STATE OF MICHIGAN

COURT OF APPEALS

LEONARD THOMAS,
UNPUBLISHED
Plaintiff–Appellant,

December 13, 1996

v

No. 181318
Oakland County
LC No. 94-471157

AIN PLASTICS OF MICHIGAN, INC., MEL ETTENSON, BRIAN MCCULLOUGH, DAVID DITTMAN and ROBERT BOGNER,

Defendants–Appellees.

Before: McDonald, P.J., and White and P. J. Conlin*, JJ.

PER CURIAM.

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

Plaintiff was employed by defendant company for approximately 4 1/2 years. He was terminated on January 5, 1994. The reason given by defendant for the termination was plaintiff's poor attendance record. Plaintiff filed a complaint against defendants, alleging his termination was based on his race.

The trial court granted defendants' motion for summary disposition and dismissed plaintiff's discrimination claim. We affirm.

Plaintiff argues that the trial court improperly weighed the credibility of the evidence in granting defendants' motion. The trial court may not make findings of fact or assess credibility in deciding a motion for summary disposition. *Skinner v Square D Company*, 445 Mich 153; 516 NW2d 475 (1994). During the hearing on the motion for summary disposition, the trial court stated, "[o]f course, that's what he says but everybody else says differently?" In reviewing the record, we agree the trial

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* Circuit judge, sitting on the Court of Appeals by assignment.

court weighed the credibility of the evidence. However, because plaintiff failed to present a prima facie case of race discrimination, summary disposition was proper. Where a trial court reaches the correct result for the wrong reason, this Court will not reverse on appeal. *Reisman v Regents of Wayne State University*, 188 Mich App 526; 470 NW 2d 678 (1991).

A prima facie case of discrimination can be made by proving either disparate treatment or intentional discrimination. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645; 513 NW2d 441 (1994). In order to establish a prima facie case of race discrimination under a disparate treatment theory, plaintiff must show he was a member of a protected class, and that, for the same conduct or performance, he was treated differently than one who was a member of a different race. *Betty v Brooks & Perkins*, 446 Mich 270; 521 NW2d 518 (1994). The crux of the disparate treatment theory of discrimination is that there are similarly situated individuals who have been treated differently because of their class. *Schultes v Naylor*, 195 Mich App 640; 491 NW2d 240 (1992). To establish a prima facie case of race discrimination under the intentional discrimination theory, a plaintiff must establish (1) he is a member of a protected class, (2) an action was taken with respect to his employment, (3) the acting person was predisposed to discriminate against persons in his class, and (4) the action was actually motivated by that predisposition. *Coleman-Nichols*, *supra*, at 651. Where a defendant puts forth a legitimate, nondiscriminatory reason for its actions, the plaintiff has the burden of showing the proffered reason was merely a pretext. *Lytle*, *supra*, at 192; *Coleman-Nichols*, *supra*, at 651.

Plaintiff, an African American, failed to come forward with any evidence he was treated differently than similarly situated white employees or that his discharge was motivated by a predisposition to discriminate against him because of his race. Plaintiff's argument he was not considered for certain positions because of his race fails because in one instance the employee chosen instead of him was better qualified and in the other instances, the employees chosen were also African Americans. Plaintiff was also unable to show he was paid less, or received less vacation time or overtime than similarly situated employees and his claims he was harassed about absenteeism and tardiness because of his race failed because white employees were also reprimanded for similar attendance records. Plaintiff failed to present a prima facie case of race discrimination.

Finally, plaintiff failed to establish the reason given by defendants was a pretext. Defendants offered plaintiff's time cards as evidence of tardiness, the claimed reason for his discharge. Plaintiff failed to come forward with any specific evidence disputing he was tardy. Therefore, the trial court did not err in granting defendants' motion for summary disposition.

Plaintiff also argues the trial court erred in finding no genuine issue of material fact as to whether defendants' terminated his employment in retaliation for his threat he would consult an attorney about job discrimination. Employers are prohibited from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the Elliott-Larsen Civil Rights Act ("CRA"). MCL 37.2701(a); MSA 3.548(701)(a); *McLemore v Detroit Receiving Hospital*, 196 Mich App 391; 493 NW2d 441 (1992).

Plaintiff testified in his deposition that he threatened to contact a lawyer around the time he received the notice of probation and that he told his employer he ought to consult an attorney before signing the notice of probation. However, plaintiff did not threaten he was planning to see an attorney about job discrimination in violation of the Elliott-Larsen Civil Rights Act. Because plaintiff was not making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing, plaintiff's termination could not be considered retaliation under the CRA. *McLemore*, *supra*, at 395-396. The trial court did not err in summarily dismissing plaintiff's retaliation claim.

Affirmed.

/s/ Gary R. McDonald
/s/ Patrick J. Conlin