

STATE OF MICHIGAN
COURT OF APPEALS

HERBERT RODRIGUEZ,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
November 4, 1997

No. 199076
Genesee Circuit Court
LC No. 96-042865-CL

Before: MacKenzie, P.J., and Sawyer and Neff, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff is a police officer for the City of Flint. In 1995, he applied to be transferred to the Flint Police Department's School Liaison Program. Plaintiff was not selected to fill either of the two positions that were available in the program. Both of the officers selected for the program, Mark Williams and Thomas Tucker, were African-Americans. Plaintiff brought this action alleging that he was not selected for the program because he is Hispanic, in violation of the Civil Rights Act, MCL 37.2202; MSA 3.548(202).

This Court reviews summary disposition decisions de novo. *Wright v Restaurant Concept Management, Inc.*, 210 Mich App 105, 107; 532 NW2d 889 (1995). This Court must examine the record in order to determine whether the prevailing party was entitled to judgment as a matter of law. *Id.* A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* In discrimination cases, this means that, to survive summary disposition, the plaintiff must present evidence upon which reasonable minds could conclude that discrimination was the true motive for the adverse employment decision. *Lytle v Malady*, 456 Mich 1, 33 (op of Riley, J.), 48 (op of Cavanagh, J.), 52 (op of Boyle, J.), 68 (op of Brickley, J.); 566 NW2d 582 (1997).

MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) prohibits employers from discriminating against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of, among other things, race and national origin. To sustain a claim of racial discrimination, a plaintiff must first make a prima facie showing of discrimination. *Lytle, supra*, pp 29, 48, 52, and 68. To make a prima facie showing, the employee must show that (1) he was a member of a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, suggesting that discrimination was a determining factor in the defendant's adverse conduct toward the plaintiff. *Id.*; see also *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Where a plaintiff fails to establish that his qualifications were similar to the qualifications of non-protected class employees, summary disposition in favor of the defendant is proper. See *Thomas v Hoyt, Brumm & Link, Inc*, 910 F Supp 1280, 1287 (ED Mich, 1994).

Once a plaintiff makes a prima facie showing of discrimination, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions. *Lytle, supra*. If the employer is unable to satisfy its burden of production, it is presumed that the basis of the employer's decision was discriminatory. *Id.* If the defendant makes such a showing, the burden shifts back to plaintiff to show that defendant's proffered reason was merely a pretext for discrimination. *Id.* To establish pretext, plaintiff must show both that defendant's proffered reasons were false, and that the real reason was discrimination. *St Mary's Honor Center v Hicks*, 509 US 502; 515; 113 S Ct 2742; 125 L Ed 2d 407 (1993).

In this case, assuming that plaintiff established a prima facie case of discrimination, defendant articulated legitimate, non-discriminatory reasons for its actions. *Lytle, supra*. In support of its motion for summary disposition, defendant presented the deposition of Clydell Duncan. As police chief, Duncan was responsible for choosing from among the candidates recommended after the oral examinations to fill the school liaison positions. He testified that, in making his decision, he considered his personal knowledge of the officer, whether the officer has shown an interest in the type of position, and he discussed the officer with other persons such as a captain or a sergeant. He testified that the only two candidates that he seriously considered were Tucker and Williams. Both Tucker and Williams had a history of working with juveniles in programs such as the Police Athletic League (PAL) and the Drug Abuse Resistance Education Program (DARE). Tucker had worked in the community education program and the Flint Board of Education program. Duncan testified that he did not consider plaintiff for the position because his work performance "was not in line with being a liaison officer." Specifically, he stated that plaintiff had a series of minor disciplinary problems, and being a liaison officer required one to work unsupervised for the most part. He also stated that plaintiff had never worked with PAL or DARE or any other police program involving juveniles. Defendant also presented evidence that Chief Duncan did not use the oral evaluations in making his decision, and that the names on the list received by Duncan were not ranked in any order according to a candidate's performance in the oral interview. This evidence established a legitimate, nondiscriminatory reason for failing to assign plaintiff to the School Liaison Program, namely, his lack of experience with juveniles and Duncan's concern about plaintiff's ability to work without supervision.

Next, the burden shifts to plaintiff to show that defendant's proffered reason was a pretext and that the true motive for not placing him in the School Liaison Program was discrimination. *Lytle, supra*. Plaintiff stresses the fact that he scored higher on his oral evaluations than Tucker. He also states that, if the evaluators had been displeased with his level of prior experience with children, it would have been reflected in their evaluations. Furthermore, he argues that Duncan did not inform applicants that prior experience with juveniles was a factor he considered. However, in demonstrating pretext, it is not sufficient to merely demonstrate that defendant's reasons were not true. Rather, plaintiff must present some evidence that the real reason was discrimination. *Id.* "The plaintiff must set forth specific facts showing that there is a genuine issue for trial; conclusory allegations are insufficient to rebut evidence of nondiscriminatory conduct." *Clark v Uniroyal Corp*, 119 Mich App 820, 826; 327 NW2d 372 (1982). On review of the record, we find that plaintiff has presented no evidence from which a reasonable jury could infer that defendant's reasons for not assigning plaintiff to the School Liaison Program were a pretext for discrimination. Therefore, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ David H. Sawyer

/s/ Janet T. Neff