STATE OF MICHIGAN

COURT OF APPEALS

LEM D. GILMER,

Plaintiff-Appellant,

v

IBM CORP.,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 198593
Oakland Circuit Court
LC No. 94-481460-CZ

Before: Fitzgerald, P.J., and Markey and J. B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant in this race and age discrimination case. We affirm in part, reverse in part, and remand.

At the time this suit was filed, plaintiff was a 43-year-old African-American male who has been employed at International Business Machines Corporation (IBM) since 1974 and remains employed by IBM today. Plaintiff worked in several positions over the years including marketing, systems engineering, and management. At the time this lawsuit was filed, plaintiff was providing business consulting services to corporations on behalf of IBM.

The events giving rise to this lawsuit occurred primarily after plaintiff was promoted in 1990 to branch manager at IBM's Toledo office. Plaintiff was removed from this position in 1992 after receiving a low rating in a performance evaluation. His supervisor attributed the rating to low employee moral and poor overall performance. Plaintiff was replaced by another African-American male seven years his senior and was transferred laterally within the company.

On appeal, plaintiff first claims that the circuit court committed legal error by dismissing his race discrimination claim because he established a prima facie case of disparate treatment with respect to promotional and demotional decisions made by defendant's agents.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Michigan's Elliott-Larsen Civil Rights Act prohibits an employer from "discriminat[ing] against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race. MCL 37.2202(1); MSA 3.548(202)(1). In order to establish a prima facie case of intentional racial discrimination based on the disparate treatment theory, a plaintiff must prove (1) that he was a member of a protected class, and (2) that he was treated differently than persons of a different class for the same or similar conduct. *Reisman v Wayne State Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). Michigan law requires a plaintiff to prove that race was one of the determining factors or motives for the employment decision. *Id.*

Once a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to proffer a non-discriminatory reason for the employment decision. *Featherly v Teledyne Indus, Inc*, 194 Mich App 352; 486 NW2d 361 (1993). If the defendant satisfies this burden, the plaintiff must present sufficient documentary evidence to create a material issue of fact on which reasonable minds could conclude that the employer's reason is a pretext for discrimination for summary disposition to be precluded. *Town v Michigan Bell*, 455 Mich 688, 697-698; ___ NW2d ___ (1997). Plaintiff may not rely on his allegations in the pleadings, nor may he assert mere conclusory accusations without documentary evidence. *Ewers v Stroh Brewery Co*, 178 Mich App 371, 374; 443 NW2d 504 (1989).

Here, plaintiff attributed his removal from branch manager to the discriminatory practices of defendant's agents. He cites several instances where he was treated with less respect and appreciation than his white co-workers during his tenure as branch manager. However, although plaintiff presented evidence of racially motivated and derogatory comments by defendant's agents, he has failed to connect those remarks to any alleged discriminatory practice on behalf of defendant. All of the alleged racial comments occurred before plaintiff received the promotion and significant salary increases and bonuses. Moreover, plaintiff has not provided any evidence of racial animus while he was branch manager that prompted his removal. Therefore, we are not persuaded that plaintiff has submitted any evidence that defendant's explanation for removing plaintiff from the position of branch manager was pretextual and that the employment decision was racially motivated.

However, plaintiff also argues that race was a determining factor in other employment decisions that adversely affected his opportunity to further advance within the company. After he was removed from the position of branch manager, plaintiff applied for another managerial position and was denied this job in favor of a less experienced white co-worker. Plaintiff alleged that his supervisor explained that, despite his qualifications, plaintiff did not fit the "profile" because the company needed an individual who could satisfy IBM's white male customers. In addition, after his transfer from the position of branch manager, and while he was working as a consultant, plaintiff was again overlooked for an advisory consulting position when the same supervisor awarded the position to another while male with less experience.

In light of this evidence, and because defendant has not come forth with a non-discriminatory basis to explain the employment decisions taken after plaintiff was removed from the position of branch manager, we find that plaintiff has sustained his burden and submitted sufficient evidence to create a factual dispute regarding whether race was an issue in these later employment decisions. Accordingly,

plaintiff's race discrimination claim with respect to promotional decisions made after plaintiff was removed from the position of branch manager should not have been summarily dismissed.

Plaintiff next argues that the trial court erred by dismissing his age discrimination claim because plaintiff offered factual support and documentary evidence sufficient to allow a reasonable jury to conclude that plaintiff's age was a determining factor in defendant's employment decisions. We disagree.

Michigan's Elliott-Larsen Civil Rights Act forbids an employer to "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 . . . age." MCL 37.2202; MSA 3.548(202). A plaintiff establishes a prima facie case of age discrimination by showing that (1) the plaintiff was within the protected class, (2) the plaintiff was qualified for the position, and (3) the plaintiff was replaced by a substantially younger person. *Meagher v Wayne State University,* 222 Mich App 700, 710; 565 NW2d 401 (1997). Here, plaintiff was replaced by a man seven years his senior. Hence, plaintiff failed to establish the third prong of a prima facie case of age discrimination with respect to removal from the position of branch manager. Further, plaintiff's allegations with respect to other positions for which plaintiff felt he was qualified rest entirely on one instance where he and two IBM employees conversed about what it takes to be successful in the business. The employees indicated to plaintiff that potential advancement in the company was limited by one's age, referring to the term "runway" as the approximate time that a person should attain a certain level of performance in order to be successful. Plaintiff apparently interpreted this comment to mean that his *own* opportunity to advance was declining. However, never during the conversation did either employee imply that they were referring specifically to plaintiff. There is no evidence that this term was not merely contrived by the employees. Further, no evidence was presented that age had any significance whatsoever on the hiring, promotion, or termination procedures in the company at all. Thus, we find that plaintiff failed to introduce any factual support or documentary evidence that plaintiff was discriminated against based on his age, or that age was even a factor in any of defendant's employment decisions regarding plaintiff. *Town, supra*. Accordingly, plaintiff's age discrimination claim was properly dismissed. *Quinto v Cross & Peters,* 451 Mich 358, 362-363; 547 NW2d 314 (1996).

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan