STATE OF MICHIGAN

COURT OF APPEALS

RAYNARD NEWBERRY,

Plaintiff-Appellant,

v

GENERAL MOTORS,

Defendant-Appellee.

UNPUBLISHED
November 6, 1998

No. 201841
Wayne Circuit Court
LC No. 95-527087 CZ

Before: Hoekstra, P.J., and Cavanagh and O'Connell, JJ.

PER CURIAM.

In this race discrimination case brought pursuant to Michigan's Civil Rights Act (CRA), MCL 37.2202(1)(a)-(b); MSA 3.548(202)(1)(a)-(b), plaintiff, an African American employee of defendant, alleged in his complaint that defendant failed to promote plaintiff because of plaintiff's race, that defendant demoted plaintiff because of plaintiff's race, and that the environment in which plaintiff worked was racially hostile. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), and the lower court granted the motion, dismissing all of plaintiff's claims. Plaintiff appeals as of right from this order of the lower court, although he takes issue with only the lower court's dismissal of the claim regarding his demotion. We affirm.

Plaintiff asserts that summary disposition was improperly granted on the demotion claim because of his evidence that defendant's decision to demote him in October 1992 could not have been based upon the allegations of sexual harassment that a female summer student working for defendant brought against plaintiff. Plaintiff asserts that the allegations of sexual harassment are false and that the nature of defendant's investigation of the allegations raises a question of fact that the conclusions drawn from the investigation and the resulting action taken to discipline plaintiff were motivated by defendant's racial animus. This Court reviews de novo a trial court's determination regarding motions for summary disposition. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Id.* This Court must consider the pleadings, affidavits, depositions, and other documentary evidence, must give the benefit of any reasonable doubt to the nonmoving party, and must draw any reasonable inferences in favor of that party. *Id.*

Plaintiff's claim constitutes one of disparate treatment that may be proved by alternate methods. *Harrison, supra* at 606; *Meagher v Wayne State Univ*, 222 Mich App 700, 708-710; 565 NW2d 401 (1997). A plaintiff may prove disparate treatment by the presumption-based scheme set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986); *Harrison, supra* at 606-609; *Meagher, supra* at 710-712. Alternatively, a plaintiff may prove discrimination under ordinary principles of proof by any direct or indirect evidence relevant to and sufficiently probative of the issue without resort to any special judicially created presumptions or inferences related to the evidence. *Matras, supra*; *Harrison, supra; Meagher, supra* at 710.

Here, plaintiff first attempts to prove disparate treatment by direct evidence of intentional discrimination. To support his assertion that defendant's adverse employment decision was driven by its racial animus, plaintiff produced the statements contained within two pieces of documentary evidence: (1) an October 1993 memo from the director of the lab where plaintiff worked sent to defendant's personnel director summarizing a meeting that the lab director had with plaintiff at plaintiff's request to discuss plaintiff's concerns about not being promoted; and (2) the deposition of the personnel director. Plaintiff relies on the lab director's statement that plaintiff did not deny his reputation as a "pot-stirrer." Plaintiff relies on the personnel director's comments during deposition that plaintiff was a "difficult" employee who "used his race to intimidate people." Plaintiff opines that these comments constitute direct evidence that defendant did not find plaintiff credible during its investigation of the sexual harassment charges because of plaintiff's race and earlier complaints about defendant's discriminatory practices against African Americans. We disagree.

Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *Harrison, supra* at 610. For example, racial slurs by a decision maker constitute direct evidence of racial discrimination that is sufficient to get the plaintiff's case to a jury. *Downey v Charlevoix County Bd of Road Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998). When this kind of direct evidence is adduced, there is no need to employ the *McDonnell Douglas* presumption-based scheme. *Matras, supra* at 683-684. Here, we find that the statements within the documentary evidence proffered by plaintiff are not evidence that, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in defendant's adverse employment decision. See *Harrison, supra* at 610. The statements instead require an inference to reach that conclusion. Compare *Downey, supra* at 633-635 (deciding that the plaintiff had created a question of fact regarding the reason for his discharge where he presented evidence that the defendant stated, "If I have to, I will get rid of the older guys – you older guys and replace you with younger ones").

More importantly, as one federal court found, statements by non-decisionmakers, or statements by decisionmakers unrelated to the decisional process itself, do not suffice to satisfy a plaintiff's burden; instead, what is required is direct evidence that the decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching the decision. *Coleman v Toys "R" Us, Inc*, 976 F Supp 713, 718 (ND Ohio, 1997), quoting *Hopkins v Price Waterhouse*, 490 US 228, 277; 109 S Ct 1775; 104 L Ed 2d 268 (1989) (O'Connor, J. concurring).[1] Here, the lab director wrote the memo almost one year after the summer student made her allegations of sexual harassment and defendant concluded that plaintiff had committed actions requiring discipline. Because of the time lapse, the lab director's

comments are not direct evidence that the decisionmakers placed substantial negative reliance on an illegitimate criterion. Similarly, because the personnel director did not begin his position until May 1, 1993; therefore, his comments are not direct evidence of intentional discrimination because he was uninvolved in the October 1992 investigation and decisional process that resulted in plaintiff's demotion.

Plaintiff correctly argues that in reviewing the lower court's decision regarding defendant's motion for summary disposition, this Court is obligated to construe the evidence in the light most favorable to plaintiff. See *Harrison, supra* at 605. However, we are not likewise obligated to accept plaintiff's argument that these allegedly racially discriminatory comments must be imputed to defendant in the face of evidence that the lab director did not rely on the statement in the investigatory or disciplinary process and that the personnel director was not a decisionmaker in the process. Compare *Harrison, supra* at 609 n 7. We instead find that these comments did not satisfy plaintiff's burden of producing direct evidence that defendant placed substantial negative reliance on an illegitimate criterion in reaching its employment decision.

Without direct evidence of discrimination, plaintiff must proceed to prove discrimination under the *McDonnell Douglas* presumption-based approach. *Matras, supra* at 683-684; *Harrison, supra* at 609. In the first stage of the *McDonnell Douglas* framework, a plaintiff must establish a prima facie case of discrimination in order to create a rebuttable presumption of discrimination. *Id.* at 607-608. To establish a prima facie case of discrimination, a plaintiff must prove by a preponderance of the evidence that (1) he was a member of the 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." *Lytle v Malady*, 456 Mich 1, 29; 566 NW2d 582 (1997), vacated in part on reh'g, 458 Mich 153; 579 NW2d 906 (1998).[2] See also *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994) (stating that in order to establish a prima facie case of disparate treatment race discrimination, a plaintiff must show that he was a member of the class entitled to protection under the act and that, for the same or similar conduct, he was treated differently than one who was a member of a different race).

Plaintiff satisfied the first three prongs of his prima facie case. Plaintiff, an African American, is a member of a protected class. He suffered an adverse employment action when he was demoted, suffered a cut in pay, and lost wages for his suspension. Last, plaintiff was qualified for the position because he had previously been at the level from which he was demoted, and plaintiff has since been promoted back to that level. Thus, plaintiff is correct in identifying the key issue in this case as whether race was a motivating factor in defendant's decision to demote plaintiff, which is the fourth prong in his prima facie case.

Contrary to plaintiff's statement in his brief on appeal that "[d]efendant has been unable to identify a single case where a white employee was similarly disciplined under comparable circumstances," plaintiff bore the burden of producing evidence sufficient "to permit a reasonable juror to find that for the same or similar conduct" he was treated different from a similarly situated nonminority employee. See *Lytle, supra* at 456 Mich 29; *Betty, supra; Civil Rights Comm v Chrysler Corp*, 80 Mich App 368, 377-378; 263 NW2d 376 (1977). Because plaintiff offered no evidence of other similarly situated nonminority employees who were disciplined differently under comparable

circumstances, he has not established the suggestion that discrimination was a determining factor in defendant's adverse conduct toward plaintiff. Accordingly, without evidence to satisfy the fourth prong, he failed to create a rebuttable presumption of discrimination sufficient to shift the burden of persuasion to defendant.

Plaintiff did not present direct evidence of intentional discrimination, nor did he establish a rebuttable presumption of intentional discrimination. Therefore, the lower court properly granted defendant summary disposition.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell

[1] When direct evidence of discrimination is involved, federal case law provides appropriate guidance for analyzing discrimination claims under the Michigan Civil Rights Act. *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

[2] Plaintiff correctly pointed out at oral argument that upon rehearing in *Lytle v Malady (On Rehearing)*, 458 Mich 172-173; 579 NW2d 906 (1998), Justice Weaver stated the fourth prong differently, i.e., she stated that a plaintiff is required to show that he was "discharged under circumstances that give rise to an inference of unlawful discrimination." The earlier panel of the Court had phrased the fourth prong as requiring a plaintiff to show that "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct, *suggesting that discrimination was a determining factor in defendant's adverse conduct toward the plaintiff*." *Lytle v Malady*, 456 Mich 1, 29; 566 NW2d 582 (1997) (emphasis added). Justice Weaver's modification appears to extract only the second half of the requirement as it was originally phrased. However, other than plaintiff's argument in this case, we have no grounds upon which to find that in rearticulating the fourth prong, our Supreme Court intended to bring about a substantial change in discrimination jurisprudence and remove the well-established requirement that a plaintiff produce evidence of others, similarly situated and outside the protected class, who were unaffected by the employer's adverse conduct.

Without a clear direction from the Court that it meant for lower courts applying its decision in *Lytle* to omit this proof requirement, we decline plaintiff's invitation to read the fourth prong in a manner contrary to previous decisions of this Court and our Supreme Court. Indeed, both our Supreme Court and this Court have often noted that the crux of a civil rights discrimination case is the plaintiff's showing that similarly situated individuals have been treated differently from one another because of the protected characteristic. See, e.g., *Lytle, supra* at 456 Mich 43 n 49, 40 n 40; *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994) (race discrimination); *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993) (sex discrimination); *Schellenberg v Rochester Michigan Lodge No. 2225*, 228 Mich App 20, 34; 577 NW2d 163 (1998) (sex discrimination); *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992) (sex discrimination); *Civil Rights Comm v Chrysler Corp*, 80 Mich App 368, 373; 263 NW2d 376 (1977) (race discrimination).