STATE OF MICHIGAN

COURT OF APPEALS

BILAL SEKOU and ROSEMARIE SEKOU,

Plaintiffs-Appellants,

v

CMS ENERGY CORPORATION d/b/a CONSUMERS ENERGY, CAREY PLANCK and CHUCK ESLINGER,

Defendants-Appellees,

and

JOHN DOE I[1],

Defendant.

UNPUBLISHED
September 20, 2011

No. 297879
Wayne Circuit Court
LC No. 08-125172-NO

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Bilal Sekou challenges the trial court's rulings on three separate motions for summary disposition, which ultimately resulted in the dismissal of all of Sekou's employment discrimination claims premised on religious discrimination, retaliatory discharge and hostile work environment. We affirm.

The grant or denial of a motion for summary disposition is reviewed de novo.[2] The nonmoving party is required to provide facts and evidence in addition to his or her pleadings to demonstrate the existence of a genuine issue of material fact.[3] "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."[4] As noted by the trial court, several of the

[1] John Doe I was identified as Kevin Carey, a field leader with Consumers Energy.

[2] *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001) (citations omitted).

[3] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); MCR 2.116(G)(5).

[4] *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

allegations pertaining to Sekou's claims of wrongful employment termination were barred by the statute of limitations. "Questions regarding whether a statute of limitation bars a claim . . . are [also] reviewed de novo. . . ."[5]

Sekou contends the termination of his employment by Consumers Energy was wrongful based on theories of religious discrimination, retaliatory discharge and hostile work environment. The trial court granted summary disposition in favor of Consumers Energy and the various individual defendants based on Sekou's failure to come forward with evidence in support of his claims, the preclusion of certain alleged instances of discrimination or wrongful conduct being barred by the statute of limitations and the inability of Sekou to demonstrate that he was qualified for the position or to show that the reasons provided by Consumers Energy for his discharge were pretextual.

Employment discrimination is prohibited by the Civil Rights Act.[6] In asserting an employment discrimination claim, Sekou is required to demonstrate, in addition to proving that he suffered an adverse employment decision, that his religion was also a factor that led to the adverse action.[7] Unlawful discrimination can be proven by either direct or circumstantial evidence.[8] Direct evidence has been defined as comprising "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions."[9]

If relying on indirect evidence to establish employment discrimination, Sekou is required to establish a rebuttable prima facie case involving evidence or proofs that would permit a finder of fact to infer that he was the victim of unlawful discrimination.[10] To establish a prima facie case of discrimination Sekou must demonstrate that (a) he or she was a member of a protected class, (b) was the victim of an adverse employment action, (c) was qualified for the employment position, and (d) the action taken by Consumers Energy gives "rise to an inference of unlawful discrimination."[11] To satisfy this final element Sekou is required to show that Consumers Energy either gave the job to another individual in circumstances that would permit an inference of unlawful discrimination or that Consumers Energy treated Sekou in a manner that was different from other non-protected individuals for engaging in the same conduct or behavior.[12] If

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[5] *Vance v Henry Ford Health Sys*, 272 Mich App 426, 429-430; 726 NW2d 78 (2006) (internal citations omitted).

[6] MCL 37.2202(1)(a).

[7] *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 362; 597 NW2d 250 (1999); *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001).

[8] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132; 666 NW2d 186 (2006).

[9] *Id.* at 133 (internal quotation marks and citations omitted).

[10] *Id.* at 134.

[11] *Hazle*, 464 Mich at 463.

[12] *Id*. at 468.

Sekou is able to successfully present a prima facie case, the burden then shifts to Consumers Energy to assert a legitimate, nondiscriminatory explanation for the adverse employment action taken. Upon demonstration by Consumers Energy of a legitimate and nondiscriminatory reason for the discharge or action, the burden once again shifts back to Sekou to show that Consumers Energy's stated explanation for the action comprises a mere pretext for discrimination.[13]

Although Sekou asserts he was subjected to various incidents involving negative statements pertaining to Muslims by some co-workers, the vast majority of these alleged incidents were vague and without a temporal reference or clearly occurred well outside the three year statute of limitations. The one negative statement Sekou attributed to Charles (Chuck) Eslinger purportedly occurred in the mid-1990's, without recurrence. Similarly, many statements by co-workers were alleged to have occurred shortly following the terrorist attacks on "9-11." Consistent with the trial court's ruling these incidents are not actionable because they are barred by the limitations period, but may be considered consistent with the established rules of evidence. Specifically, this Court has ruled:

> [A]cts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination. This evidence is subject to the rules of evidence and applicable governing law, and may be admitted under the sound discretion of the trial court. We note that our decision to adopt this rule of law does not resurrect the continuing-violations doctrine. Unlike under the continuing-violations doctrine, a plaintiff cannot recover for any injury suffered as a result of a prior act occurring outside the limitations period. However, we find no reason why the use of such acts as background evidence should not be subject to Michigan's evidentiary rules and the trial court's discretion to admit it.[14]

The only remaining incidents asserted by Sekou occurring within the limitation period involved another employee shouting, "Someone stop Bilal and see if he has any bombs" when Sekou entered a meeting. Sekou also made vague allegations that "he has been confronted about being a Muslim" by individuals within his department. He indicated that three co-workers "began to engage in a pattern of remarks coinciding with news reports of fallen US troops abroad." He further asserted that Carey Planck made comments suggesting the elimination of Muslims by violent means and would engage in incomprehensible muttering, which Sekou perceived as threatening. Sekou acknowledged that he did not report these incidents to Consumers Energy as he assumed there would be no action taken. In contrast, Consumers Energy provided affidavits from several employees and management staff indicating that they had never overheard or had not engaged in such comments. Because Sekou has not tied or

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[13] *Id*. at 463-466; *Wilcoxon*, 235 Mich App at 359, citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[14] *Campbell v Dep't of Human Srvs*, 286 Mich App 230, 238; 780 NW2d 586 (2009) (footnote omitted).

linked these alleged comments to his discharge, he has not provided direct evidence of religious discrimination.

Having failed to provide any direct evidence that "unlawful discrimination was at least a motivating factor in the employer's actions,"[15] to succeed on his claim Sekou must establish a prima facie case of discrimination by demonstrating (a) his membership in a protected class, (b) that he was the victim of an adverse employment action, (c) he was qualified for the particular job and (d) that the action taken by the employer gives rise to an inference of unlawful discrimination.[16] Neither party disputes that Sekou is a member of a protected class or that he was the recipient of an adverse employment action. The dispute centers on Sekou's qualification for his position and whether the action taken by the employer gives rise to an inference of unlawful discrimination.

Sekou's claim of religious discrimination must fail as a matter of law. Even if Sekou were able to establish a prima facie case of discrimination, which he cannot, Consumers Energy and the individual defendants have satisfied their burden by demonstrating legitimate, nondiscriminatory reasons for terminating his employment. Sekou had a documented history of prolonged and serious performance deficiencies resulting in the revocation of his occupation qualifications (OQs) and his failure, despite several opportunities, to successfully pass the test required to reinstate his OQs and resume his regular job responsibilities. This evidence was undisputed and demonstrated that Sekou was not qualified for his position.

In addition, Consumers Energy asserted that Sekou had engaged in verbal threats, which led to his discharge. Sekou does not dispute having made the alleged statements merely that he did not construe his words to constitute threats. Sekou's personal interpretation is self-serving and irrelevant as the inability to demonstrate that he was qualified for the position was sufficient to constitute a legitimate, nondiscriminatory basis for his discharge. Sekou has presented no evidence to show that the reasons provided by Consumers Energy were pretextual.

Sekou also contends his discharge was in retaliation for the filing of a complaint with the EEOC. The lower court record demonstrates that Sekou filed complaints with the EEOC in 1994, 2000 and 2008, in addition to an unrelated lawsuit in 1997.[17] The majority of these claims are outside the statutory limitation period. In his most recent EEOC claim, Sekou alleged that Consumers Energy was refusing to provide him with remedial training but would provide it to Caucasians. Although following the submission of a response by Consumers Energy outlining the various opportunities provided for his training and his subsequent withdrawal of this charge, Seiko asserts his discharge was in retaliation for filing the EEOC claim and in anticipation of his filing the underlying lawsuit.

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[15] *Sniecinski*, 469 Mich at 133.

[16] *Hazle*, 464 Mich at 463.

[17] Sekou also purportedly alleged that he filed a claim with the EEOC in 1996, but no record of such a filing was ever produced.

To demonstrate retaliatory discharge under the Civil Rights Act[18] Sekou must prove that he was (a) engaged in a protected activity, (b) Consumers Energy was aware of or knew he was engaged in a protected activity, (c) Consumers Energy engaged in an adverse employment action regarding Sekou, and (d) there exists a causal connection between the protected activity and the adverse employment action taken.[19] A protected activity is deemed to encompass the following activities:

> [T]he person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.[20]

First, Sekou cannot demonstrate retaliation as there is no evidence that Consumers Energy knew he was engaging in the protected activity of filing an EEOC claim when it made the decision to undertake an investigation of his performance deficiencies four days *before* the filing of the claim. Although Sekou contends he verbally indicated to co-workers his intent to file the underlying lawsuit, he provided no evidence that such information was available or made known to Consumers Energy.

Second, the mere fact that the investigation of Sekou's work performance, suspension of his OQs and subsequent discharge were temporally related to the filing of his EEOC claim and lawsuit, such a relationship is insufficient to establish causation. "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination based retaliation is claimed."[21] It is incumbent on Sekou to prove that his participation in a protected activity constituted a "significant factor" in the adverse employment action undertaken by Consumers Energy, not simply the existence of "a causal link between the two."[22]

The evidence presented demonstrates that Sekou was terminated from his employment with Consumers Energy because of his verbal threats and failure to qualify for reinstatement of his OQs, precluding his performance of job responsibilities and his qualification to retain his position. Sekou failed to demonstrate that the individuals making the decision to investigate his performance deficiencies and terminate his employment knew of his filing of the EEOC claim and lawsuit or that such knowledge influenced these decisions. Sekou's contention that Eslinger was aware of the filing of his EEOC complaint is disingenuous, as the e-mails he relies on as evidence were dated after the determination was made to investigate Sekou's job performance and are irrelevant. Similarly, Sekou's contention that various medical examiners deemed him

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[18] MCL 37.2701(a).

[19] *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003).

[20] MCL 37.2701(a).

[21] *West*, 469 Mich at 186.

[22] *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001) (internal quotation marks omitted).

not to be a threat and capable of returning to work is not pertinent as he was discharged for making threats and not for being an actual threat. As this Court has previously indicated, "[i]t is insufficient for a plaintiff to simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer. . . ."[23] Summary disposition, therefore, of Sekou's claim of retaliatory discharge was proper as a matter of law.

For similar reasons, Sekou's hostile work environment claim is not sustainable. As discussed by our Supreme Court:

> An examination of the Michigan Civil Rights Act reveals that there are five necessary elements to establish a prima facie case of hostile work environment:
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> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of [religion].
>
> (3) the employee was subjected to unwelcome [religious conduct or communication;
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> (4) the unwelcome [religious] conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offense work environment; and
>
> (5) respondeat superior.[24]

In addition:

> [A] hostile work environment claim is actionable when the work environment is so tainted that, in the totality of the circumstances, a reasonable person in the plaintiff's position would have perceived the conduct at issue as substantially interfering with employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.[25]

Even assuming the truth of the disputed allegations regarding the offensive verbal statements by co-workers related to Sekou's religious affiliation, based on his acknowledged failure to give notice to the employer regarding these incidents Sekou cannot establish the element of respondeat superior.

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[23] *Campbell*, 286 Mich App at 241 (internal quotation marks and citation omitted).

[24] *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).

[25] *Id.* at 372.

Sekou is also unable to demonstrate that Eslinger isolated him from non-Muslim co-workers by requiring him to sit in his truck or that making computer entries designating "MED" were somehow related to his religious beliefs. Sekou's allegations when viewed within the context of a claim of disparate treatment, cannot be sustained based on the unrebutted legitimate and nondiscriminatory reasons provided by Consumers Energy to explain Sekou's periods of down time based on job assignment restrictions as the result of the suspension of his OQs, the time spent by Sekou to compensate for his mosque attendance and use of the "MED" designation to signify job assignment availability due to limited duty status. The same is true of his assertion that the alteration in accommodation that permitted him to attend mosque was attributable to discrimination, retaliation or contributed to a hostile work environment. Sekou had a long-standing accommodation that permitted him to attend weekly religious services. Due to the time required for attendance, it was necessary for him to work additional time to offset the time away from work without any resultant pay decrease. Sekou was unable to demonstrate that the mere fact that he was now required to use his personal vehicle to attend services in any way impacted his employment. The explanation provided by Consumers Energy adequately demonstrated the existence of a legitimate, nondiscriminatory basis for this slight policy change.

Sekou's remaining claims against the individual defendants could not be sustained. Sekou asserted Carey "unlawfully suspended his OQs and restricted his overtime" and interfered with his religious observance and accommodation by requiring Sekou to use his personal vehicle to attend mosque. Contrary to these assertions, the undisputed affidavit of Sekou's supervisor John Phillips indicated that it was his decision to suspend the OQs and that it was at his instruction that the change in accommodation occurred. Sekou failed to provide evidence to dispute that dispatchers and schedulers assigned overtime, not Carey and ultimately admitted the procedure for assignment did not involve Carey. Similarly, Sekou's claims against Planck were not sustainable based on the absence of evidence that Planck had any supervisory or management authority over Sekou as a gas services worker with Consumers Energy and, therefore, cannot be construed of as an "agent" for purposes of incurring individual liability for violation of Civil Rights Act.[26]

Sekou also asserts the trial court erred in determining that two co-employees who were not members of a protected class, Dennis Walker and Aaron Tucker, were not similarly situated. Sekou contends that the discipline imposed on Walker and Tucker was less than or significantly different from that applied to Sekou despite the serious nature of their errors in the workplace as compared to the incidents detailed of his deficient performance. Our Supreme Court has determined that to create a rebuttable presumption of discrimination, a plaintiff is required to produce evidence that he "was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct."[27]

[26] *Elezovic v Ford Motor Co*, 274 Mich App 1, 10; 731 NW2d 452 (2007).

[27] *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

The term "similarly situated" has been defined to mean "'all of the relevant aspects' of his employment situation were 'nearly identical' to those of [other employees'] employment situation[s]."[28] Sekou argues the trial court erred in not evaluating or considering the similarity of Sekou and his co-workers positions with Consumers Energy and focusing solely on the limited aspect of the severity of their respective errors resulting in disciplinary action. In making this assertion, Sekou ignores the requirement that to be deemed "similarly situated" he must demonstrate that "all of the relevant aspects" of his employment with Consumers Energy were "nearly identical" to the employees he seeks to be compared. No one disputed that Sekou, Walker and Tucker held the same position with the employer and had been engaged in the same job duties. What separated and distinguished these two individuals from Sekou was the severity and repetitive occurrence of incidents of deficient job performance by Sekou.

While evidence indicated that Turner and Walker had each been involved in an accidental mercury spill, these incidents, while serious and no doubt expensive to Consumers Energy to rectify, were not comparable to Sekou's admitted repetitive failure to properly effectuate repairs and resulting in significant safety concerns for customers and expense necessitating a thorough review of the work he performed. As indicated by the trial court, this placed Sekou, when compared to his co-workers, in a league of his own. This level of performance discrepancy, precluding Sekou's demonstration that he was "nearly identical" in "all relevant aspects" of his employment to the identified co-employees was further buttressed by the affidavit of Charles Eslinger, in which he averred that in his experience as a supervisor "no other Gas Service Worker A . . . has come to my attention who has a record of performance deficiencies, car accidents, and/or other performance issues or disciplines as serious as Bilal Sekou's." In a similar vein, Janice Willis, a senior human resources consultant with Consumers Energy, also averred that Sekou "has had his OQs revoked more often than any other employee in the Company. . . ." Thaddeus Popa, a senior employee development consultant with Consumers Energy also identified Sekou as "[t]he individual with the highest record performance issues. . . ." further affirming that neither of the two individuals alleged to be "similarly situated" were comparable to Sekou in terms of performance deficiency.

Sekou also cannot demonstrate that Turner and Walker were treated more favorably as they both received written disciplinary action for their mercury spills as did Sekou for his failure to properly install an orifice in the furnace that first brought to light his suspected and acknowledged errors in other repair jobs assigned. What distinguished Sekou from the identified co-workers is not the type of discipline received for a particular performance error, but rather Sekou's repetitive serious repair deficiencies necessitating Consumers Energy to undertake a review of all work he performed over an extended period to ascertain and rectify safety concerns to its customers stemming from his repairs. Based on this distinction, the trial court properly concluded that Turner and Walker could not be construed as "similarly situated" to Sekou.

Sekou further contends it was error for the trial court to have prepared a written opinion before the conclusion of oral argument on a motion for summary disposition. It is a well

[28] *Id.* at 699-700, citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994).

recognized precept that trial courts are endowed with an inherent power to "manage their own affairs so as to achieve the orderly and expeditious disposition of cases."[29] "An exercise of the court's 'inherent power' may be disturbed only upon a finding that there has been a clear abuse of discretion."[30] Summary dispositions are subject to review de novo.[31] Claims pertaining to the violation of due process are also reviewed de novo.[32]

While Sekou implies that the trial court's having prepared an opinion before conclusion of oral argument comprised a violation of his right to procedural due process, he fails to actually support his contention with relevant case law. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'"[33] Sekou does not assert that he was denied an opportunity to engage in oral argument, merely that the trial court was prepared to rule based on the briefs and documentation before it after having found his verbal arguments at hearing to be unpersuasive.

There exists no basis for Sekou's assertion that the trial court's preparedness to rule constitutes an issue for appellate review. The court rules clearly state, "A court may, in its discretion, dispense with or limit oral arguments on motions, and may require the parties to file briefs in support of an in opposition to a motion."[34] In the context of a civil case, due process typically requires notice of the nature of the proceedings, a meaningful time and manner for hearing, and the presence of an impartial decision maker.[35] Sekou is unable to establish a violation or failure to meet any of these requirements. Sekou was provided and responded to the motion for summary disposition, which was scheduled for a hearing. A hearing was conducted at which counsel were able to present arguments orally to the trial court in addition to the submission of briefs and supporting evidence and documentation. There is no assertion or viable contention that the trial judge was not impartial, merely that he was prepared to rule based on the evidence before him.

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[29] *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

[30] *Id.* at 388 (citation omitted).

[31] *Kuznar v Raksha Corp*, 481 Mich 169, 175; 750 NW2d 121 (2008).

[32] *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002).

[33] *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[34] MCR 2.119(E)(3).

[35] *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Finally, Sekou contends the trial court's grant of the third motion for summary disposition was in error because it was untimely. This Court reviews the interpretation and application of court rules de novo.[36]

Motions for rehearing or reconsideration are governed by the court rules.[37] First and foremost, it is clear from the order issued by the trial court that it construed the third motion as a motion for summary disposition and not a motion for reconsideration as evidenced by the trial court's indication that it construed it to be a "renewed" motion for summary disposition. Second, this Court need not decide whether the motion was brought under the correct court rule, as the Court will not reverse a trial court's order if it attained the right result, albeit even for a wrong reason.[38]

Sekou does not dispute Consumers Energy's contention that the motion was filed within the time frame permitted by the trial court for dispositive motions. A review of the file indicates that the second motion for summary disposition did not address Sekou's claims that Eslinger "isolated" him from non-Muslim co-workers and required him to use the code "MED" on the computer. Consequently, the hearing on the third motion did not comprise a rehearing or reconsideration of an argument raised in an earlier dispositive motion. Finally, even if the third summary disposition motion were to be construed as a motion for rehearing it would be timely as the court rule requires "a motion for rehearing or reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion."[39] The order memorializing the trial court's ruling following hearing on the second motion for summary disposition was entered on March 15, 2010. The third motion was filed on March 2, 2010, 13 days *before* entry of the order. Even using the date of hearing of the second motion of February 19, 2010, the filing of the third motion was within the 21 day requirement, having been filed on March 2, 2010. Sekou's claim asserting error by the trial court in failing to strike the third motion is insupportable.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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[36] *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 336; 602 NW2d 596 (1999).

[37] MCR 2.119(F).

[38] *Etefia*, 245 Mich App at 470; *Welch v Dist Court*, 215 Mich App 253, 256; 545 NW2d 15 (1996).

[39] MCR 2.119(F)(1).