STATE OF MICHIGAN

COURT OF APPEALS

PATRICK J. WALSH,

Plaintiff-Appellant,

v

DEPARTMENT OF MANAGEMENT AND BUDGET,

Defendant-Appellee.

UNPUBLISHED
December 15, 2000

No. 219081
Ingham Circuit Court
LC No. 98-087917-NO

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

In this reverse race discrimination and age discrimination case, plaintiff appeals as of right from an order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10), and denying plaintiff's motion for leave to amend the complaint pursuant to MCR 2.118. We affirm.

This case arises out of defendant's decision not to promote plaintiff, a white male who was in his early fifties, to the positions of director of operations in the property management division, director of the construction division, director of the office of facilities, and director of the design division. On appeal, plaintiff contends that the trial court erred in granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(10). We disagree. This Court reviews a trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiff argues that he established direct evidence of reverse race discrimination against defendant pursuant to the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 37.2101 *et seq*. A plaintiff can establish direct evidence of reverse race discrimination by showing that (1) the plaintiff is a member of the protected class, (2) the plaintiff suffered an adverse employment action, (3) the defendant was predisposed to discriminate against members of plaintiff's protected class, and (4) the defendant acted on the predisposition when the employment decision was made. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360-361; 597 NW2d 250

(1999). A plaintiff may establish the third and fourth elements by showing through direct evidence that the defendant had a discriminatory animus that was a motivating factor in the adverse employment action. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).

In this case, we conclude that plaintiff failed to present evidence establishing a genuine factual dispute whether discrimination was a motivating factor when defendant offered the positions to Okechukwu Eneli, an African-American employee. *Id.* The alleged direct evidence proffered by plaintiff at best demonstrates that defendant had affirmative action goals and gave bonus incentives to employees who complied with these goals. These affirmative action considerations, however, represent but one of six categories on which the potential for bonuses rested. More importantly, members of the interview panel averred that they selected Eneli simply because he was the superior candidate. Plaintiff failed to set forth direct evidence that would indicate otherwise. Therefore, plaintiff failed to establish direct evidence of reverse race discrimination against defendant.

Plaintiff also argues that he established a reverse race discrimination claim against defendant under the burden-shifting framework articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). We disagree.

To establish a reverse race discrimination claim under the burden-shifting framework, a plaintiff must first establish a prima facie case by showing (1) background circumstances supporting a suspicion that the defendant is that unusual employer who discriminates against the majority, (2) plaintiff applied and was qualified for the position, (3) defendant did not offer the position to plaintiff, and (4) defendant offered the position to a minority employee of similar qualifications. *Allen v Comprehensive Health Services*, 222 Mich App 426, 433; 564 NW2d 914 (1997). Once the plaintiff has established a prima facie case, an inference of discrimination arises. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* If the defendant satisfies this burden of production, the inference of discrimination raised by the prima facie case is rebutted. *Id.* at 174. The burden of proof then shifts back to the plaintiff to prove, through direct or circumstantial evidence, that the defendant's proffered reason is not the true reason, but was a pretext for discrimination. *Id.*

Even assuming that plaintiff established a prima facie case, we conclude that plaintiff's argument fails because he failed to support the necessary subsequent contention that defendant's proffered reason for the employment decision was pretextual. For the purposes of avoiding summary disposition, to satisfy this step under the *McDonnell Douglas* framework plaintiff must present evidence raising a question of fact as to whether defendant's proffered reason was a pretext for discriminatory animus. *Lytle, supra* at 176. Plaintiff relies on essentially the same facts by which he sought to establish direct evidence of discrimination, and our conclusion that they fail to give rise to a triable issue that race was a motivating factor when defendant offered the positions to Eneli is dispositive of plaintiff's claim.

Plaintiff next argues that he established an age discrimination claim against defendant under the *McDonnell Douglas* burden-shifting framework. To establish a prima facie case of age discrimination, a plaintiff must prove by a preponderance of the evidence that (1) he was a member of the protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) a younger person got the position. *Lytle, supra* at 177. Again, we disagree with plaintiff's claim that defendant's reason for the promotion decisions was pretextual on the ground that plaintiff failed to set forth specific facts raising a triable issue that age was a motivating factor in defendant's decision not to promote him. *Id.* at 176. Through numerous affidavits of the relevant decision makers, defendant asserted that the various promotion decisions were based on the superior qualifications of the individuals who accepted the positions. The only evidence plaintiff presented to counter this assertion is the fact that every time he applied for a position, men in their mid-forties or late-thirties, who were allegedly less qualified, got the position. We hold that standing alone, this is insufficient circumstantial evidence to show a pattern and practice of age discrimination.

Plaintiff finally argues that the trial court erred in denying his motion for leave to amend the complaint to add a retaliation claim against defendant pursuant to MCR 2.118. We disagree.

To establish a prima facie case of retaliation under the CRA, a plaintiff must show that (1) the plaintiff engaged in a protected activity, (2) the defendant knew that the plaintiff engaged in a protected activity, (3) the defendant took an adverse employment action against the plaintiff, and (4) 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). MCR 2.118(A)(2) provides that leave to amend a pleading "shall be freely given when justice so requires." This Court reviews a trial court's decision to deny a motion for leave to amend a complaint for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

Though we have already determined that plaintiff's discrimination claims are without merit, it is possible that he could still establish a retaliation claim against defendant under the CRA. MCL 37.2701; MSA 3.548(701); *DeFlaviis, supra* at 436. However, the alleged adverse employment action on which plaintiff bases this claim is defendant's decision not to interview him for a newly created and redefined position of director of the construction division that opened up after plaintiff initiated this discrimination action. Not only is it questionable whether a preliminary decision regarding applicant finalists and interview opportunities qualifies as an adverse employment action, but plaintiff fails to establish even a minimal causal connection between defendant's decision to only interview four of thirty applicants for this new position and plaintiff's engagement in this protected activity.

Plaintiff's claim is based on the contention that if he was qualified for the director of construction position before, the decision not to interview him when the position again opened up during these ongoing proceedings suggests retaliation. However, according to affidavits submitted in support of defendant's opposition to plaintiff's motion to amend, the position in question was redefined following a reorganization of departments. As such, the new position entailed different responsibilities than had the similarly named position for which plaintiff had applied and been interviewed three years previously. Plaintiff presented the trial court with no

information countering defendant's assertion that plaintiff did not have sufficient qualifications for the new position. Accordingly, we agree with the court's determination that permitting amendment of plaintiff's complaint would have been futile. We find no abuse of discretion.

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder