STATE OF MICHIGAN

COURT OF APPEALS

INA GRANT,

Plaintiff,

and

PAUL LARRY and GEORGE KING,

Plaintiffs-Appellees,

v

DEPARTMENT OF CORRECTIONS, BUREAU OF FIELD SERVICES,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 191657
Wayne Circuit Court
LC No. 84-418726 CZ

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's judgment confirming the jury's verdict in favor of plaintiffs Paul Larry and George King[1] in this employment discrimination action. We affirm.

Defendant's first argument on appeal is that the trial court erred in failing to grant defendant's motions for a directed verdict and for judgment notwithstanding the verdict (JNOV). We disagree.

Under the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.,* a prima facie case of race discrimination can be made by showing either intentional discrimination or disparate treatment. *Reisman v Regents of Wayne State Univ,* 188 Mich App 526, 538; 470 NW2d 678 (1991). To prove intentional discrimination, the plaintiff must show that he was a member of the affected class, that he was subjected to adverse treatment, and that the person who so treated him was predisposed to discriminate against persons in the affected class and actually acted on that disposition. *Id.* To prove disparate treatment, the plaintiff must show that he was a member of the class entitled to

protection under the act and that he was treated differently than persons of a different class for the same or similar conduct. *Id.* The plaintiff must prove that race was one of the reasons or motives which made a difference in making the employment decision. *Id.* at 539.

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to articulate some nondiscriminatory reasons for the adverse treatment. *Id.* If the defendant is able to meet this burden, the plaintiff must have the chance to prove that the reasons offered by the defendant were a pretext for discrimination. *Id.* In this case, plaintiffs alleged both intentional discrimination and disparate treatment in their amended and supplemental complaint.

Looking at the evidence adduced at trial in the light most favorable to plaintiffs, *Severn v Sperry Corp,* 212 Mich App 406, 412; 538 NW2d 50 (1995); *Haberkorn v Chrysler Corp,* 210 Mich App 354, 364; 533 NW2d 373 (1995), we hold that the trial court did not err in denying defendant's motions for a directed verdict and JNOV. Plaintiffs were black and thus members of a class protected by the Civil Rights Act. Plaintiffs were subjected to adverse treatment by not being promoted despite being eligible for promotion.

Plaintiffs also presented evidence that the persons responsible for plaintiffs' adverse treatment had discriminatory animus and could have acted on it against plaintiffs. Plaintiffs' regional director used a racist term during an angry confrontation with Larry, and had been heard telling ethnic jokes at staff meetings. The director was also the subject of a number of grievances brought by black employees because he had shown anger toward and intimidated these employees. Larry's "second-line" supervisor complained when Larry brought a grievance forcing the supervisor to change a low promotability rating given to Larry, and later refused to discuss office discrimination with Larry. Defendant never offered legitimate business reasons why plaintiffs were denied promotion. *Reisman, supra* at 538-539. Accordingly, plaintiffs made a prima facie case of intentional discrimination strong enough to go to the jury and over which reasonable jurors could differ. *Id.* at 538.

Plaintiffs also offered evidence of disparate treatment. This Court has found that the use of statistics may be relevant in establishing a prima facie case of discrimination, particularly when combined with other evidence. *Featherly v Teledyne Indus, Inc,* 194 Mich App 352, 360-361; 486 NW2d 361 (1992); *Dixon v W W Grainger, Inc,* 168 Mich App 107, 118; 423 NW2d 580 (1987). Plaintiffs showed that when they first became promotable, no blacks were in policy-making positions, one black man served in Region I as an assistant regional administrator, no blacks held supervisory positions in Regions II, VI and VII, and, there were two black supervisors in Region III. Plaintiffs also showed that, in 1983, blacks filled only nine of thirty-four supervisory positions in Region I, even though the population of that region was largely black. Plaintiffs also offered evidence that two white employees were allowed to take the promotion examination after being on the job for only seven months, instead of a year as normally required.

In addition, an adverse inference may be drawn against a party who fails to produce evidence within its control. *Grossheim v Associated Truck Lines, Inc,* 181 Mich App 712, 715; 450 NW2d

40 (1989). Accordingly, adverse inferences of discrimination may be drawn against defendant because of the destruction of its minority hiring explanation memos at a time when one of its officials was aware of plaintiffs' claim.

It is true that unfavorable ratings for Larry were reversed when his work improved and when he complained of unfair ratings. In addition, when Larry was forced to choose between a new job with increased duties or staying where he was, he complained and was allowed to relocate without taking on increased duties. Finally, King testified that he had given poor interviews on a number of occasions. Nevertheless, this evidence merely created issues of material fact over which reasonable jurors could differ. Based on our review of plaintiffs' evidence, the trial court did not err in denying defendant's motions for a directed verdict and JNOV. *Severn, supra* at 412; *Haberkorn, supra* at 364.

Plaintiffs also presented a prima facie case of retaliation. The Civil Rights Act prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. *McLemore v Detroit Receiving Hosp and Univ Medical Ctr,* 196 Mich App 391, 395-396; 493 NW2d 441 (1992). Here, Larry's promotability rating dropped after he began making discrimination complaints. The supervisor who refused to discuss discrimination with Larry wrote a negative memo about Larry, which was placed in Larry's personnel file and removed only after Larry filed a civil rights grievance. King was subjected to increased, selective and often harsh criticism of his written work after giving a deposition in 1983. King also testified that his supervisors made his work worse to retaliate against him for bringing civil rights complaints. Looking at this evidence in the light most favorable to plaintiffs, we hold that the trial court did not err in denying defendant's motions for a directed verdict and JNOV. *Severn, supra* at 412; *McLemore, supra* at 396-397.

Defendant argues that the trial court abused its discretion by allowing plaintiffs to present evidence that defendant implemented an affirmative action program to correct past racial and gender discrimination. We disagree.

MRE 407 articulates a basic rule of Michigan common law that generally, evidence of repairs, changes in conditions, or precautions taken after an incident is not admissible as proof of culpable conduct. *Palmiter v Monroe Co Bd of Rd Comm'rs,* 149 Mich App 678, 685; 387 NW2d 388 (1986). The primary ground for excluding this type of evidence rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. *Id.* Exclusion of such evidence is also defended in terms of relevancy. *Id.* at 686.

Here, defendant's implementation of affirmative action was designed to place minorities in "responsible positions." The program was implemented in 1974. Plaintiffs did not become eligible to assume "responsible positions" until 1977, and did not begin to complain of discrimination until 1979. Therefore, the "remedial measure" is not "subsequent" to the failure to promote. *Id.* at 685.

In addition, evidence of the program's existence was relevant to plaintiff's discrimination claim because plaintiffs presented evidence that the program was not being effectively implemented. Blacks were severely underrepresented in supervisory positions in defendant's Regions I, II, III, VI and VII, as noted above. The director of Region I complained in 1987 that he could not implement the program because of a lack of qualified candidates, despite the overwhelmingly black labor pool in Region I. Accordingly, the trial court did not abuse its discretion in allowing plaintiff to present evidence that defendant implemented an affirmative action program, because the program was not a subsequent remedial measure, and because the existence and implementation of the program were relevant to plaintiffs' discrimination claim. See *Cleary v Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994); *Palmiter*, *supra* at 685-686.

Defendant's final issue on appeal is that the trial court abused its discretion in awarding attorney fees to Larry.[2] We disagree. A trial court has both authority and discretion to award attorney fees to a successful civil rights plaintiff under MCL 37.2802; MSA 3.548(802), as long as the trial court makes findings of fact regarding the factors that must be applied to every award of attorney fees. *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1992). Here, in making its decision to award attorney fees, the trial court held a hearing in which it considered the amount of work done by plaintiffs' attorney, the attorney's expertise, and the difficulty and long pendency of plaintiffs' case. The trial court did not abuse its discretion in awarding attorney fees to Larry. *Hovanesian v Nam*, 213 Mich App 231, 238; 539 NW2d 557 (1995); *Howard*, *supra* at 437.

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls

Judge Taylor concurs in result only.

[1] "Plaintiffs" in the body of this opinion will refer to both plaintiffs. Where the plaintiffs are referenced separately they will be referred to by their last names.

[2] Attorney fees were not awarded to King because King settled his claims between the verdict and the trial court's order awarding fees.