

STATE OF MICHIGAN
COURT OF APPEALS

DARRYL HALL,

Plaintiff-Appellant,

v

DETROIT FORMING INC,

Defendant-Appellee.

UNPUBLISHED

January 8, 2008

No. 274059

Oakland Circuit Court

LC No. 2005-070760-CL

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this racial discrimination case, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendant. Because we conclude that plaintiff presented sufficient evidence to establish a question of fact on both his hostile work environment claim and his claim that he was improperly denied a promotion based on his race, we reverse and remand for further proceedings.

I

Plaintiff first argues that the trial court erred when it determined that, under *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005), plaintiff could not establish his hostile work environment claim with evidence of racially hostile events that occurred more than three years before plaintiff filed his complaint. Although it is clear that plaintiff had to file his hostile work environment claim within three years of the point at which his hostile work claim accrued, see *id.* at 284, it is unclear whether and to what extent a trial court (or finder of fact) may consider evidence of racially hostile conduct that occurs outside the period of limitations.¹ Nevertheless, because we conclude that plaintiff presented sufficient

¹ See *Ramanathan v Wayne State Univ Bd of Directors*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 266238), slip op. at 4 (concluding that *Garg* cannot be read so "broadly as to exclude per se all background evidence of alleged discriminatory or retaliatory acts occurring outside the limitations period.") and *Hill v PBG Michigan, LLC*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 2006 (Docket No. 268692), slip op. at 3 (stating that the plaintiff must establish his hostile work environment claim with evidence of conduct that occurred "within the three-year period (continued...)

evidence to establish a question of fact on his hostile work environment claim based on events occurring within the period of limitations, we do not need to consider whether the trial court should also have considered evidence of racially hostile events that occurred more than three years before plaintiff filed his complaint.

II

This Court reviews de novo the trial court's decision to grant summary disposition. *Lansing v Michigan*, 275 Mich App 423, 428; 737 NW2d 818 (2007). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). Summary disposition is appropriate under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When determining whether there is a genuine issue as to any material fact, the trial court must consider the evidence presented by the parties in the light most favorable to the party opposing the motion. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III

In order to establish his claim of discrimination based on hostile work environment, plaintiff must present evidence that (1) he belonged to a protected group, (2) he was subjected to communication or conduct on the basis of his protected status, (3) he was subjected to unwelcome conduct or communication involving his protected status, (4) the unwelcome conduct was intended or did in fact substantially interfere with his employment or created an intimidating, hostile, or offensive work environment, and (5) respondeat superior. *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996).

Plaintiff testified at his deposition that he attended a shift meeting in 2002 or 2003 where Leigh Rodney, who is defendant's owner, told employees that if they didn't like the way he ran the company they could go back and pick cotton.² Plaintiff also testified about a dog incident that occurred in 2004. He said that he had just entered the office to make some copies.

(...continued)

immediately preceding the filing of his complaint).

² Although defendant presented evidence, which, if believed, would establish that this meeting occurred outside the period of limitations, plaintiff's deposition testimony indicated that the meeting occurred in either 2002 or 2003. It is well settled that the Court "is not permitted to assess credibility, or to determine facts" on a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Although a reasonable jury might conclude that defendant's evidence establishes that the statement occurred more than three years before plaintiff filed his complaint, a reasonable jury might also conclude that defendant's records are incomplete and that the testimony contradicting plaintiff's testimony is not credible.

And when I went in the front office, Don Meade was sitting to my right, and Leigh Rodney and his dog was in the other section of the front office. When I came in the office, Leigh Rodney's dog was on top of him. He had a chain in his hand. Leigh pointed at me and told his dog to sic me, I was a black man. He said he trained black dogs to bite black men. When I went into the other section of the office, his dog came and tried to bite me.

Rodney testified that he made the statement as a joke in response to plaintiff's reaction to seeing the dog. He further testified that it was his experience that black people are more afraid of dogs than white people and that this was a "discussed fact" among people at his home in the Bahamas. Thus, according to Rodney, his remark was merely a joking reference to plaintiff's unreasonable reaction to seeing the dog. However, based on this incident and Rodney's testimony concerning his beliefs about black people, a reasonable jury could conclude that Rodney deliberately acted with the intent to humiliate and intimidate plaintiff. Further, a reasonable jury could conclude that this incident, in conjunction with the picking cotton reference, is indicative of Rodney's general attitude towards his black employees and how he treated them. Hence, a reasonable jury could conclude that defendant created a hostile work environment for plaintiff that adversely affected his work performance. *Radtke v Everett*, 442 Mich 368, 394-395; 501 NW2d 155 (1993).

IV

Plaintiff also presented sufficient evidence to create a question of fact on his claim that he was not promoted because of his race. Proof of discriminatory treatment in violation of the civil rights act 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). Where there is direct evidence of unlawful discrimination, it is unnecessary to engage in a burden shifting analysis. *Id.* at 132-133. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Id.* at 133. However, where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff in a direct evidence case must prove that he or she was qualified for the position and that the discriminatory animus was a substantial or motivating factor in the adverse decision. *Id.*

Plaintiff testified that in late 2002 the position of warehouse supervisor became available after the previous supervisor died. Plaintiff stated that Keith McLean, Dave Ryan and Tim Kempa met in Ryan's office and discussed who would become the new warehouse supervisor. Plaintiff testified that Mark Gildon was called into the office first. Plaintiff further testified that he and Rick Kinsey stood outside the door after Gildon went in the office. Plaintiff stated that he heard Gildon tell the others that he "refused to take orders from a black man." Shortly after this, plaintiff was called into the office and told that Gildon would be the new supervisor. Plaintiff stated that he protested that he had more seniority and that Ryan responded, "What is seniority? Seniority don't mean nothing no more."

The evidence concerning Gildon's statement coupled with the testimony that plaintiff was immediately told that he would not receive the promotion despite his seniority is direct evidence that the decision not to promote plaintiff was motivated by plaintiff's race. *Id.* Further, although defendant presented evidence that suggests that plaintiff was not as qualified as the

individual actually promoted, plaintiff has presented evidence from which a jury could conclude that he was qualified for the position. *Id.* Hence, plaintiff established the elements of this claim.

V

Because plaintiff presented evidence from which a jury could conclude that defendant subjected plaintiff to a hostile work environment and decided not to promote him based on his race, the trial court erred when it granted summary disposition in favor of defendant.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder