STATE OF MICHIGAN

COURT OF APPEALS

LARRY BYERS,

Plaintiff-Appellant,

v

HONEYTREE II LTD PARTNERSHIP, d/b/a THE CROSSINGS AT CANTON,

Defendant-Appellee,

and

PREMIER APARTMENT STAFFING SERVICES, INC.,

Defendant.

UNPUBLISHED
February 11, 2010

No. 288907
Wayne Circuit Court
LC No. 07-710200-CD

Before: Sawyer, P.J., and Saad and Shapiro, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting summary disposition in favor of defendant Honeytree II Ltd Partnership ("The Crossings") on plaintiff's claim for wrongful termination based upon racial discrimination. We affirm.

Plaintiff was employed by Premier Apartment Staffing Services, which supplies temporary employees to apartment complexes. Plaintiff was assignment to a temporary position at The Crossings apartment complex as a maintenance technician beginning September 13, 2006, to assist the regular maintenance crew employed by The Crossings in bringing vacant units into rentable condition as part of a sale of the complex that was originally scheduled to be completed at the end of November.

It is undisputed that during plaintiff's tenure at The Crossings he was racially harassed by one of The Crossings maintenance workers, Robert Valez, who routinely addressed plaintiff with racial slurs. Plaintiff claims that he made a number of complaints to his immediate supervisor, Paul Herron, his "crew leader" (the same position held by Valez). According to plaintiff, after another incident on October 23 he complained again to Herron, who suggested that they take the matter to Valez's supervisor, Clint Hall. Defendant claims that it took prompt remedial measures, directing Valez to stop the harassment. Although plaintiff in his deposition stated that

he did not know what, if any, action The Crossings took, he did concede that Valez's harassment stopped after the complaint to Hall.

On November 6, plaintiff's assignment to The Crossings was terminated. Premier Staffing assigned him to a comparable position at a different work location two days later. Defendant's stated reason for the termination of the position at The Crossings is that the closing date of the sale of the apartment complex had been postponed and The Crossings believed that it was now able to complete the necessary work with its own regular maintenance crew.

Plaintiff thereafter filed the instant action against both The Crossings and Premier Staffing alleging a single count of wrongful termination based upon racial discrimination. The claim against Premier was dismissed by stipulation of the parties and only the claim against The Crossings is relevant to this appeal.

On appeal, plaintiff raises two issues. First, the trial court erred in granting summary disposition in favor of defendant. And, second, the trial court erred in refusing to enforce an agreement to arbitrate. We will consider the second issue first because, if plaintiff is correct that the matter should have been submitted to arbitration, the issue of summary disposition becomes moot.

During the pendancy of the action, the parties negotiated the possibility of submitting the matter to arbitration rather than proceeding to trial. Plaintiff claims that the parties reached an agreement to arbitrate on June 19, 2008, before the trial court's grant of summary disposition on August 1.[1] Defendant argues that not only had the parties never actually reached an agreement to arbitrate, even if there was an agreement it was for common-law arbitration rather than statutory arbitration and, therefore, defendant had the right to unilaterally revoke its agreement to arbitrate any time before an arbitration award was announced. And, because no such award has been announced, it obviously has done so.

In granting summary disposition, the trial court assumed that the writings referred to by plaintiff constituted an arbitration agreement, but because there was no clause in those writings providing for a circuit court judgment to be entered upon the arbitration award,[2] it constituted a common-law arbitration rather than a statutory arbitration and, therefore, defendant did have the right to unilaterally revoke any agreement to arbitrate. We agree with the trial court.

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[1] Plaintiff makes this argument in his brief on appeal, despite the fact that he also states in the very same paragraph of that brief that he "had a few questions about the Arbitration Agreement and Arbitration High-Low Agreement and the parties discussed them on Tuesday, August 5, 2008 after which Plaintiff and Plaintiff's counsel signed and returned the Arbitration Agreement and Arbitration High-Low Agreement to Defendant's counsel." It should also be noted that the agreement was never signed by defendant or defendant's counsel, though plaintiff argues that a signing is unnecessary to enforce the agreement.

[2] In fact, the trial court noted that the arbitration agreement signed by plaintiff and his attorney provided that the circuit court action would be dismissed with prejudice upon the execution of the arbitration agreement.

On appeal, plaintiff focuses on the issue whether the unsigned writings are sufficient to satisfy the requirements of the arbitration act under MCL 600.5001 that the arbitration agreement be in writing. Plaintiff avoids the issue whether that agreement must include a provision that "a judgment of any circuit court shall be rendered upon the award made pursuant to such submission." MCL 600.5001(1). In order to be considered statutory arbitration rather than common-law arbitration, the arbitration agreement must include a provision that the circuit court enter a judgment upon the arbitration award. *Tellkamp v Wolverine Mut Ins Co*, 219 Mich App 231, 237; 556 NW2d 504 (1996); *Beattie v Autostyle Plastics, Inc*, 217 Mich App 572, 578; 552 NW2d 181 (1996) ("Because the parties' agreement did not provide that judgment shall be entered in accordance with the arbitrators' decision, this case involves common-law arbitration, and the procedures regarding 'statutory arbitration' are not applicable."). See also *Wold Architects and Engineers v Strat*, 474 Mich 223, 231; 713 NW2d 750 (2006).

Because plaintiff does not point to any such provision in the "agreement," then even if there was an agreement to arbitrate, it was for common-law rather than statutory arbitration. And common-law arbitration allows for unilateral revocation at any time before the announcement of the arbitration award. *Id.* And, because defendant clearly no longer wishes to arbitrate this dispute, the trial court correctly concluded that it could not compel defendant to submit this claim to arbitration.

This conclusion thus renders it necessary to determine whether the trial court correctly granted summary disposition on the claim itself. We conclude that it did. The trial court granted summary disposition under MCR 2.116(C)(10) for three reasons: (1) that plaintiff failed to establish a prima facie case of a hostile work environment because there was no complaint to "higher management" until the October 23 complaint to Clint Hall, after which plaintiff concedes Valez ceased the harassment; (2) that plaintiff failed to support his disparate treatment claim because he provided no evidence that he was replaced by a worker not a member of the protected class; and (3) that plaintiff failed to support his retaliation claim by showing that the termination of his assignment to The Crossings was related to his complaint of the harassment by Valez.

A ruling on a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo and the motion tests the factual support of the claim. *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 620; 637 NW2d 536 (2001). If the party opposing the motion fails to present documentary evidence establishing the existence of a genuine issue of material fact, the motion should be granted. *Id.*

On appeal, plaintiff has abandoned the disparate treatment and retaliation claims as he only argues that the trial court erred in concluding that there was no complaint made to "higher management" until the October 23 complaint to Clint Hall. Plaintiff argues that his complaints to Herron were sufficient because on his first day of work at The Crossings, Hall directed him to refer any problems to Herron.

In order for an employer to be responsible for a hostile work environment, it is necessary that it failed to adequately investigate and take prompt, appropriate action upon receiving notice of the hostile work environment. *Id.* at 621. In order for defendant to have adequate notice, it was necessary for the harassment to be reported to "higher management." *Id.* at 622. "Higher management" means "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining

the offensive employee." *Id.* That is, "management employees who have actual authority to effectuate change in the workplace." *Id.* at 623.

Plaintiff does not dispute that Herron is not higher management.[3] Rather, he argues that as his immediate supervisor, Herron served as a "proxy" for Hall in this matter. This issue was addressed in *Sheridan*. In *Sheridan*, the plaintiff was employed as a custodian at the defendant's aquatic center. The plaintiff was sexually harassed, including being raped, by a fellow custodian. Sometime thereafter both had been assigned to a different building, Northern High School, and the plaintiff expressed "some of her concerns" to the Head Custodian at Northern. *Id.* at 623-624. On appeal, this Court rejected the plaintiff's argument that that constituted a report to higher management:

> All recommendations regarding hiring, firing, pay, job assignments, hours, and discipline of custodians were made by Northuis, Finch, and VanderJagt. Therefore, Northuis, Finch, and VanderJagt are the only individuals involved that could reasonably have their knowledge imputed to defendant. [*Id.* at 624.]

We think it clear under *Sheridan* that a report to an immediate supervisor, even one who might handle issues arising during the performance of their jobs, is insufficient to trigger the employer's liability. Rather, liability arises only when higher management learns of the problem and fails to take appropriate action.

In the case at bar, higher management learned of the problem when a complaint was made to Hall. At that point, the problem was addressed and Valez no longer harassed plaintiff. Accordingly, the trial court properly granted summary disposition in favor of defendant.

Affirmed. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Douglas B. Shapiro

[3] In fact, it appears that Herron and Valez held the same position, so Herron would presumably not have the authority to discipline Valez in any event.