STATE OF MICHIGAN

COURT OF APPEALS

PATRICE D. WALKER,

Plaintiff-Appellant,

v

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
August 21, 1998

No. 201481
Ingham Circuit Court
LC No. 95-081512-CL

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff, a black male, first argues that the trial court erred in dismissing his claim of race discrimination brought under the Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We disagree.

We review de novo a trial court's grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1996). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). The court must "review the record evidence, make all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists, giving the nonmoving party the benefit of reasonable doubt." *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Having reviewed the record presented to the trial court, we conclude that defendant was entitled to summary disposition of this claim. Even assuming that plaintiff established a prima facie case of race discrimination under the *McDonnell Douglas*[1] burden-shifting framework,[2] defendant rebutted the presumption of discrimination, asserting that plaintiff was discharged because he initiated the altercation with Corrections Officer George Davis. Although plaintiff claims that defendant's proffered reason is false and nothing but a pretext for race discrimination, we conclude that plaintiff failed to establish a genuine issue of material fact concerning whether race was a determining factor in Warden

Gerald Hofbauer's decision to discharge him. See *Town v Michigan Bell Telephone Co*, 455 Mich 688, 706-707; 568 NW2d 64 (1997).

The problem here is that plaintiff offers nothing but unsubstantiated assertions to support his claim. While plaintiff attributes his earlier twelve-day suspension to racism on the part of Deputy Warden Sally Langley, and claims that this discipline "set [him] up for a fall," plaintiff offers no evidence that he was treated any differently than other employees who left prison grounds without punching out. *Town*, *supra* at 695. Further, plaintiff's only evidence of discriminatory motive on the part of Deputy Warden Langley consists of inadmissible opinion statements.[3] Plaintiff testified that Assistant Deputy Warden Robin Pratt told plaintiff that she believed Deputy Warden Langley to be "a racist" who "never had anything good to say about a black employee" and who was "always dogging them." However, plaintiff offers nothing to establish that those opinions are rationally based on Pratt's own perceptions, as required by MRE 701. Only admissible evidence may be used to establish the existence of a disputed fact. *Marsh v Dep't of Civil Service (After Remand)*, 173 Mich App 72, 77-78; 433 NW2d 820 (1988). Finally, even assuming that plaintiff did provide some evidence that Deputy Warden Langley was predisposed to discriminate, she did not make the decision to discharge plaintiff, and plaintiff has failed to provide any basis for imputing Deputy Warden Langley's allegedly racist motives to Warden Hofbauer. See *McDonald v Union Camp Corp*, 898 F2d 1155, 1160-1161 (CA 6, 1990).

Plaintiff next argues that the trial court erred in summarily disposing of his claim of unlawful retaliation. We disagree. In order to establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis v Lord & Taylor*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

In this case, plaintiff's discharge occurred some three months after plaintiff filed an internal complaint with the Department of Corrections' Regional Administrator, Bill Grant, alleging racial harassment by Deputy Warden Sally Langley. Moreover, there is no dispute that Warden Hofbauer was aware of the complaint when he made the decision to discharge plaintiff. Nevertheless, we conclude that summary disposition in favor of defendant was proper because plaintiff provided no evidence from which a reasonable jury could find that plaintiff's filing of the discrimination complaint was causally related to his discharge following the altercation with Corrections Officer Davis. Cf. *Feick v Monroe Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 198014, issued 4/21/98), slip op at 5.

Finally, plaintiff argues that the trial court erred in dismissing his handicap discrimination claim. Again, we disagree. Plaintiff's claim fails because he has not put forth any admissible evidence that Warden Hofbauer regarded him as being mentally unstable. Plaintiff testified in his deposition that his union steward, Phil Berghausen, told plaintiff that Warden Hofbauer made some unspecified remarks to Berghausen which, in turn, led Berghausen to believe that Warden Hofbauer regarded plaintiff as being some sort of "paranoid schizophrenic." Again, however, inadmissible hearsay does not satisfy the requirement that the existence of a disputed fact be established by admissible evidence. *Marsh*, *supra*. Moreover, plaintiff has failed to show how Deputy Warden Langley's January 17, 1995, memo to Warden Hofbauer (noting plaintiff's previous failure to return from a medical leave of absence and

recommending plaintiff's discharge for leaving prison grounds without punching out) is in any way related either to Warden Hofbauer's alleged perception of plaintiff as handicapped or Warden Hofbauer's decision to terminate plaintiff in May 1995 following the altercation with Corrections Officer Davis. The trial court properly dismissed plaintiff's handicap discrimination claim.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[2] Because plaintiff did not provide any direct evidence of race discrimination, he was obligated to establish a prima facie case under the familiar approach established in *McDonnell Douglas*. See *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

[3] While plaintiff also claims that Deputy Warden Langley continually "harrassed" him (e.g., had him searched at the prison entrance, followed him when he left prison grounds), again, plaintiff has failed to show that he was ever treated differently than similarly situated employees.