STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER JACKSON, Personal Representative of the Estate of CYNTHIA JACKSON, Plaintiff-Appellee,	UNPUBLISHED February 11, 2014
v	No. 313008 Ingham Circuit Court
DEPARTMENT OF HUMAN SERVICES, Defendant-Appellant.	LC No. 10-001502-CD

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Following a two day bench trial, the trial court entered a judgment in favor of plaintiff Cynthia Jackson[1] on her claim of racial discrimination under the Elliot Larson Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Defendant appeals as of right. For the reasons set forth in this opinion, we reverse and remand for entry of an order of involuntary dismissal pursuant to MCR 2.504(B)(2).

Plaintiff was an African American woman who began working for defendant, the Department of Human Services (DHS) in 1994. Plaintiff received multiple promotions during the course of her employment at DHS. As of October 2006, plaintiff worked as a Child Support Specialist, grade 11, in the Office of Child Support in Lansing. From October 2009 to October 2010, plaintiff applied for a total of 21 promotions with various departments within DHS, which were to be filled by 24 people. Plaintiff did not offer any evidence regarding the locality of the promotions. Defendant introduced plaintiff's employment records, which showed that the Department of Civil Service (DCS) determined that plaintiff failed to meet the minimum qualifications for 15 of the 21 promotions and her application was "failed, screened out" of consideration for those promotions. Two of plaintiff's applications had entries that simply stated, "minimum education and experience," one application was "rejected," two applications

[1] Cynthia Jackson died during the pendency of this appeal and her estate is represented by her personal representative. For ease of reference, we will refer to Cynthia Jackson as "plaintiff" in this opinion.

received interviews, and one application was "referred." However, plaintiff testified that she received 16 interviews and she disputed DCS' finding that she failed to meet the qualifications for 15 of the promotions, explaining that there was a discrepancy with her transcripts from Michigan State University. Plaintiff testified that when she interviewed, she interviewed with panels of three interviewers and she explained that the panels were comprised of "mostly white" people. Plaintiff did not receive any of the promotions.

On November 22, 2010, plaintiff filed a complaint alleging that defendant discriminated against her on the basis of race in violation of the ELCRA, MCL 37.2101 *et seq*. At trial, plaintiff testified that she did not know who received the promotions she applied for but she assumed that Caucasians were promoted. Defendant introduced evidence that, of the 24 people hired or promoted, 10 of the people were African Americans and 14 were Caucasians. Plaintiff did not offer any evidence related to how her qualifications compared to the qualifications of the people who were ultimately hired or promoted. Plaintiff testified that she was highly qualified and that she trained for the interview process. Plaintiff testified that there were no African American supervisors in her department in Lansing and that the Lansing office did not have many African American employees. Defendant introduced testimony showing that African American women made up 50-percent of its statewide workforce in the Office of Child Support. However, plaintiff countered that most of the African American women worked primarily in Wayne County.

Following plaintiff's offer of proof, defendant moved for a directed verdict. The trial court denied the motion, finding that plaintiff was well-qualified for the promotions and finding that the makeup of plaintiff's interview panels was "questionable." Ultimately, the trial court entered a judgment in favor of plaintiff. The court found that plaintiff was highly qualified for the promotions and there was no evidence of poor work performance or attendance issues. The court concluded that race was the "motivating factor" in defendant's decision not to promote plaintiff. The court noted that eight of the African Americans who received promotions were located outside of Lansing, and concluded that there was discrimination occurring at the DHS Lansing office. The court clarified that its finding was based on evidence of intentional discrimination, as opposed to disparate impact. The court ordered defendant to promote plaintiff to Child Support Specialist grade 12 and awarded plaintiff a total judgment of $39,153. This appeal ensued.

Defendant argues that the trial court erred in denying its motion for a directed verdict. In a bench trial, a motion for a directed verdict should be treated as a motion for an involuntary dismissal. MCR 2.504(B)(2); *Samuel D Begola Servs, Inc, v Wild Bros*, 210 Mich App 636, 639; 534 NWd2d 217 (1995). MCR 2.504(B)(2) provides that in a bench trial, a trial court may dismiss an action "on the ground that, on the facts and the law, the plaintiff has no right to relief." We review de novo a trial court's ultimate determination on a motion for involuntary dismissal while the court's factual findings are reviewed for clear error. *Begola*, 210 Mich App at 639 (citations and quotations omitted). A trial court's factual findings are clearly erroneous when "we are left with a definite and firm conviction that a mistake has been made." *Id*.

Under the ELCRA, an employer may not discriminate against an individual in employment matters because of race. MCL 37.2202(1)(a). "In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. 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." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). "Direct evidence" of racial bias is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*.

At one point in this case, the trial court appeared to infer that there was direct evidence of racial discrimination. However, the parties did not argue that there was direct evidence of discrimination, and, having reviewed the record, we conclude that there was no direct evidence of discrimination. The trial court did not articulate any facts that supported its conclusion and to the extent that it found direct evidence of discrimination, it clearly erred in doing so.

In cases where there is no direct evidence of racial bias, such as in this case, the plaintiff must proceed under the burden-shifting test set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462.

Under *McDonnell Douglas*, the plaintiff has the initial burden to prove a prima facie case of racial discrimination." *McDonnell Douglas*, 411 US at 802, 807. To establish a prima facie case of discrimination, a plaintiff must present evidence that "(1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination." *Hazle*, 464 Mich at 463.

If the plaintiff establishes a prima facie case, the burden shifts to "the employer to articulate some legitimate, nondiscriminatory reason for the [adverse employment action]." *Id.* at 802. The burden then shifts back to the plaintiff to show that the "assigned reason for [the adverse employment action] was a pretext or discriminatory in its application." *Id.* at 807. See also *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-176; 579 NW2d 906 (1998).

In this case, plaintiff failed to prove a prima facie case of discrimination. It is undisputed that plaintiff was (1) a member of a protected class and (2) suffered an adverse employment action. *Hazle*, 464 Mich at 463. However, the evidence did not support that plaintiff was qualified for all 21 of the promotions that she applied for. Defendant's exhibits showed that plaintiff was screened-out of consideration for 15 of the promotions based on her failure to meet minimum qualifications. Plaintiff testified that she was qualified for the promotions because Michigan State University sent DCS a letter clarifying her educational achievements. However, plaintiff did not introduce a copy of the letter into evidence. In short, defendant's exhibits showed that plaintiff was not qualified for at least 15 of the promotions and, other than her own testimony, plaintiff failed to offer anything to rebut this evidence. Nevertheless, even assuming plaintiff was qualified for all of the promotions, there was no evidence to support that the promotions were given to other individuals under circumstances that give rise to an inference of unlawful discrimination and the trial court clearly erred in concluding otherwise. *Id*.

Plaintiff offered no evidence to show that race played any part in defendant's hiring practices. Plaintiff did not submit any evidence concerning the individuals who were hired or their qualifications. Plaintiff testified that she was qualified for the positions and trained for the interview process. Plaintiff's counsel also argued that the makeup of the interview panels gave rise to an inference that race played a factor in defendant's decision not to promote plaintiff.

However, standing alone, this evidence amounted to nothing more than speculation and conjecture and it cannot establish a prima facie case of racial discrimination for purposes of ELCRA. Simply because plaintiff was qualified for the promotions and trained for the interviews, without more, does not support the inference that plaintiff was not selected because of her race. Like plaintiff, DCS screened all of the other applicants to ensure that they met the minimum qualifications for the positions. There was no evidence to support that plaintiff was the only applicant to train for the interviews or was more qualified than any of the other applicants. Similarly, the mere fact that plaintiff was interviewed by Caucasians does not support the inference that race played a part in defendant's hiring decisions. Indeed, 10 of the 24 individuals that defendant ultimately hired were African Americans. There was simply no evidence to support the inference that defendant discriminated against plaintiff based on her race.

Moreover, the trial court clearly erred in concluding that plaintiff was discriminated against because there were more Caucasian individuals in the Lansing Office of Child Support. Plaintiff neither submitted evidence to show that any of the promotions were located in Lansing nor did she offer evidence to show that African Americans applied for promotions in Lansing. Indeed, defendant's exhibits supported that, at most, only two of the promotions were located in the Lansing Office of Child Support and plaintiff did not offer any evidence to suggest otherwise. Proof that the Lansing office rejected two of plaintiff's applications does not support that defendant hired or promoted individuals instead of plaintiff under circumstances that give rise to the inference of discrimination. *Hazle*, 464 Mich at 463. In short, plaintiff failed to prove a prima facie case of discrimination under *McDonnell Douglas* and defendant was entitled to involuntary dismissal under MCR 2.504(B)(2).[2] *Hazle*, 446 Mich at 463.

Reversed and remanded for entry of an order of involuntary dismissal consistent with this opinion. No costs awarded to either party. MCR 7.219(A). We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

[2] Plaintiff alleged a constitutional violation in her complaint, however, plaintiff did not advance a constitutional claim in the trial court and she does not brief it on appeal; it is therefore abandoned. See *Treasurer v Sprague*, 284 Mich App 235, 243; 772 NW2d 452 (2009).