STATE OF MICHIGAN

COURT OF APPEALS

JOHN CHAKAN,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED
November 16, 1999

No. 208374
Wayne Circuit Court
LC No. 96-621077 NO

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing his claim of reverse race discrimination under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. We affirm.

Plaintiff, a white male, was hired by the Detroit Fire Department in 1960 and remained employed by the department through the filing of the present action. Plaintiff worked as a firefighter and steadily received promotions within the department until he reached the rank of battalion chief. Beginning in 1985, plaintiff served full-time as a union representative while retaining his seniority within the fire department. Plaintiff returned to work in the field in 1993. In December 1993, Detroit Fire Department Chief Curtis Edmonds announced his intent to retire from the department, effective January 4, 1994. That date marked the end of Coleman Young's term as Mayor of Detroit. Harold Watkins, a black male, was appointed fire department commissioner by incoming Detroit Mayor Dennis Archer. As commissioner, Watkins was required by the city charter to select Edmonds' successor from a pool of candidates that consisted only of the fire department's battalion chiefs and to submit his selection to the Detroit Mayor's office for final approval. Individuals were promoted to the rank of battalion chief based solely on seniority. At the time of Edmonds' retirement, all of the battalion chiefs eligible for the position of department chief were white. Watkins solicited resumes for the position, and plaintiff and two other Caucasian battalion chiefs submitted resumes. Watkins also accepted a resume from fire captain Archie Warde, a black male who was in line to be promoted to a battalion chief position. After two other fire captains were promoted to the position of battalion chief on January 5, 1994, Warde had the highest seniority of any fire captain.

In February 1994, Warde was promoted to battalion chief, and Watkins immediately appointed him as the next department chief. Watkins told plaintiff and a newspaper reporter that plaintiff was his second choice to serve as chief and that he would select plaintiff if the position were to again become available. Plaintiff then filed a grievance with his union, claiming that he was denied the opportunity for equal consideration during the appointment process. Plaintiff told Watkins that he had filed the union grievance and that he believed he was the victim of race discrimination. Plaintiff also informed Watkins that he intended to file suit. Plaintiff filed discrimination charges with the Equal Employment Opportunity Commission and the Michigan Department of Civil Rights. Watkins was aware of those charges.

In January 1996, Warde retired from the fire department. Plaintiff was not among the final candidates considered to succeed Warde as the next department chief. Raymond George, a white male, was appointed department chief. Plaintiff filed suit, alleging reverse race discrimination in connection with defendant's failure to appoint plaintiff department chief in 1994 and retaliation in connection with defendant's failure to appoint plaintiff in 1996.

On appeal, plaintiff argues that the trial court erred in granting summary disposition because the evidence indicated that defendant discriminated against plaintiff on the basis of race. We review the trial court's decision to grant defendant's motion for summary disposition under MCR 2.116(C)(10) de novo to determine whether any genuine issue of material fact exists that would prevent entering judgment for the moving party as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). In making this determination, we view all documentary evidence in a light favoring the nonmoving party. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993).

Section 202 of the Civil Rights Act, MCL 37.2202; MSA 3.548(202), prohibits racial discrimination in hiring decisions and provides, in part, as follows:

> (1) An employer shall not do any of the following:
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> (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.

Plaintiff's civil-rights action is based on a theory of disparate treatment, sometimes referred to as intentional discrimination. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Intentional discrimination can be established by either direct or indirect evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Plaintiff has not presented any direct evidence that racial discrimination was a factor in the failure to appoint him as the fire department chief.[1] Therefore, plaintiff must establish a prima facie case under the burden-shifting analysis adapted from *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Harrison*, *supra* at 609 (holding that the *McDonnell Douglas* burden-shifting analysis applies to cases where no direct evidence of discrimination has been presented).

Typically, a plaintiff must demonstrate that he or she is a member of a minority group that is protected under the Civil Rights Act. *Allen v Comprehensive Health Services*, 222 Mich App 426, 430; 564 NW2d 914 (1997). However, in the context of reverse discrimination, where a majority plaintiff brings an action for discrimination, the *McDonnell Douglas* analysis is modified, so that the majority plaintiff must present evidence of background circumstances that demonstrates "'that the defendant is that unusual employer who discriminates against the majority.'" *Id*. at 432, quoting *Parker v Baltimore & O R Co*, 209 US App DC 215; 652 F2d 1012 (1981). Accordingly, to establish a prima facie case of reverse race discrimination, a plaintiff must demonstrate (1) that the defendant is that unusual employer who discriminates against the majority, (2) that the plaintiff applied and was qualified for the available position, (3) that the plaintiff was not offered the position, and (4) that a minority person of similar qualifications was offered the position. *Id*. at 433.

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason was merely a pretext for discriminatory animus in order to survive a motion for summary disposition. *Id*. at 175-176.

In the instant case, plaintiff failed to establish a prima facie case because he failed to introduce evidence that plaintiff and Warde were similarly qualified for appointment as department chief. The evidence indicates that plaintiff and Warde were dissimilar with respect to their experience in the field. Watkins testified that Warde had worked in the field, performing duties similar to those performed by department battalion chiefs for several years, while plaintiff worked as a union representative from 1985 until 1993, after his promotion to battalion chief. Watkins testified that Warde's prolonged experience working in the field was relevant to his decision to select Warde over plaintiff. Thus, plaintiff and Warde were not similarly qualified for the position of department chief. Therefore, we conclude that plaintiff failed to establish a prima facie case.

Moreover, even if plaintiff had established a prima facie case, defendant articulated a legitimate, nondiscriminatory reason for choosing Warde over plaintiff—specifically, that Warde had more experience in the field. Plaintiff argues that he was, in fact, more qualified for the position and that defendant's stated reason is a pretext for racial discrimination. To establish that the stated reason is a pretext, plaintiff must show that the reason had no basis in fact, that it was not the actual factor motivating the employment decision, or that the factor was not sufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Here, plaintiff's assertion that he was more qualified than Warde does not establish that defendant's stated nondiscriminatory reason is a pretext for racial discrimination. Plaintiff did not present evidence that Watkins' reason for hiring Warde had no basis in fact or that Warde's qualifications were not the motivating factor for the decision. In short, plaintiff has presented no evidence to allow a reasonable factfinder to conclude that racial discrimination was a motivating factor behind the decision to appoint Warde, and not plaintiff, as department chief.

Plaintiff also argues that the trial court erred in granting defendant's motion for summary disposition of plaintiff's claim for retaliation. Section 701 of the Civil Rights Act, MCL 37.2701; MSA 3.548(701), prohibits retaliation against a person who has opposed a violation of the act and provides, in part, as follows:

> Two or more persons shall not conspire to, or a person shall not:
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> (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.

In order to establish a prima facie case of retaliation, a plaintiff must show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Here, plaintiff argued that defendant retaliated against him for filing discrimination charges with the EEOC and the Michigan Department of Civil Rights by failing to appoint him department chief following Warde's retirement in 1996. Plaintiff presented evidence that Watkins had stated that he would appoint plaintiff if the position ever became open again. Plaintiff argues that Watkins' knowledge of the discrimination charges filed by plaintiff and his failure to appoint plaintiff as Warde's successor constitutes proof of retaliation. However, plaintiff has failed to demonstrate a causal connection between the charges plaintiff filed and defendant's failure to appoint him department chief in 1996. The appointment process for Warde's successor involved a blind procedure whereby several individuals evaluated the qualifications of the candidates without knowing the identity of those candidates. Therefore, plaintiff has not demonstrated a causal connection sufficient to establish a prima facie case of retaliation. Accordingly, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Direct evidence is evidence that, if believed, requires the conclusion that discriminatory animus was a motivating factor in the employment decision. *Harrision*, *supra* at 610, quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997).