative "trade-off" to balance out the effects of any new standard.