STATE OF MICHIGAN

COURT OF APPEALS

DAVID ALLEMON,

Plaintiff-Appellant,

v

DAIMLERCHRYSLER CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 2, 2004

No. 242264
Oakland Circuit Court
LC No. 01-031878-CL

Before: Borrello, P.J., and White and Smolenski, JJ.

PER CURIAM.

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

We review de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999), our Supreme Court discussed the burden of proof required under MCR 2.116(C)(10) as follows:

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law.
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing

> the existence of a material factual dispute, the motion is properly granted. [Citations omitted.]

Plaintiff first argues that the trial court erred in granting defendant's motion for summary disposition regarding his religious discrimination claim under the Elliot-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*., because he offered direct evidence of discriminatory intent and presented a prima facie case of religious discrimination. Specifically, plaintiff, who was a contract worker for defendant, claims that defendant discriminated against him in violation of the CRA by refusing to hire him for a permanent position because he did not pray with his supervisor, Rob Marcott, at lunch. We disagree.

MCL 37.2202(1) provides in part:

> An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Proof of discriminatory treatment in violation of the CRA may be established by direct, indirect, or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). "Direct evidence" has been defined as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* at 132-133; quotations and citations omitted. In this case, plaintiff has offered no direct evidence that defendant discriminated against him when defendant declined to hire him. Plaintiff himself admits that he never raised the issue of religion with any of defendant's employees, and it had not been an issue during the four years he had worked for defendant. As the trial court astutely observed, plaintiff has "not presented any direct evidence that his non-participation in prayer was ever commented upon or was in any way a source of conflict at work." Because plaintiff has not offered any evidence from which a reasonable inference can be made that religious discrimination was a motivating factor in defendant's actions, plaintiff must prove his case by indirect or circumstantial evidence. *Id.* at 132.

To prove his case by indirect or circumstantial evidence, plaintiff must proceed using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. To establish a prima facie case of discrimination, a plaintiff must prove that: (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) his failure to obtain the position occurred under circumstances that give rise to an inference of unlawful discrimination. *Id.* at 134.

Here, plaintiff satisfies the three prongs of this test. First, plaintiff is a practicing Roman Catholic. Members of any religion, including agnostics and atheists who have no religious beliefs, are a protected class under the CRA. *Cline v Auto Shop, Inc*, 241 Mich App 155, 157-158; 614 NW2d 687 (2000). Second, it is undisputed that plaintiff suffered an adverse employment action; namely, defendant did not choose plaintiff for its open permanent position. Third, by virtue of Marcott placing plaintiff's name on a list of potential candidates for the

position, plaintiff presented sufficient evidence to survive a summary disposition by creating a question of fact for the jury as to whether plaintiff was qualified for the position.

But we also find that plaintiff's assertions do not give rise to an inference of unlawful discrimination, and thus, plaintiff has failed to present a prima facie case. Even though plaintiff did not say grace before meals, he was not offended by the practice and plaintiff does not contend that any comments were uttered regarding his absence. Additionally, of the contract workers who said grace with Marcott before lunch, only three of the four were eventually hired by defendant. These facts do not give rise to an inference of unlawful discrimination.

Nevertheless, even if we were to conclude that plaintiff's assertions constitute a prima facie case for religious discrimination, plaintiff's claim still fails. After establishing a prima facie case, the burden shifts to defendant to articulate a "legitimate nondiscriminatory reason for the adverse employment action." *Sniecinski, supra* at 134. Here, defendant asserts that Steve Emenheiser, who filled the open position plaintiff was seeking, was selected because he was one of the strongest technical writers Marcott had ever seen, had international travel experience, had the most experience of the candidates, and thus, he was the best qualified candidate. Emenheiser was also studying the second level of German, which was not required for the position, but was "a nice thing to have." Therefore, defendant fulfilled its burden of articulating a legitimate, non-discriminatory reason for not hiring plaintiff for the permanent position.

Plaintiff, on the other hand, offers no evidence that this reason is simply a pre-text for discrimination. Because plaintiff believes that he is more qualified than Emenheiser, he is unable to see a nondiscriminatory reason for not hiring him. But a subjective belief is not sufficient proof. To establish that defendant's proffered reason was a mere pre-text, a plaintiff can do so by showing that (1) the reason has no basis in fact, (2) it was not the actual factor motivating the decision, or (3) the factors proffered were jointly insufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335; 582 NW2d 207 (1998).

Plaintiff argued that he was more qualified than Emenheiser for the open position and submitted two favorable performance reviews. But plaintiff offers no evidence that Emenheiser was not qualified for the position. Also, defendant does not claim that plaintiff was unqualified for the position, only that Emenheiser was more qualified. And the soundness of an employer's business judgment may not be questioned as a means of showing pretext. *Meagher v Wayne State Univ*, 222 Mich App 700, 712; 565 NW2d 401 (1997).

Likewise, in regards to establishing that defendant's reason was not the motivating factor in its hiring decision, plaintiff proffers no contrary evidence. Neither Marcott nor Ron Watkins, Marcott's supervisor, knew the religious affiliation of plaintiff or Emenheiser. Plaintiff never raised the issue of religion and hiring practices with any of defendant's employees, and religion was never discussed with him. Accordingly, we find that plaintiff fails to refute defendant's legitimate, nondiscriminatory reason for not hiring plaintiff.

Next, plaintiff argues that the trial court erred in dismissing his fraud claim because plaintiff provided evidence to support it. The general rule is that to constitute actionable fraud it must appear:

> (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*Kassab v Michigan Basic Property Ins Ass'n*, 441 Mich 433, 442; 491 NW2d 545 (1992) (quotations and citations omitted).]

Plaintiff contends that the fraud occurred when Marcott told him that he would be upfront with the technical writers during the hiring process. Plaintiff argues that Marcott failed to tell plaintiff that he was a candidate and that Marcott was hiring from the outside. However, plaintiff's assertions are irrelevant because, even if plaintiff could show that Marcott's statement was a material representation, "[f]uture promises are contractual and cannot constitute actionable fraud." *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997). Also, during his deposition, plaintiff stated that Marcott "did keep us informed, for the most part," which undercuts plaintiff's argument that Marcott's promise to be upfront constitutes fraud. Furthermore, there is no evidence to suggest that plaintiff relied on Marcott's statement or suffered any injury as a result of such reliance. Because there is no genuine issue of material fact, summary disposition was properly granted.

Plaintiff also argues that the trial court erred in dismissing his defamation claim because defendant's statements that defendant's were infuriated by plaintiff's e-mail and that plaintiff had been terminated for misuse of e-mail, were false. Again, we disagree.

A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual. *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000) (citations omitted). While working as a contract worker for Comprehensive Data Processing (CDP) at defendant's office, plaintiff's salary was $55,000. Four months after leaving defendant's office, plaintiff secured a position at Cosworth with similar benefits and a salary of $61,000. Because plaintiff was able to secure a higher-paying position with similar benefits, it is illogical to suggest that his reputation in the community was lowered or that the statements deterred others from associating with him. *Kefgen, supra* at 617. Therefore, we hold that summary disposition was properly granted as to this claim.

Regardless, even if plaintiff's reputation were harmed, he must still establish the elements of a defamation claim, which he cannot do.

> Generally, a plaintiff may establish a claim of defamation by showing: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by the publication (defamation per quod). [*Kefgen, supra,* 241 Mich App 617; *Kevorkian, supra,* 237 Mich App 6-7.]

Plaintiff did not provide any affidavits or depositions to support his allegation that defendant conducted a meeting during which his former coworkers were told that plaintiff was terminated

for misuse of e-mail, and plaintiff also, presented no information about the person who allegedly told him about this meeting. Thus, plaintiff's statement about what was said at this meeting is hearsay under MRE 801(c), as it is a statement offered to prove the truth of the matter asserted and fits into no exception category. The existence of a disputed fact must be established by admissible evidence to survive a motion under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

Furthermore, plaintiff submitted no evidence regarding the falsity of this statement. Watkins and Marcott were not asked to provide CDP a reason for the termination. And Watkins, when deposed, denied he told anyone that plaintiff was terminated for misuse of e-mail. Also, none of defendant's employees informed plaintiff why they terminated him. It was his employer, CDP, who informed plaintiff that he was terminated because of the February 11, 2000 e-mail. Accordingly, we find that the trial court properly granted defendant's motion for summary disposition as to plaintiff's defamation claim.

Affirmed.

/s/ Stephen L. Borrello
/s/ Helene N. White
/s/ Michael R. Smolenski