STATE OF MICHIGAN

COURT OF APPEALS

ROBERT TURNER,

Plaintiff-Appellant,

v

VISTEON CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 17, 2005

No. 252219
Macomb Circuit Court
LC No. 2002-005262-CZ

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

In this age discrimination claim, plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant. We affirm.

Plaintiff first argues that the trial court violated his constitutional right to be represented by an attorney, by accepting the admission made in his deposition that he did not believe he was terminated because of age, and by dismissing other evidence and arguments proffered by plaintiff's counsel. We disagree. We review de novo claims of constitutional error by a trial court. *Oakland Co Prosecutor v Scott*, 237 Mich App 419, 422-423; 603 NW2d 111 (1999). The Michigan Constitution provides a party with the right to have legal representation in a civil suit. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517; 449 NW2d 916 (1989); Const 1963, art 1, § 1 (providing that "[a] suitor in any court of this state has the right to prosecute or defend his suit, either in his own person or by an attorney"). However, the record reveals that plaintiff was represented by his attorney throughout all stages of the proceedings and that the trial court considered evidence other than plaintiff's deposition statement. Further, plaintiff provides no authority for the proposition that a trial court's reliance on a party's testimony, rather than an attorney's argument, constitutes a violation of the right to counsel. We decline to address this argument further—"this issue has not been properly presented for review because [plaintiff] has given cursory treatment to the issue with little or no citation to relevant supporting authority for his argument." *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001).

Plaintiff next argues that the trial court violated MCR 2.116(G)(5) by failing to consider all the evidence presented to it in deciding defendant's motion for summary disposition. We disagree. We review de novo the interpretation and application of court rules. *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a complaint. *Veenstra v Washtenaw Country Club*, 466

Mich 155, 163; 645 NW2d 643 (2002). In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a trial court is required to consider affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Veenstra*, *supra* at 164. "Evidence offered in support of or in opposition to the motion can be considered only to the extent that it is substantively admissible." *Id*. at 163. And 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. *Id*. at 164.

A review of the trial court's opinion demonstrates that it considered the appropriate evidence in deciding the motion for summary disposition brought under MCR 2.116(C)(10). Plaintiff argues that the trial court violated MCR 2.116(G)(5) by only considering plaintiff's statement in his deposition that he did not believe he had been discriminated against because of age, and by failing to consider other evidence, as mandated by the court rule. While the trial court considered plaintiff's deposition statements (which it was required to consider under the court rule), the record reveals that it also considered other evidence presented by the parties. However, the trial court found the evidence to be insufficient to withstand a motion for summary disposition, because there was no genuine issue as to any material fact, and defendant was therefore entitled to judgment as a matter of law. MCR 2.116(C)(10).

Additionally, the trial court could only consider evidence that would have been substantively admissible in determining the motion for summary disposition. Therefore, the trial court properly declined to consider plaintiff's speculation that certain individuals, who may have made discriminatory comments, had some involvement with defendant's decision not to promote plaintiff and to terminate him. "[P]arties opposing a motion for summary disposition must present more than conjecture and speculation to meet the burden of providing evidentiary proof establishing a genuine issue of material fact." *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993). We find that the trial court considered all of the appropriate evidence submitted by the parties as required by MCR 2.116(G)(5) in deciding defendant's motion for summary disposition under MCR 2.116(C)(10); therefore, plaintiff is not entitled to relief on this issue.

Plaintiff next argues that the trial court erred in granting summary disposition in favor of defendant on his claims of age discrimination. We disagree. We review de novo a trial court's ruling on a motion for summary disposition. *Veenstra*, *supra* at 159. A disparate treatment claim is a claim for intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Proof of discriminatory treatment in violation of the Civil Rights Act, MCL 37.2202(1)(a), may be established by direct evidence or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). Plaintiff argues that he presented sufficient proof of discriminatory treatment, by both direct and indirect evidence, to survive defendant's motion for summary disposition.

In a case involving direct evidence, the plaintiff must present "'evidence which if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). In a direct evidence case involving mixed motives—where the adverse employment

decision could have been based on both legitimate and legally impermissible reasons—a plaintiff must prove that the defendant's discriminatory animus was more likely than not a substantial or motivating factor in the decision. *Sniecinski*, *supra* at 133. Further, a plaintiff must establish his qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. *Sniecinski*, *supra* at 133. A defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision. *Sniecinski*, *supra* at 133. However, once a plaintiff submits direct evidence, that if believed, would require the conclusion that unlawful discrimination was a motivating factor, the defendant cannot avoid trial by articulating a nondiscriminatory reason for the employment decision. *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

Plaintiff argues that the trial court employed too narrow of a definition of what constitutes direct evidence. The trial court considered evidence that two of the supervisors at defendant's plant had called plaintiff "old man" and "senior supervisor" at various times during plaintiff's employment. The trial court found that these statements were not direct evidence of age discrimination because they were not made by the individuals who were responsible for the decisions not to promote plaintiff and to terminate him. We agree with the trial court's finding that this did not constitute direct evidence of discrimination, because it would not require the conclusion that unlawful discrimination was a factor in defendant's decisions to not promote plaintiff and to terminate him. *Hazle*, *supra* at 462. Additionally, plaintiff admitted in his deposition that he did not believe that the decisionmakers discriminated against him because of his age. We conclude that the trial court did not err in finding that plaintiff failed to present direct evidence of discrimination.

Plaintiff also may proceed with his claim by showing indirect or circumstantial evidence of discrimination under the burden shifting approach set out in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski*, *supra* at 133-134. To establish a rebuttable prima facie case of discrimination under the *McDonnell Douglas* approach, a plaintiff must present evidence 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 giving rise to an inference of unlawful discrimination. *Sniecinski*, *supra* at 134. "Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action." *Id*. "If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination." *Id*. Stated another way, "disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 175; 579 NW2d 906 (1998).

Regarding plaintiff's failure to promote claim, we find that the trial court properly granted summary disposition in favor of defendant because plaintiff did not show that defendant's proffered nondiscriminatory reason for declining to promote him was a pretext for discrimination. Defendant presented evidence that plaintiff was tiered a "4" on a promotion scale, which was the tier least likely to be promoted. Plaintiff claimed that one of the supervisors

who made "old man" and "senior supervisor" statements to plaintiff lowered his tier from a "3," where employees had a chance to be promoted, to a "4." However, plaintiff did not offer any evidence to support this assertion. Evidence submitted by defendant showed that another supervisor—one who plaintiff admitted did not discriminate against him—had tiered plaintiff a "4" for reasons unrelated to plaintiff's age. Plaintiff did not submit sufficient evidence to show that defendant's nondiscriminatory reason was a pretext for discrimination. Therefore, the trial court properly granted summary disposition in favor of defendant on plaintiff's claim of age discrimination based on his failure to be promoted.

Regarding plaintiff's termination claim, we agree with plaintiff that the trial court employed an incorrect standard in determining whether he had made out a prima facie case of age discrimination. However, even assuming plaintiff presented a prima facie case under *McDonnell Douglas*, the appropriate standard set out above, we find that the trial court properly granted summary disposition in favor of defendant because plaintiff did not show that defendant's proffered nondiscriminatory reason for plaintiff's termination was a pretext for discrimination. Defendant cited a pay practice violation as the reason for plaintiff's termination; specifically, that plaintiff was terminated for paying himself overtime that he did not work. Plaintiff argues that this was pretextual because the investigation before he was terminated was only cursory and motivated by age-biased employees, defendant did not have proper evidence that plaintiff had in fact paid himself for time not worked, and other employees had committed similar acts and had not been terminated.

Aside from his unsubstantiated opinion, plaintiff offered no evidence that the investigation was cursory and motivated by an age-biased employee. Further, deposition testimony by the individuals responsible for the termination decision—individuals who plaintiff admitted did not discriminate against him—testified that their decision was not influenced by the person plaintiff claimed was age-biased. Additionally, defendant presented evidence that the departments plaintiff supervised had not produced any parts on many of the nights plaintiff claimed to be working, and that when employees "spot checked" plaintiff's departments, plaintiff and other employees were not present. Although plaintiff argues that other employees were not terminated for committing the same pay practice violations, none of the employees to which plaintiff compares himself were found to have paid themselves for overtime they had not worked. Indeed, defendant presented evidence suggesting that if plaintiff had only committed the pay violations the other employees had committed, he would not likely have been terminated. Therefore, we find that plaintiff did not present evidence that defendant's reason for terminating him was a pretext for discrimination, and the trial court properly granted summary disposition in favor of defendant on plaintiff's claim of age discrimination based on his termination.[1]

We affirm.

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[1] "This Court will not reverse an order of the trial court if the court reached the right result for the wrong reason." *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 354; 686 NW2d 756 (2004).

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello