

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL LIND,

Plaintiff-Appellant,

v

CITY OF BATTLE CREEK,

Defendant-Appellee.

UNPUBLISHED

July 9, 2002

No. 227874

Calhoun Circuit Court

LC No. 98-005111-CL

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

PER CURIAM.

In this reverse discrimination case, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. In his complaint, plaintiff, a white police officer, claims that defendant violated the Civil Rights Act (CRA), MCL 37.2202, when it promoted a black officer, rather than plaintiff, to the supervisory position of police sergeant. We affirm.

On appeal, plaintiff argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant because plaintiff offered direct evidence of discrimination, established a prima facie case of reverse discrimination, and defendant had articulated no legitimate non-discriminatory reason for its decision to promote a minority instead of plaintiff. We review a trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

With regard to motions pursuant to MCR 2.116(C)(10), our Supreme Court has explained:

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).]

The CRA prohibits an employer from discriminating against an employee on the basis of race, among other things. MCL 37.2202(1)(a); *Wilcoxon v Minnesota Mining & Mfg Co*, 235

Mich App 347, 359; 597 NW2d 250 (1999). Unless there is direct evidence of discrimination, the plaintiff in a reverse discrimination suit based on race may establish a prima facie claim of discrimination with regard to an adverse employment action by showing (1) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority; (2) that the plaintiff was qualified for the promotion; (3) that, despite the plaintiff's qualifications, he was not promoted; and (4) that a minority employee of similar qualifications was promoted. *Allen v Comprehensive Health Services*, 222 Mich App 426, 433; 564 NW2d 914 (1997). Meeting this burden does not mean a plaintiff can overcome a motion for summary disposition; it merely creates a rebuttable presumption that the defendant acted with discriminatory intent. *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001); *Allen, supra*. If the defendant articulates a legitimate, nondiscriminatory reason for its decision, the presumption falls away and the burden shifts back to the plaintiff to demonstrate a question of fact that the employer's articulated reason is a pretext for discrimination. *Hazle, supra* at 464-465; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173-174; 579 NW2d 906 (1998).

In the present case, we disagree with plaintiff's argument that he presented direct evidence of reverse discrimination. Direct evidence of employment discrimination includes "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle, supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). We fail to see how the circumstances of an earlier alleged promotion of a black female to an administrative aide position, which is not the position at issue here, including comments by a deputy police chief, not the chief who was the main decisionmaker in this case, constitute direct evidence of reverse discrimination in the present case.

With respect to the plaintiff's claim that he established a prima facie case of reverse discrimination, we disagree. For purposes of its summary disposition motion only, defendant conceded the existence of the later three elements, but argued that plaintiff failed to establish the first element, i.e., background circumstances supporting the suspicion that defendant is the unusual employer who discriminates against the majority. Plaintiff claims that he presented evidence establishing that defendant is the unusual employer who discriminates against white males. In support of this claim, plaintiff points to "direct testimony of discriminatory animus" in the administrative aide promotion, disparity of qualifications between plaintiff and the promoted officer, violation of past practice in promotions, use of subjective judgment in making the decision, and "other evidence of discrimination."

Having reviewed the record, we agree with the trial court that plaintiff "failed to present sufficient evidence upon which a reasonable trier of fact could conclude that background/historical circumstances support a suspicion that [defendant] within the [p]olice [d]epartment was the unusual employer who discriminates against the majority." Contrary to plaintiff's argument, the administrative aide situation does not reflect discriminatory animus toward white men where the factual circumstances of that situation are distinctly different from the scenario here. Plaintiff's arguments concerning disparity of qualifications between plaintiff and the promoted officer and the alleged violation of past practice in promotions also lack merit. In his brief, plaintiff admits that the collective bargaining agreement granted defendant the discretion to promote among the top five individuals on the promotion list. Moreover, the

evidence reveals no requirement that hiring be done in descending chronological order, and other white applicants other than plaintiff were promoted. We further note that, without more, the use of subjective judgment in making an employment decision shows no discriminatory animus. Further, plaintiff's claim of "other evidence of discrimination" is supported by examples that are not analogous to the current claim and provide no support for the suspicion of discrimination against the majority. Because plaintiff failed to establish that defendant was the unusual employer who discriminated against white men, he failed to create a prima facie case of reverse discrimination. *Allen, supra*. Summary disposition was appropriate.¹

Affirmed.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Peter D. O'Connell

¹ Moreover, we believe that defendant's proffered reason for promoting to the supervisory position the black officer rather than plaintiff, that being that the former was more mature, is a legitimate nondiscriminatory reason, and plaintiff failed to present sufficient evidence to show that this reason was pretextual, to disguise discriminatory intent. See *Hazle, supra*.