STATE OF MICHIGAN

COURT OF APPEALS

JOHN GREENE,

Plaintiff-Appellant,

v

PREMARC CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 8, 2002

No. 226270; 229603
Shiawassee Circuit Court
LC No. 99-002975-CL

JOHN GREENE,

Plaintiff-Appellee,

v

PREMARC CORPORATION,

Defendant-Appellant.

No. 229719
Shiawassee Circuit Court
LC No. 99-002975-CL

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

In docket number 226270, plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. In docket numbers 229603 and 229719, the parties appeal from the trial court's order granting, in part, defendant's motion for attorney fees pursuant to MCR 2.405. We affirm.

Plaintiff first argues that the trial court erred in dismissing his age discrimination claims when he presented direct evidence of discrimination. We disagree. An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. Affidavits,

depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra*. An affidavit consisting of mere conclusory allegations that are devoid of detail are insufficient to satisfy the nonmoving party's burden in opposing a motion for summary disposition. *Quinto, supra* at 371-372.

Intentional discrimination may be proved by direct and circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). When direct evidence is offered to prove discrimination, the shifting burden test does not apply. *Id*. at 540. In a case involving direct evidence the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. *Harrison v Olde Financial Corp*, 225 Mich App 601, 612; 572 NW2d 679 (1997). Further, the plaintiff must establish evidence of the plaintiff's qualification or eligibility and direct proof that the discriminatory animus was causally related to the decisionmaker's action. *Id*. at 613. Once the plaintiff submits these proofs, the defendant may not avoid a trial by articulating a nondiscriminatory reason for its action. Rather, the presentation of direct evidence is generally sufficient to submit the plaintiff's case to the jury. *Id.* Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was, at least, a motivating factor. *Id*.

Plaintiff alleges that direct evidence of discrimination is established by the comments of Dan Marsh and Paul Marsh. Specifically, plaintiff testified that he initiated a conversation regarding company vehicles. Plaintiff told Dan Marsh that Lincoln Town Cars were not suitable because they were "old" people cars, and the company should be getting "Mark VIII's." In response, Dan Marsh told plaintiff, "You are old." Plaintiff acknowledged that Dan Marsh was the same age as plaintiff or a year older. Plaintiff contends that this "stray remark" presents direct evidence of discrimination.

To determine the admissibility of a stray remark based on a relevancy analysis, the court must determine: (1) whether the proffered comment was made by an agent of the employer involved in the decision to terminate; (2) whether the statements made related to the decision-making process; (3) whether the statements were vague, ambiguous, or isolated remarks; and (4) whether the statements or comment were proximate in time to the termination. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 298-300; 624 NW2d 212 (2001). Once the proffered remark is determined to have some bearing on the employer's motivation, the probative value of the remark must be balanced in light of the potential or risk of unfair prejudice. *Id*. at 302-303. An inflammatory remark may be extremely prejudicial to the defense where the jury might attribute a comment by an agent, unauthorized to make adverse employment decisions, to the employer. *Id*. at 303.

In light of these principles, we conclude that the stray remark by Dan Marsh does not qualify as admissible evidence to oppose defendant's motion for summary disposition. Dan Marsh, despite having an ownership interest, did not hold the authority to discharge plaintiff. The comment did not relate to the termination process, but rather seemed to be an innocuous comment made following *plaintiff's initiation* of the issue of age into the process of vehicle selection. This comment by Dan Marsh was isolated in that plaintiff did not testify regarding any other instances where the issue was raised. Furthermore, while plaintiff asserts that the comment was proximate in time to the act of demotion, we cannot conclude, based on the record available, that the comment occurred at that time. In fact, there is no indication in the transcript

pages provided that the comment was correlated to any particular date. The probative value of the stray remark is far outweighed by the prejudicial effect, and therefore, the remark does not provide admissible evidence of direct discrimination.[1] *Maiden, supra*; *Krohn, supra*.

Plaintiff also alleges that three other individuals were demoted or terminated and replaced by younger, less qualified employees. However, when asked to provide the specifics for this conclusion, plaintiff testified that he acquired the knowledge through hearsay. Plaintiff must oppose a motion for summary disposition with admissible evidence and has failed to demonstrate or cite authority for the proposition that any hearsay testimony is admissible under an exception to the general rule. *Maiden, supra*.[2]

Plaintiff alleges that there was sufficient evidence of discrimination to meet the shifting burden test. We disagree. To establish a prima facie case of discrimination, a plaintiff must prove that: (1) he was a member of a protected class; (2) he suffered adverse employment action; (3) he was qualified for the position; and (4) he was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the termination. *Id*. at 173. If the defendant carries this burden, the presumption raised by the prima facie case is rebutted. *Id*. at 174. Plaintiff then must demonstrate that the employer's reasons were a mere pretext for discrimination to permit the trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer. *Id*. at 176.

The trial court held that plaintiff failed to meet his burden in demonstrating that defendant's reasons for the termination were pretextual. Following de novo review of the record, *Maiden, supra*, we agree. Plaintiff argues that the comments made by other demoted or terminated employees demonstrates pretext. However, as noted above, plaintiff testified to conclusions based on hearsay. Plaintiff must meet his burden in opposing summary disposition with admissible evidence, *Maiden, supra*, and mere conclusions without foundational support are insufficient to meet this burden. *Quinto, supra*. Plaintiff also alleges that there is sufficient

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[1] We also note that plaintiff alleged that Paul Marsh referred to him as "old man" on a regular basis. Again, Paul Marsh did not hold termination authority, plaintiff did not identify the context in which the comments occurred, and there was no indication whether they occurred in proximity to the demotion or termination. Accordingly, this evidence is also not admissible as direct evidence of discrimination.

[2] Furthermore, defendants have provided documentation from these employees to indicate that the circumstances surrounding any change in their positions in the company was not due to their age. Plaintiff contends that his contradictory testimony creates a question for the trier of fact. However, plaintiff testified that he *believed* that he was being used as a "scapegoat" and would not have been in that position if he was younger. When asked to delineate the precise statement made by John Morgan, plaintiff testified that Morgan did not disagree or agreed that it *could be interpreted* that way. When asked how the conversation with Morgan came about, plaintiff testified: "He did because he was moving out of his office because of his age. Perhaps because of his age. He was moving out of his office, anyway." Mere allegations that are devoid of detail are insufficient to meet plaintiff's burden when opposing a motion for summary disposition. *Quinto, supra*.

statistical data to meet his burden and that defendant's termination of plaintiff did not follow procedures set forth in the company handbook. Plaintiff's "statistical data" is based on his hearsay opinion evidence and is insufficient to counter the documentary evidence presented by defendants that demotions or reassignment accounted for any change in status for older employees. *Id*. Plaintiff's reliance on the company handbook is also without merit. The disciplinary procedure provides that it applies to "hourly" workers, and there is no evidence to indicate that plaintiff was characterized as an hourly employee. The handbook outlined the procedure that "may" occur, but noted that the type of offense determined the procedure utilized. Furthermore, defendant reserved the right to deviate from the disciplinary procedure to take whatever disciplinary action was necessary. Lastly, plaintiff's contention that his evaluations demonstrate pretext is without merit. Plaintiff's evaluations, although positive in some aspects, reflect that he consistently received negative comments about his ability to handle challenges and his ability to adapt to change. Accordingly, the trial court properly granted defendant's motion for summary disposition.

In docket numbers 229603 and 229719, both parties challenge the trial court's award of costs pursuant to MCR 2.405. Plaintiff argues that defendant's offer of judgment of $3,000 was gamesmanship, and no award is required under the circumstances. Defendant challenges the trial court's reduction of its monetary request. The trial court's decision to award costs is reviewed for an abuse of discretion. *Cole v Eckstein*, 202 Mich App 111, 116-117; 507 NW2d 792 (1993). We cannot conclude that the trial court abused its discretion. Plaintiff's contention that costs should not have been awarded because defendant's offer was "gamesmanship" was rejected in *Sanders v Monical Machinery, Co*, 163 Mich App 689, 692-694; 415 NW2d 276 (1987). Furthermore, defendant's contention that the failure to award the entire request for costs is also without merit. "It is inherent in the court's power to determine reasonableness." *Id*. at 694.

Affirmed.

/s/ Harold Hood
/s/ David H. Sawyer