STATE OF MICHIGAN

COURT OF APPEALS

KEVIN L. HATMAKER,

Plaintiff-Appellant,

v

XEROX, PATRICIA DUFAULT, KRYS KLUCK and WILLIAM COLLINS,

Defendants-Appellees.

UNPUBLISHED
June 30, 1998

No. 200685
Washtenaw Circuit Court
LC No. 95-001982 NO

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

Plaintiff Kevin L. Hatmaker appeals as of right from an order granting summary disposition in favor of defendants. We affirm.

Following his initial hire as a trainee in either May or June, 1990, plaintiff became a marketing representative in defendant Xerox's Detroit district in January, 1991. Defendant Patricia DuFault was plaintiff's supervisor. In 1991, plaintiff had a good sales year. In September, 1991, plaintiff unsuccessfully sought a promotion that ultimately went to a female. Beginning in 1992, plaintiff's sales began to drop. In June, 1992, defendant again unsuccessfully sought a promotion that ultimately went to a female. In 1993, plaintiff's sales performance dropped further and in 1994, plaintiff still was not meeting Xerox's sales' expectations. Apparently in March, 1994, plaintiff filed a charge with the Michigan Department of Civil Rights (MDCR), alleging that he was denied promotions and job opportunities because, in part, he was a white male. In approximately September, 1994, defendant Krys Kluck became plaintiff's supervisor. In November, 1994, Kluck and defendant William Collins, general manager of Xerox's Detroit district, requested that plaintiff be discharged. Plaintiff was subsequently discharged on the ground of sustained poor sales performance.

Plaintiff filed this suit, alleging in his complaint the following five civil rights claims: (1) that in September, 1991, defendants unlawfully failed to promote him because he was a white male; (2) that in June, 1992, defendants unlawfully failed to promote him because he was a white male; (3) that during his employment defendants unlawfully retaliated against him for filing a charge with the MDCR; (4) that

defendants unlawfully discharged him because he was a white male, and; (5) that defendants unlawfully discharged him in retaliation for filing a complaint with the MDCR. In addition, plaintiff's complaint also alleged a wrongful discharge claim and a compelled self-defamation claim.

The trial court subsequently granted defendants' motion for summary disposition with respect to all claims. Concerning plaintiff's civil rights claims, the trial court used the *McDonnell Douglas*[1] burden-shifting approach. Specifically, the court assumed for the purpose of argument only that plaintiff had established the requisite prima facie cases and found that Xerox had offered legitimate business reasons for its employment decisions. The court determined that summary disposition in favor of defendants was warranted because plaintiff had failed to create a question of material fact that defendant's legitimate business reasons were a pretext for discrimination or retaliation.

A trial court's decision to grant a motion for summary disposition is reviewed de novo by this Court to determine if the defendant was entitled to judgment as a matter of law. *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 486; 532 NW2d 183 (1995). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court construes the evidence in favor of the nonmoving party. *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). The nonmoving party must set forth specific facts demonstrating that a genuine issue of material fact exists on which reasonable minds could differ. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); *Check Reporting Services, Inc v Michigan Nat'l Bank-Lansing*, 191 Mich App 614, 622; 478 NW2d 893 (1991).

On appeal, plaintiff raises five issues, the first two of which concern plaintiff's civil rights claims. Our review of the statement of questions presented for and the arguments made with respect to these first two issues indicates that the only civil rights claims appealed by plaintiff are the discriminatory failure to promote and retaliatory discharge claims. *Brookshire-Big Tree Ass'n v Onieda Twp*, 225 Mich App 196, 201; 570 NW2d 294 (1997); *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172, 178; 568 NW2d 365 (1997). We thus begin our analysis by considering these claims.

The Elliot Larson Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, provides, in relevant part, that an employer shall not discriminate or retaliate against an employee:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).]
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> * * *
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> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the 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. [MCL 37.2701(a); MSA 3.548(701)(a).]

A claim of unlawful discrimination or retaliation may be shown under ordinary principles of proof by the use of direct evidence. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). Alternatively, courts may use the *McDonnel Douglas* burden-shifting analysis as a framework for evaluating claims of unlawful discrimination or retaliation. *Booker v Brown & Williamson Tobacco Co*, 879 F2d 1304, 1311 (CA 6, 1989); *Matras, supra*. No matter whether the direct evidence approach or the *McDonnell Douglas* burden-shifting analysis is used, the plaintiff must always establish that the employer's nondiscriminatory or nonretaliatory reason was a pretext and that discrimination or retaliation was a determining factor in the employer's decision. *Booker, supra* at 1314; *Town v Michigan Bell Telephone Co*, 455 Mich 688, 696-697 (Brickley, J., with Boyle and Weaver, JJ., concurring), 707-708 (Riley, J.); 568 NW2d 64 (1997); *Matras, supra* at 682-683.

With respect to his discriminatory failure to promote claims, plaintiff first argues that the *McDonnell Douglas* approach is inapplicable to this case because he has direct evidence of discrimination consisting of Xerox's Balanced Workforce (BWF) strategy and statements by DuFault and Collins. Plaintiff contends that the trial court erred in failing to consider his direct evidence of discrimination.

With respect to the BWF strategy, we note that plaintiff and defendants both make unsupported assertions concerning the exact nature of Xerox's BWF strategy, i.e., whether it is an affirmative action plan and, if so, whether it is an approved or unapproved affirmative action plan. However, whatever its nature, the mere fact that the BWF strategy exists is not relevant to proving discrimination unless the employer acted pursuant to the plan. *Cerrato v San Francisco Community College Dist*, 26 F3d 968, 976 (CA 9, 1994). Thus, we conclude that the BWF strategy, standing alone, does not create a question of fact concerning discrimination.

Plaintiff also notes that he testified that DuFault explained that he did not receive the September, 1991, promotion "for quote 'balanced workforce reasons' unquote" and that "they just could not put a white male in that position." Stray workplace remarks, statements by non-decision makers, and statements by decision makers that are unrelated to the employment decision at issue do not constitute direct evidence that unlawful discrimination was a determining factor in the employer's decision. *Wells v New Cherokee Corp*, 58 F3d 233, 237-238 (CA 6, 1995); *McCarthy v Kemper*, 924 F2d 683, 686-687 (CA 7, 1991); *Harrison v Olde Financial Corp*, 225 Mich App 601, 608, n 7; 572 NW2d 679 (1997). Rather, to qualify as direct evidence of discrimination, such remarks must relate to the employment decision at issue. *McCarthy, supra* at 686.

In this case, DuFault's statements do not relate to the June, 1992, promotion decision and thus are not evidence of discrimination with respect to that decision.. DuFault's statements do relate to the September, 1991, promotion decision. However, DuFault also testified that she was not involved in the September, 1991, promotion interview or decision process. Plaintiff has failed to rebut this assertion. Thus, we conclude that DuFault's statements do not constitute direct evidence of discrimination with respect to the September, 1991, promotion decision where it is undisputed that DuFault was not the

person who made the decision concerning this promotion and no showing has been made that DuFault was consulted about or otherwise meaningfully involved in this decision. *Wells, supra*; *Harrison, supra*.

Plaintiff also notes that Collins testified "Yes," when asked by counsel whether he had "ever heard anyone within the Detroit district when considering a promotional decision make any statements that race or gender should be a consideration in determining a specific promotion?" When counsel asked whether Collins could say who would have made such a statement, Collins responded "No one in particular." Finally, Collins testified that he has the "final say-so" with respect to promotions in Xerox's Detroit district. However, Collins' testimony does not reflect any discriminatory motives on his part. Moreover, his testimony does not relate to the promotion decisions at issue or to the persons who would have made the initial decisions. Moreover, defendant's own brief concedes that Collins did not come to the Detroit district until 1994, well after both promotion decisions had been made. Thus, we conclude that Collins' testimony does not constitute direct evidence of discrimination in the September, 1991, and June, 1992, promotion decisions.

Alternatively, plaintiff argues that he presented a prima facie case of race and gender discrimination with respect to his failure to promote claims. Plaintiff further argues that the previously discussed evidence of the BWF strategy and statements by DuFault and Collins, along with evidence that he was more qualified for the promotion than the females who were ultimately promoted, creates a question of fact concerning whether Xerox's nondiscriminatory reason for its failure to promote plaintiff (that the women who received the promotions were as qualified, if not more so, than defendant) was a pretext. At least one federal appeals court has recognized that statements that do not qualify as direct evidence of discrimination may nevertheless, when considered with other evidence, create a question of fact under the *McDonnell Douglas* approach concerning whether the employer's reason for the employment decision is pretextual. See, e.g., *Fuka v Thomson Consumer Electronics*, 82 F3d 1397, 1404, 1406 (CA 7, 1996).

In this case, plaintiff admitted that the women who were promoted possessed the requisite qualifications demanded by Xerox for the positions. Plaintiff's argument that he was more qualified focuses on the soundness of Xerox's selection of one competent employee over another and does not create a question of fact concerning whether Xerox's nondiscriminatory explanation for its failure to promote plaintiff was a pretext for discrimination. *Town, supra* at 704 (Brickley, J., with Boyle and Weaver, JJ., concurring), 707, n 2 (Riley, J.). Thus, we are left with the evidence of the statements by DuFault and Collins and the BWF strategy. We have already determined that this evidence does not support a direct inference of discrimination. Because plaintiff did not come forward with additional evidence that would, in conjunction with this evidence, suggest that Xerox's stated reason for its failure to promote plaintiff was a pretext for discrimination, we conclude that the trial court properly granted summary disposition in favor of defendants with respect to plaintiff's discriminatory failure to promote claims.

We now turn to a consideration of plaintiff's retaliatory discharge claim. Plaintiff contends that he did put forth evidence that created a question of fact concerning whether Xerox's proffered business reason for his discharge was a pretext for retaliation. Plaintiff asserts that the most compelling evidence

that retaliation was a motive in the decision to discharge him was the fact that at the time he was discharged in 1994 his sales numbers had significantly improved when compared to his 1992 sales numbers. However, plaintiff was discharged for sustained poor sales performance. Despite any alleged improvement in his sales numbers at the time of his discharge, the record reveals that at this time plaintiff was still not meeting Xerox's sales expectations despite the fact that he had been placed on probation several times and been given assistance in an attempt to boost his sales numbers. We conclude that no question of fact concerning pretext is raised by this argument or these facts.

Plaintiff also contends that at the time he was discharged he was third out of five people on his sales team and that there were over seventeen other sales persons with year-to-date sales number lower than his sales numbers. Again, plaintiff was discharged for sustained poor sales performance, not his performance in only 1994. Moreover, to create an inference of disparate treatment, a plaintiff must prove that he and another employee were similarly situated, i.e., that all of the relevant aspects of the plaintiff's employment were nearly identical to those of the alleged similarly situated employee. *Town*, *supra* at 699-700 (Brickley, J., with Boyle and Weaver, JJ., concurring), 712 (Riley, J.). In this case, plaintiff has failed to create a question of fact that the seventeen other sales people with lower numbers than plaintiff were similarly situated to plaintiff. Thus, we conclude that no question of fact concerning pretext is raised by this argument or these facts.

Plaintiff contends that Xerox's nonretaliatory reason for his discharge—sustained poor sales performance—is undercut by Xerox's treatment of Bruce Smith, a black male with a history of poor sales performance dating back to 1981 and who at the time of plaintiff's discharge was fifth in terms of performance on plaintiff's sales team. However, Smith and plaintiff did not hold the same job title until August, 1993. Unlike plaintiff, Smith met or exceeded Xerox's sales expectations in both jobs that he held with Xerox in 1993. We conclude that there is no dispute that Smith and plaintiff were not similarly situated employees. Accordingly, we conclude that no question of fact concerning pretext is raised by this argument or these facts.

Finally, plaintiff contends that the timing of the discharge decision is evidence of retaliation. Specifically, plaintiff contends that on October 28, 1994, he had a telephone conversation with Ted Klich, manager of human resources consulting in Xerox's Chicago office, at which time he asked Klich whether he was going to be terminated. Plaintiff contends that Klich replied that no decision had been made to terminate plaintiff. Plaintiff has alleged, both below and on appeal, that on November 8, 1994, a resolution conference was held by the MDCR at which plaintiff alleges he "established that he was not going to back down and intended to pursue his complaint." Plaintiff contends that on November 14, 1994, Kluck and Collins generated a termination request containing false information about plaintiff and then went forward with plaintiff's termination.

However, the record indicates that as far back as November, 1993, DuFault warned plaintiff that she would place him on probation if he did not significantly improve his sales performance in thirty days. When his sales performance did not improve, DuFault placed plaintiff on a sixty-day probation on January 20, 1994. At this time, DuFault also warned plaintiff that "if significant improvement does not occur during this period that there will be additional consequences up to and including termination."

On March, 31, 1994, and after plaintiff had again failed to meet Xerox's sales expectations during the probation period, DuFault extended plaintiff's probation for another sixty days to May 31, 1994. At this time, DuFault warned plaintiff that "failure to achieve a satisfactory performance and activity levels will result in termination of your employment." DuFault denied that at the time she took this action she had any knowledge of plaintiff's MDCR charge. Plaintiff has offered no evidence to rebut this contention.

It is not entirely clear when plaintiff's Detroit-based supervisors learned about plaintiff's MDCR charge. Plaintiff's charge is dated March 17, 1994. Deanna Lammes, who allegedly was a human resources executive in Xerox's Chicago office, testified that although plaintiff gave her a copy of his MDCR charge she did not share this fact with DuFault or Collins until after Xerox was formally notified of the charge by the MDCR. The record does not indicate when the MDCR formally notified Xerox of plaintiff's charge. However, Xerox formally responded to the MDCR with respect to plaintiff's charge on June 7, 1994.

On June 2, 1994, DuFault removed plaintiff from probation because plaintiff had met all of his probation goals for April and May, 1994. We note that plaintiff met his probationary sales expectation goal because DuFault credited plaintiff with a portion of sales that normally would have been credited to June, 1994. At this time, DuFault also cautioned plaintiff that "any recurrence of unsatisfactory performance will result in further action, including the possibility of placement in an alternative assignment or termination without another probationary period."

During July, August and September, 1994, plaintiff performed at thirty-five percent, one-hundred percent and 37.5 percent, respectively. However, plaintiff's August sales number reflected an order that plaintiff actually took in July but could not be processed until August. Plaintiff did not actually write any new orders in August and closed only one order in September. Although plaintiff had been transferred to a new sales team with defendant Kluck as his supervisor effective September 1, 1994, on October 19, 1994, DuFault[2] reinstated plaintiff's probation for the following reasons:

> Kevin, as a result of your performance over the past two months, we are reinstating your Probation status. When you were removed from Probation, I communicated in a memo that if your performance reverted to below plan levels, you would be terminated without another Probation period. We have given you a grace period and the benefit of two additional months (August & September) to demonstrate improvement. If your performance is below plan in October, we will proceed with termination of your employment.
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> Krys [Kluck] will be meeting with you on October 21'st at 1:00 p.m. to review the activities you accomplished from October 1 to October 21. She will also meet with you on October 28 at 11:30 a.m. to review your activity levels between October 24 through October 28.

This history puts into context plaintiff's October 28, 1994, telephone conversation with Klich. Specifically, it is apparent that all parties were aware in October, 1994, of the very real possibility that

plaintiff was going to be terminated. Klich's memo regarding his October, 28, 1994, conversation indicates that he telephoned plaintiff in order to give plaintiff an opportunity to talk. Klich's memo indicates that plaintiff asked about termination dates and that Klich responded that he informed plaintiff about the termination process and that "I could not give a firm date and that we have not determined the final outcome."

Plaintiff has alleged that the November 14, 1994, termination request by Kluck and Collins falsely portrays him in the most negative light possible in order to justify his termination. In this respect, plaintiff takes issue with the fact that the termination request did not indicate that his 1990 performance level was a "4." However, the request accurately indicates that plaintiff was a trainee in 1990. Moreover, plaintiff was not terminated for his performance in 1990, but rather was terminated for his sales performance following his trainee period. Plaintiff also takes issue with the fact that his 1992 performance was forty-nine percent but that the termination request incorrectly lists his 1992 performance as sixty-six percent. We simply fail to understand how this error, which credited plaintiff with a higher sales performance, portrays plaintiff in the most negative light possible. Finally, plaintiff takes issue with the fact that his 1993 performance was thirty-nine percent but the termination request incorrectly lists his 1993 performance as thirty-seven percent. We find this error insignificant.

Finally, although plaintiff contends that a MDCR resolution conference occurred on November 8, 1994, and that at that time plaintiff indicated that "he was not going to back down and intended to pursue his complaint," plaintiff, either below or on appeal, has provided no citations to record evidentiary support for these allegations. Moreover, even assuming that a resolution conference occurred, the mere fact that an adverse employment decision (here, plaintiff's termination) occurs after a charge of discrimination (or, as here, a resolution conference) is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim. *Booker, supra* at 1314. In light of the extended chain of events leading up to plaintiff's discharge, i.e., plaintiff's inability to improve his sales performance despite probations and repeated warnings of termination if his sales performance did not improve, we conclude that the mere fact that his termination request occurred after the resolution conference is, in and of itself, insufficient to avoid summary disposition. *Id*.

In summary, we conclude that plaintiff has failed to create a question of fact that defendants' reason for discharging plaintiff was a pretext and that retaliation was a determining factor in plaintiff's discharge.

Next, plaintiff argues that the trial court erred in granting summary disposition with respect to his wrongful discharge claim. We disagree. The policy statement relied on by plaintiff as creating a legitimate expectation of just-cause employment cannot reasonably be interpreted as a promise to discharge for just cause only. See *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 387; 563 NW2d 23 (1997). Nor is the policy statement capable of two reasonable interpretations. *Id*. Accordingly, we find no error.

Next, plaintiff contends that the trial court erred in granting summary disposition of his claim for compelled self-defamation. We disagree. Even assuming that such a claim is recognized in Michigan,[3] a claim for defamation always requires as one of its elements a false statement concerning the plaintiff.

DeFlavis v Lord & Taylor, Inc, 223 Mich App 432, 443; 566 NW2d 661 (1997). In this case, plaintiff testified that he had not made untrue statements concerning himself and his employment at Xerox to a prospective employer. Because no question of fact exists concerning whether plaintiff made a false statement, we conclude that the trial court did not err in granting summary disposition of plaintiff's compelled self-defamation claim.

Finally, the trial court properly revisited the issue of the timeliness of defendants' motion for summary disposition pursuant to defendants' motion for reconsideration. MCR 2.119(F).

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[2] DuFault reinstated plaintiff's probation because she had been plaintiff's supervisor at the time of his prior probation and the change in supervisors had occurred only recently.

[3] Cf. *Crist v The Upjohn Co*, 16 Mich App 452, 483-484; 168 NW2d 389 (1969), with *Bonkowski v Arlan's Dept Store*, 12 Mich App 88, 101; 162 NW2d 347 (1968), reversed on other grounds 383 Mich 90 (1970).