STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL L. HERENDEEN,

Plaintiff-Appellant,

v

MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED
July 30, 1999

No. 207052
Ingham Circuit Court
LC No. 96-084275 CL

MICHAEL L. HERENDEEN,

Plaintiff-Appellant,

v

MICHIGAN STATE POLICE,

Defendant-Appellee.

No. 207489
Court of Claims
LC No. 96-016292 CM

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

This is an employment discrimination case challenging defendant's procedure for promoting State Police troopers to the rank of sergeant. Plaintiff appeals as of right from an opinion and order granting summary disposition for defendant pursuant to MCR 2.116(C)(8) and (10) in these consolidated circuit court and court of claims cases. We affirm in part and reverse in part.

Plaintiff is a white male who has been employed by defendant as a state trooper for twenty years. Although he has on three occasions scored in the highest category on a civil service examination, has excellent performance reviews, and produced letters of recommendation from his supervisors, plaintiff has been unsuccessful in seeking a promotion to the rank of sergeant. According to plaintiff's

complaints, defendant's failure to promote him stems from its affirmative action program that grants preferences to women and minorities in promotional decisions.

Typically, when there is a vacancy in a classified civil service position, the department of civil service administers an examination, ranks the scores in "bands," and prepares a list of individuals in the top band. The department then forwards the list to the appointing agency to select the eligible candidate of its choice. Through a series of executive orders starting in 1975, state agencies were required to establish and maintain an affirmative action program to ensure equal employment opportunity. See *Victorson v Dep't of Treasury*, 439 Mich 131, 141 n 9; 482 NW2d 685 (1992). At some point, the department of civil service developed a modified method for assembling lists of eligible candidates for a job vacancy when there was an under-representation of women and minorities in the particular job classification to be filled. Under this modified procedure, if there were not three protected group members in the top band, then protected group members from a lower band were added to the top band. This addition was called "augmented certification."

According to the affidavit of William A. Slaughter, director of the Michigan State Police equal employment office, defendant's affirmative action plans from 1989 to 1994 included the use of the augmented certification procedure. Until 1994, whenever defendant had a vacant sergeant position and a protected group was underutilized in the county where the vacancy existed, defendant requested an augmented list of eligible candidates from the department of civil service. The post commander filling the vacancy then evaluated the eligible candidates and made a recommendation to the district commander, who in turn forwarded the recommendation to a bureau director for a final decision. Colonel Michael Robinson, the director of the Michigan State Police, testified in a deposition that race and gender, along with a multitude of other factors, were taken into consideration when filling a specific vacancy.

Plaintiff's second amended circuit court complaint alleged that the use of augmented certification in determining who is eligible for a promotion to sergeant (Count I) and defendant's consideration of race and gender when deciding who among the eligible candidates is promoted (Count II) violated the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. Plaintiff's second amended complaint in the court of claims case alleged that the same promotion eligibility procedures (Count I) and promotion selections (Count II) violated the equal protection clause of the Michigan Constitution. Both complaints sought money damages. The cases were consolidated before the circuit court.

Defendant moved for summary disposition on all claims. Following two hearings, the trial court entered opinions and orders granting summary disposition pursuant to MCR 2.116(C)(8) and (10).

On appeal, plaintiff first claims that the trial court erred in dismissing his constitutional tort claim in the court of claims case. The question whether an individual may sue the state for damages based on an allegation that the state's employment practices are unconstitutionally discriminatory was recently addressed by this Court in *Cremonte v Michigan State Police*, 232 Mich App 240; 591 NW2d 261 (1998), lv pending. The *Cremonte* Court concluded that, while a damage remedy may be inferred from the constitution in certain cases, no inferred remedy applies to claims of employment discrimination

based on age, race, or gender. *Id.*, pp 251-252. Plaintiff's argument therefore fails. The trial court did not err in dismissing the court of claims action.

Plaintiff also claims that the trial court erred in dismissing his claim concerning defendant's use of the augmented certification procedure in determining eligibility for a promotion to sergeant. According to plaintiff, the use of augmented certification violated § 202(1)(a) of the Civil Rights Act, MCL 37.2201(1)(a); MSA 3.548(201)(1)(a), which prohibits employers from discriminating against individuals with respect to employment because of religion, race, color, national origin, age, sex, height, weight or marital status. We disagree.

Under § 210 of the Civil Rights Act, MCL 37.2210; MSA 3.548(210), when the Civil Rights Commission has approved an affirmative action plan, an employer's reliance on the plan insulates the employer from charges that it violated the Civil Rights Act. See *Kulek v Mt Clemens*, 164 Mich App 51, 64-65; 416 NW2d 321 (1987). See also *Middleton v City of Flint*, 92 F3d 396, 401 n 4 (CA 6, 1996). The trial court concluded that there was unrebutted evidence that defendant's approved affirmative action plan included the augmented certification procedure, and accordingly ruled that, as a matter of law, defendant was insulated from liability under the Civil Rights Act. MCR 2.116(C)(10).

On appeal, plaintiff claims that there were two genuine issues of fact making summary disposition of his challenge to the use of the augmented certification procedure inappropriate. First, he contends that there is a question of fact whether defendant's affirmative action plans were adopted to "eliminate the present effects of past discriminatory practices or assure equal opportunity." This claim is without merit. The procedure was part of a "plan to eliminate present effects of past discriminatory practices or assure equal opportunity" as that phrase is used in § 210. See *Local 526-M v Civil Service Comm*, 110 Mich App 546; 313 NW2d 143 (1981). See also *Conlin v Blanchard*, 745 F Supp 413, 418 (ED Mich, 1990). There also was no genuine issue of fact whether defendant's use of the augmented certification procedure was approved by the Civil Rights Commission, as required to rely on the "safe haven" of § 210. Defendant presented an affidavit averring that its affirmative action plans included use of augmented certification in the event of underutilization of any protected group; plaintiff's evidence did not refute the affidavit. Additionally, it was undisputed that the affirmative action plans were approved by the Civil Rights Commission. Because there was no genuine issue that defendant's use of augmented certification was part of an approved affirmative action plan, defendant was, under § 210, insulated from charges that it violated the Civil Rights Act by using augmentation in determining eligible candidates for promotion to sergeant. *Kulek, supra*. The trial court did not err in so concluding.

Plaintiff also contends that § 210 should not insulate defendant from liability under the Civil Rights Act because that section violates the Michigan Constitution's equal protection clause, Const 1963, art 1, § 2, as well as the civil service amendment, art 11, § 5. Issues raised for the first time on appeal, even those relating to constitutional claims, are not ordinarily subject to appellate review. *Michigan Up & Out of Poverty Now Coalition v State of Michigan*, 210 Mich App 162, 167; 533 NW2d 339 (1995). Because plaintiff has not demonstrated exceptional circumstances that would mandate review of the constitutional arguments for the first time on appeal, we decline to address them. *Id.*, p 168.

Finally, plaintiff argues that the trial court erred in concluding that plaintiff's third amended complaint stated a cause of action for employment discrimination in promotional decisions based on race and gender. We agree. The court dismissed Count II pursuant to MCR 2.116(C)(8). A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of a claim and is reviewed de novo. *Stott v Wayne Co*, 224 Mich App 422, 426; 569 NW2d 633 (1997). When reviewing a motion decided under MCR 2.116(C)(8), this Court accepts as true all factual allegations and any reasonable inferences drawn from them in support of the claim. *Id.*

In *Allen v Comprehensive Health Services*, 222 Mich App 426, 433; 564 NW2d 914 (1997), this Court held that, in reverse discrimination cases such as this one, a reverse discrimination plaintiff may establish a prima facie claim of gender discrimination under the Civil Rights Act with respect to a promotion decision by showing: (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against men; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a female employee of similar qualifications was promoted. Some of the factors courts have examined when analyzing whether a male or a non-minority plaintiff has satisfied the "background circumstances" element include the percentage of minority employees elevated to plaintiff's desired position, the proportion of the decision makers who were minorities, the qualifications of the minorities who received the position instead of the plaintiff, evidence of other acts of favoritism toward minority employees, and internal and external pressures to increase diversity. *Harel v Rutgers, The State Univ*, 5 F Supp 2d 246, 265 (D NJ, 1998); *Harding v Gray*, 9 F3d 150, 153 (US App DC, 1993); *Lucas v Dole*, 835 F2d 532, 534 n 9 (CA 4, 1987).

Here, with regard to the "background circumstances" element, while plaintiff's complaint indicates that the majority of sergeant promotions went to white males, the complaint also alleges internal pressures to increase diversity and that minorities and females with lower test scores and less experience were promoted instead of plaintiff. Plaintiff's complaint also pleaded facts that, if accepted as true, establish the remaining three *Allen* elements of a reverse discrimination claim: that he applied and was qualified for the rank of sergeant, that he was nevertheless not promoted, and that less qualified female and minority troopers were promoted.

The trial court's concern in granting summary disposition was that plaintiff at best showed only systemic preferences for promoting females and minorities, but did not show that he himself was a victim of that discriminatory system. Had this been a motion brought under MCR 2.116(C)(10), that concern might be legitimate. Because the motion was argued and granted under MCR 2.116(C)(8), however, the inquiry was whether, accepting all factual allegations in the complaint as true, plaintiff's claim was so clearly unenforceable as a matter of law that no factual development could establish the claim. Plaintiff's allegations may not be provable at trial. The allegations, if true, however, clearly suggest that defendant was denied a promotion on the basis of his gender or non-minority status. Accordingly, we reverse the trial court's decision to dismiss Count II of the circuit court action and remand for further proceedings on that count only.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood