STATE OF MICHIGAN

COURT OF APPEALS

FRANKLIN B. JACKSON,

Plaintiff-Appellant,

v

GENESEE COUNTY ROAD COMMISSION, ROGER WALTHER, and DENNIS KAYE,

Defendants-Appellees.

UNPUBLISHED
August 3, 1999

No. 206941
Genesee Circuit Court
LC No. 96-046567 NZ

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

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in favor of defendants; awarding costs to defendants; and denying in part plaintiff's motion for an order compelling discovery. We affirm.

Plaintiff began his employment with defendant Genesee County Road Commission ("GCRC") as an Equipment Operator I on July 3, 1973. Plaintiff was promoted to an Equipment Operator II on June 8, 1992. In 1995, GCRC had an opening for foreman of its Swartz Creek garage, for which plaintiff applied but was denied. Anthony Branch, an African-American male, was promoted to this position. Defendants maintain that Branch was the best qualified person because of his previous management experience, his leadership and communication skills, his intelligence, and his college education. In 1996, plaintiff applied for another open foreman position, this time at the Linden Road garage. Defendants promoted Rick Ray to this position, based on his many years of employment at the Linden garage and his familiarity with the territory and townships to be maintained. Defendants maintain that plaintiff was not chosen to interview for these two foreman positions because of his poor attendance record.

Plaintiff filed the instant lawsuit on March 28, 1996, claiming that he was not promoted to foreman of the Swartz Creek garage in retaliation for his filing of a claim for worker's compensation benefits in 1990, which constituted a violation of the Worker's Disability Compensation Act (WDCA), MCL 418.301(11); MSA 17.237(301)(11). Plaintiff also claimed that defendants' actions in refusing to promote him to foreman of the Swartz Creek garage constituted age discrimination in violation of the

Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., and handicap discrimination under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*.

On January 31, 1997, plaintiff filed a motion for leave to amend his complaint to add a claim of reverse race discrimination in violation of the Civil Rights Act, MCL 37.2202; MSA 3.548(202), regarding defendants' failure to promote him to foreman at the Swartz Creek garage. Plaintiff also sought to add claims under the WDCA, the Civil Rights Act, and the HCRA regarding his failure to be promoted to foreman of the Linden garage in 1996. Plaintiff did not include in his motion an explanation for his failure to bring these claims in his original complaint. The trial court granted plaintiff leave to amend his complaint and, apparently agreeing with defendants' contention that plaintiff had acted with undue delay, awarded defendants $250 in costs.

I.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 490; 579 NW2d 411 (1998). When reviewing a motion for summary disposition based on MCR 2.116(C)(10), this Court must determine whether any genuine issue of material fact exists which would preclude judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). "[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

Plaintiff contends that he established the existence of a genuine issue of material fact regarding whether defendants' failure to promote him constituted retaliation in violation of the WDCA. An employee has a cause of action in tort under the WDCA if he is discharged in retaliation for filing a worker's compensation claim. MCL 418.301(11); MSA 17.237(301)(11); See also *Phillips v Butterball Farms Co, Inc (After Second Remand)*, 448 Mich 239, 245-249; 531 NW2d 144 (1995). In order to prevail on a retaliation claim, plaintiff must present proof of (1) an adverse employment action; (2) that was a result of plaintiff's decision to pursue a claim under the WDCA. *Phillips, supra*.

The trial court found that plaintiff failed to present evidence that GCRC's failure to promote plaintiff was a result of plaintiff's claim under the WDCA. We agree. The mere fact that plaintiff filed a claim and received benefits under the Act does not support his contention that defendants' failure, five years later, to promote him to foreman was motivated by retaliation for filing the claim. Moreover, plaintiff actually received a promotion soon after filing this claim, from Equipment Operator I to Equipment Operator II. Because plaintiff failed to present any evidence demonstrating the existence of a genuine issue of material fact regarding whether he was retaliated against because he sought and received worker's compensation benefits, summary disposition as to this claim was appropriate.

Plaintiff also argues that the trial court erred in granting summary disposition to defendants on the age, race, and handicap discrimination claims. The Civil Rights Act provides that employers may not "[f]ail 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). The HCRA prohibits employers from "[f]ail[ing] or refus[ing] to hire, recruit, or promote an individual because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position." MCL 37.1202(1)(a); MSA 3.550(202)(1)(a).

The burden of proof in a discrimination case brought under either the Civil Rights Act or the HCRA is allocated as follows: First, the plaintiff must establish a prima facie case of discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998); *Harrison v Olde Financial Corp*, 225 Mich App 601, 607; 572 NW2d 679 (1997). If the court concludes that the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. *Lytle*, *supra* at 173. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id*.; *Rollert*, *supra* at 538; *Harrison*, *supra* at 608. Finally, the plaintiff is afforded an opportunity to demonstrate, by a preponderance of the evidence, that the employer's articulated nondiscriminatory reason is merely pretext. *Lytle*, *supra* at 174; *Victorson v Dep't of Treasury*, 439 Mich 131, 143; 482 NW2d 685 (1992); *Rollert*, *supra* at 538; *Harrison*, *supra* at 608.

Defendants offered a non-discriminatory reason for their decision not to promote plaintiff: excessive absenteeism. Defendants showed that plaintiff had been absent from work a total of 376 days from 1990 to 1995. Not surprisingly, defendants maintained that the consistent attendance of a foreman was a critical aspect of the job.

Plaintiff presented no evidence to rebut defendants' articulated reason for not promoting him. While he refers to the "anticipated testimony" of two GCRC employees, which he claims will support his claims of age and handicap discrimination, their testimony is not a part of the record and may not be considered. Because plaintiff failed to establish the existence of a genuine issue of material fact for trial, the trial court properly granted summary disposition to defendants on the discrimination claims.

II.

Next, plaintiff contends that the trial court improperly awarded costs to defendants when it granted plaintiff's motion to amend his complaint. This Court reviews a trial court's grant or denial of a motion to amend for an abuse of discretion. *Hakari v Ski Brule, Inc*, 230 Mich App 352, 355; 584 NW2d 345 (1998). Leave to amend pleadings should be freely granted if justice so requires. *Id*.; MCR 2.118(A)(2). The remedy for undue delay in bringing the request to amend the pleading is not to deny the request, but rather to sanction the offending party to reimburse the opponent for the additional expenses and attorney fees incurred because of the inexcusable delay in requesting an amendment. MCR 2.118(A)(3); *Traver Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 344; 568 NW2d 847 (1997).

Plaintiff argues that his request to amend was timely in that he did not have sufficient information at the time the complaint was originally filed to assert the race, age and handicap claims. However, we note that MCR 2.114(D) imposes upon a litigant and his counsel a duty to conduct a prefiling investigation of the facts supporting a claim. We also note that plaintiff presented no evidence to support his argument that he did not have sufficient information at the time of filing his initial complaint to bring these newly asserted claims regarding his failure to be promoted to foreman of the Linden garage. Nor has plaintiff offered an explanation of how or when these claims were discovered. Under the circumstances, we cannot find that the trial court abused its discretion by imposing a $250 sanction upon finding that plaintiff's motion to amend was less than timely.

III.

Finally, plaintiff argues that the trial court erred in denying his motion to compel discovery of confidential settlement agreements. Parties may discover any relevant, nonprivileged matter, provided that the information sought appears reasonably calculated to lead to the discovery of admissible evidence. MCR 2.302(B)(1); *Harrison, supra* at 614. This Court reviews the trial court's decision to grant or deny discovery for an abuse of discretion. *Harrison, supra.*

Plaintiff sought production of settlement agreements entered into by defendants in previous discrimination claims. The trial court granted in part and denied in part plaintiff's motion, finding as follows:

> Well, what I'm saying is, is that the parties themselves also entered into those agreements not to disclose. That's what concerns me here, it's not just the Road Commission entering into those.
>
> So I'm going to deny that. I will allow you to discover the settlement agreements which do not have confidentiality clauses or any clauses that would indicate that those settlements are not to be disclosed. And see what you have at that point, and then you can come back later if you want and see if - - after you see what you get with that, okay? It may very well be that you don't need the rest after that.

Plaintiff argues that the documents with confidentiality agreements were relevant because they **may** contain an agreement by defendants to promote employees on the basis of race and thus support his claim of reverse race discrimination. Specifically, plaintiff argued that the confidential agreement in a lawsuit to which Branch was a party would likely show that he was promised a promotion or admittance to a training program, and as a result of this agreement, Branch was promoted to foreman instead of plaintiff.

We find no abuse of discretion in the trial court's decision. The trial court did not categorically deny plaintiff's motion. Instead, the court offered plaintiff the opportunity to review the nonconfidential agreements first and if plaintiff still thought the confidential agreements were necessary, plaintiff could come back. While plaintiff brought a motion for reconsideration of the court's ruling, plaintiff never followed the court's instruction to look at the nonconfidential settlement agreements and, if still

dissatisfied, come back to court and explain why the confidential settlement agreements were needed. We do not find that the trial court abused its discretion under these circumstances.

We also find that plaintiff has failed to establish that the confidential documents were relevant to the case at bar. Plaintiff's assertions as to what the settlement agreements would contain were pure speculation. In fact, Branch testified that promises of a promotion or admittance to a training program were not a part of the settlement of his case. Moreover, even if a settlement agreement contained a provision regarding Branch's promotion or admittance into a training program, we fail to see how such information is reasonably calculated to lead to the discovery of admissible and relevant evidence. Such a provision would indicate an economic decision to settle a pending lawsuit; not a decision to promote on the basis of race. Therefore, we find that plaintiff has not shown that the confidential settlement agreements are discoverable.

Moreover, we note that this state's public policy encourages the settlement of lawsuits because it benefits both the parties and the public. *Dep't of Transportation v Christensen*, 229 Mich App 417, 429; 581 NW2d 807 (1998). Allowing plaintiff to discover settlement agreements that the parties had understood would remain confidential would be contrary to this policy. For all of the above stated reasons, we find that the trial court did not abuse its discretion in denying plaintiff's request for discovery of the confidential settlement agreements.

Affirmed.

/s/ Hilda R. Gage
/s/ Michael R. Smolenski
/s/ Brian K. Zahra