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C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Cindy Linger-Long,
Petitioner Below, Petitioner

v.) No. 23-757 (22-ICA-203)

Robert W. Milvet and the Board of Trustees of
Grant Memorial Hospital Trust Foundation, Inc.,
Respondents Below, Respondents

MEMORANDUM DECISION

Petitioner Cindy Linger-Long appeals the November 1, 2023, memorandum decision of the Intermediate Court of Appeals (ICA), affirming the order of the Circuit Court of Grant County entered on October 12, 2022, granting summary judgment to the respondents, Robert W. Milvet and the Board of Trustees of Grant Memorial Hospital Trust Foundation, Inc. (GMH).[1] *See Linger-Long v. Milvet*, No. 22-ICA-203, 2023 WL 7202487 (W. Va. Ct. App. Nov. 1, 2023) (memorandum decision). The petitioner argues that her termination from employment was unlawfully motivated and that summary judgment in favor of the respondents was improperly granted. Upon our review, finding no substantial question of law and no prejudicial error, we determine that oral argument is unnecessary and that a memorandum decision affirming the ICA's memorandum decision is appropriate. *See* W. Va. R. App. P. 21(c).

The petitioner was employed by GMH as an enrollment specialist and financial counselor, which involved gathering information from patients for billing reasons. The petitioner's mother suffered a stroke around May 3, 2019, and on May 6, 2019, the petitioner requested that GMH provide her with the paperwork needed to request leave under the Family and Medical Leave Act (FMLA), in the event she needed to take time off of work to assist with her mother's care. GMH provided the requested FMLA paperwork to the petitioner, but she did not request or take any FMLA leave in May of 2019.

On or about May 17, 2019, GMH received reports that the petitioner had been advising patients not to sign the advance beneficiary notice of non-coverage (ABN) form, which notifies patients that they must pay for services not covered by Medicare/Medicaid. If a patient does not sign the ABN form, GMH cannot charge the patient for any non-covered services rendered. On

[1] The petitioner is represented by counsel Harley O. Staggers, Jr. and the respondents are represented by counsel C. David Morrison, Michael J. Moore, and Kaitlin L.H. Robidoux.

May 20, 2019, GMH received a report that the petitioner had asked another employee to reprocess a bill in a manner which was perceived as an effort to financially benefit the petitioner's family. GMH management investigated the reports of the petitioner's alleged misconduct and, on May 21, 2019, terminated the petitioner's employment. At the time of termination, the petitioner was fifty-three years old. The petitioner's replacement was a fifty-eight-year-old-female with similar qualifications.

Following termination, the petitioner initiated the instant action and alleged that her termination was motivated, in part, due to her age and/or gender in violation of the West Virginia Human Rights Act (WVHRA), West Virginia Code §§ 5-11-1 to -20;[2] and retaliatory discharge under *Harless* due to her request for FMLA paperwork.[3] On October 12, 2022, the circuit court entered an order granting the respondents' summary judgment motion. In that order, the court determined the petitioner failed to establish a prima facie case of discrimination under the WVHRA or retaliatory discharge under *Harless*. The court concluded that, even if the petitioner had established a prima facie case necessary to shift the burden to the respondents, she was unable to show the pronounced nondiscriminatory reasons set forth for her termination were pretext for discrimination or retaliation.

The petitioner appealed to the ICA, and the ICA issued a memorandum decision affirming the circuit court's order, concluding that the petitioner failed to establish a prima facie case of discrimination based on age or gender or retaliatory discharge. *See Linger-Long*, 2023 WL 7202487, at *3-4. The petitioner now appeals the ICA's memorandum decision.

On appeal of a decision from the ICA, we apply a de novo standard of review to the circuit court's entry of summary judgment. Syl. Pt. 1, *Moorhead v. W. Va. Army Nat'l Guard*, 251 W. Va. 600, 915 S.E.2d 378 (2025). "The court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(a), in part; *see also* Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) ("Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove."). "[S]ummary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 174, 786 S.E.2d 188, 193 (2016) (citations omitted).

[2] The Legislature repealed West Virginia Code §§ 5-11-1 to -20 and reenacted the WVHRA at West Virginia Code §§ 16B-17-1 to -20 (2024). We apply the version of the WVHRA that was in effect at the time of the conduct giving rise to the petitioner's claims.

[3] *See* Syl., *Harless v. First Nat. Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) ("The rule that an employer has an absolute right to discharge an at will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.").

The petitioner advances four assignments of error, each essentially relating to her burden of proof to defeat summary judgment. We consider the petitioner's four assignments of error together in our discussion below. Under the WVHRA, an employer is prohibited from terminating an employee because they are forty years old or older or because of their sex. *See* W. Va. Code §§ 5-11-3(h), (k) (1998) and 5-11-9 (2016). To establish a prima facie case of employment discrimination under the WVHRA, we have held "the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class[;] (2) That the employer made an adverse decision concerning the plaintiff[; and] (3) But for the plaintiff's protected status, the adverse decision would not have been made." Syl. Pt. 3, in part, *Conaway v. E. Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). The petitioner satisfied the first two prongs of this test since it was undisputed that she is female and was fifty-three years of age when she was terminated and, therefore, was a member of two protected classes. The evidence also demonstrates that her employer made an adverse decision concerning her employment since it is undisputed that she was terminated. Turning to the third prong in this analysis, we have elaborated that this prong "is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination." Syl. Pt. 2, in part, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995). We have further adopted and applied the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for claims arising under the WVHRA. *See Knotts*, 237 W. Va. at 175, 786 S.E.2d at 194 (explaining the *McDonnell Douglas* framework and this Court's precedent adopting that framework). Under the *McDonnell Douglas* framework, in an action under the WVHRA, the plaintiff carries the burden to establish a prima facie case of discrimination; then the respondent may articulate a legitimate nondiscriminatory reason for the adverse employment action. Syl. Pt. 3, in part, *Shepherdstown Volunteer Fire Dep't v. State ex rel. State of W. Va. Hum. Rts. Comm'n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). If the respondent demonstrates a legitimate and nondiscriminatory reason for the adverse action, then the plaintiff may offer rebuttal evidence to show that the reasons offered were merely a pretext. *Id*. Thus, "[t]o get to the jury, the employee must offer sufficient evidence that the employer's explanation was pretextual to create an issue of fact." *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 73, 479 S.E.2d 561, 583 (1996). "Pretext may be shown through direct or circumstantial evidence of falsity or discrimination. The plaintiff's failure to come forth with evidence rebutting the defendant's explanation may entitle the defendant to judgment." *Barefoot*, 193 W. Va. at 483, 457 S.E.2d at 160 (citation omitted).

Merely being over the age of 40 is insufficient to create an inference of age discrimination. *See Johnson v. Killmer*, 219 W. Va. 320, 325, 633 S.E.2d 265, 270 (2006) (determining age discrimination claim failed because the plaintiff, who was hired at fifty-one years old and promoted at age fifty-two, did not present evidence linking her termination to her protected status). The plaintiff must show a link between age and the adverse employment action. *See Conaway*, 178 W. Va. at 166, 358 S.E.2d at 425, Syl. Pt. 3, in part (a plaintiff must show that "[b]ut for the plaintiff's protected status, the adverse decision would not have been made."). Also, a plaintiff may satisfy the third prong by presenting evidence that they were "replaced by a 'substantially younger' employee" or that "a 'substantially younger' employee, who engaged in the same or similar conduct for which the plaintiff faced an adverse employment decision, received more favorable treatment." *Knotts*, 237 W. Va. at 171, 786 S.E.2d at 190, Syl. Pts. 4-5, in part.

Here, the petitioner did not offer sufficient evidence to establish a prima facie case that her age or sex were considered in the decision to terminate her employment. The petitioner's replacement was older than she and was also female. *See Barefoot*, 193 W. Va. at 485, 457 S.E.2d at 162 (a plaintiff may satisfy the third prong of the *McDonnell Douglas* framework by showing their replacement was someone not of their protected class). The petitioner offered no indication of bias towards older workers by management. Likewise, the petitioner was unable to demonstrate that a substantially younger employee engaged in the same or similar conduct for which she faced termination and received more favorable treatment. It was also established that an overwhelming majority of GMH's workforce is female. The petitioner did not establish a prima facie case of age or sex discrimination. Moreover, the respondents established that the petitioner was terminated for misconduct.

To establish that her termination was a pretext for discrimination, the petitioner merely offered speculative theories and unsupported allegations. For instance, if GMH fired her to save money, even if true, this is not evidence of age discrimination. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (clarifying "that there is no disparate treatment . . . when the factor motivating the employer is some feature other than the employee's age[,]" including, for example, salary or seniority status). The petitioner failed to provide evidence in support of her allegation that her termination was pretext for sex discrimination because her supervisor, who was male, disfavored females who questioned his authority. Moreover, the petitioner did not claim that she experienced a hostile work environment and admitted that she did not personally experience a difficult or hostile work environment. Therefore, even if the petitioner had established a prima facie case of discrimination, she failed to meet her burden of providing evidence to suggest the reasons for her termination were pretext for discrimination.

Turning to petitioner's claim of FMLA-based retaliatory discharge, we have long held that an employer may not discharge an employee if the "employer's motivation for the discharge is to contravene some substantial public policy principle[.]" Syl., in part, *Harless v. First Nat. Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978). To succeed on a *Harless* wrongful discharge claim, a plaintiff must prove that: (1) a clear public policy exists, (2) the dismissal jeopardizes the public policy, (3) the dismissal was motivated by conduct related to the public policy, and (4) "the employer lacked overriding legitimate business justification for the dismissal[.]" *Swears v. R.M. Roach & Sons, Inc.*, 225 W. Va. 699, 704, 696 S.E.2d 1, 6 (2010) (citation omitted). "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury." Syl. Pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). We have determined that the FMLA sets forth a substantial public policy of West Virginia and prohibits employers from discrimination regarding leave under the FMLA and "interfering with, restraining, or denying any rights provided under the FMLA." *Burke v. Wetzel* Cnty. *Comm'n*, 240 W. Va. 709, 728 n.72, 815 S.E.2d 520, 539 n.72 (2018) (citations omitted). "[A] cause of action for wrongful discharge exists when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination." *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 745, 559 S.E.2d 713, 718 (2001). To establish a prima facie retaliation claim based on the FMLA, "the plaintiff must show that he

engaged in protected activity, that the employer took adverse action against him, and that the adverse action was causally connected to the plaintiff's protected activity." *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998) (citation omitted); *see also Mayo v. St. Mary's Med. Ctr., Inc.*, No. 16-0245, 2017 WL 1348514, at *5-6 (W. Va. Apr. 7, 2017) (memorandum decision) (plaintiff unable to establish a retaliatory discharge or FMLA retaliation claim since he could not show that the exercise of his rights under the FMLA was a substantial or motivating factor for termination). Like a discrimination claim, if a plaintiff establishes a prima facie case of retaliation, the burden "shifts to the employer to prove a legitimate, nonpretextual, and nonretaliatory reason for the discharge. In rebuttal, the employee can then offer evidence that the employer's proffered reason for the discharge is merely a pretext for the discriminatory act." Syl. Pt. 2, in part, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991).

The petitioner presented no evidence to support an inference that her termination was motivated by her request of FMLA paperwork. Moreover, the petitioner did not take the necessary steps to engage in the protected activity of exercising her rights under the FMLA. It is undisputed that the petitioner only requested FMLA paperwork; she did not submit the FMLA paperwork to GMH or take FMLA leave in May 2019. The petitioner also offered no evidence that the respondents interfered with or denied her rights under the FMLA. The evidence also demonstrates that, when the petitioner was terminated, the decision-maker effectuating her termination had no knowledge that the petitioner had requested FMLA paperwork.

The temporal proximity of the petitioner's request for FMLA paperwork and her termination do not create an inference of retaliation, since she had sufficient time to submit completed FMLA paperwork and chose not to do so. Further, the evidence demonstrates that GMH took reasonable, responsive action upon learning of the petitioner's alleged misconduct.

The record on appeal is void of any indication that the petitioner's age or sex played a role in her termination. Similarly, the petitioner failed to establish that she availed herself of FMLA protection or that her termination was motivated by her request for FMLA paperwork. Based on the facts presented, we conclude that the circuit court did not abuse its discretion or err by granting summary judgment. For the foregoing reasons, we affirm the memorandum decision of the ICA that affirmed the circuit court's entry of summary judgment in favor of the respondents.

Affirmed.

ISSUED: September 10, 2025

CONCURRED IN BY:

Chief Justice William R. Wooton
Justice C. Haley Bunn
Justice Charles S. Trump IV
Justice Thomas H. Ewing
Senior Status Justice John A. Hutchison