STATE OF MICHIGAN

COURT OF APPEALS

BASHAR ABUALI,

Plaintiff-Appellant,

v

STATE OF MICHIGAN,

Defendant-Appellee,

and

GARY HENINGSBURG and ROGER COLLINS,

Defendants.

UNPUBLISHED
December 11, 2001

No. 223054
Washtenaw Circuit Court
LC No. 97-009268-CZ

Before: Hood, P.J., and Whitbeck and Meter, JJ.

PER CURIAM.

Plaintiff, a man of Arab descent who alleged that defendant fired him from his job with the State of Michigan's Center for Forensic Psychology based on his national origin, appeals by right from the trial court's grant of summary disposition to defendant. We reverse and remand.

Plaintiff contends that he presented sufficient evidence of discrimination such that the trial court should not have summarily dismissed his case. We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). Here, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10), and the trial court did not specifically indicate on which subrule it relied in granting defendant's motion. Because the court looked outside the pleadings in granting the motion, however, we will treat the motion as granted under MCR 2.116(C)(10). See *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1998).

In reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Wilcoxon, supra* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id*. at 358.

The Michigan Civil Rights Act, MCL 37.2101 *et seq*., prohibits discrimination based on national origin. In accordance with this act, a plaintiff may establish a prima facie case of employment discrimination by proving either "disparate treatment" or "disparate impact" as a result of his national origin. *Wilcoxon, supra* at 358. Here, plaintiff alleged disparate treatment and was required to show that defendant "was predisposed to discriminate against [him] . . . and actually acted on that disposition." See *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999). In making this showing, plaintiff could rely on (1) indirect or circumstantial evidence of discrimination, using the burden-shifting framework originally set forth in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973),[1] or (2) direct evidence of discrimination. See *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537-540; 620 NW2d 836 (2001). As stated in *Graham, supra* at 676:

> "Direct evidence" has been defined . . . as evidence that, if believed, "requires the conclusion that unlawful discrimination was at least a motivating factor." [*Harrison Olde Financial Corp*, 225 Mich App 601,] . . . 610[; 572 NW2d 679 (1997)]. For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination that is sufficient to allow a plaintiff's case to proceed to the jury. *Id.* In a case involving direct evidence of discrimination, the plaintiff always bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. *Id*. at 612. Whatever the nature of the challenged employment action, the plaintiff must establish proof that the discriminatory animus was causally related to the decisionmaker's action. *Id*. at 613. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. *Id*.

Here, plaintiff presented sufficient direct evidence of discrimination to avoid summary disposition. Indeed, in responding to defendant's summary disposition motion, plaintiff submitted an affidavit[2] alleging, *inter alia*, that (1) a supervisor, Roger Collins, told plaintiff that

[1] This framework, used when *direct* evidence of discrimination is absent,

> requires an employee to show that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. [*Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).]

A showing of these factors establishes a presumption of discrimination. The defendant then has the burden of production to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for the employment decision, and the plaintiff must then prove that the stated reason for the adverse employment decision was merely a pretext for discriminatory animus. *Id.* at 695-697.

[2] We agree with plaintiff that the trial court erred in failing to consider this affidavit. Indeed, contrary to the trial court's conclusion, the affidavit served as sufficient documentation to oppose a motion for summary disposition. See MCR 2.116(G)(2) and (3).

Arabs were "evil"; (2) Collins also told plaintiff that "all those who believed in Islam belleved [sic] in a fake religion, that the Prophet Muhammad was phoney [sic], and we were all going to hell because we did not accept Jesus"; (3) another supervisor, Gary Heningsburg, stated that plaintiff "came to America to steal jobs" and that "we [i.e., Arabs] were all a bunch of 'camel jockeys'"; and (4) staff members and patients called plaintiff "sand nigger" or "camel jockey" regularly.

In our view, this evidence sufficiently met the test for direct evidence as set forth in *Graham, supra* at 676. Defendant claims that the statements allegedly made by Collins and Heningsburg were irrelevant to plaintiff's claim because Heningsburg and Collins did not make the decision to discharge plaintiff. Defendant refers to its answers to plaintiff's interrogatories, which indicate that the decision to discharge plaintiff was made by Shari Koeslin, director of human resources, and Ronald Woodson, director of security. Defendant's argument is disingenuous. Indeed, in a memorandum dated February 6, 1996, from Collins to Woodson, Collins recommended that plaintiff be dismissed from employment. According to another February 6 memorandum, Woodson, after reading Collins' report, forwarded the report to Koeslin and stated that he concurred with Collins' recommendation for dismissal. Clearly, Collins played a role in plaintiff's dismissal, by virtue of the fact that Woodson *concurred in Collins' recommendation for dismissal* and communicated this concurrence to Koeslin. Additionally, it only makes common sense that plaintiff's direct supervisors, whom plaintiff presumably saw more regularly than general overseers, would have a material impact on whether the more-removed director of human resources and the director of security would ultimately discharge him.

To accept defendant's argument would lead to untenable results. Indeed, an employee's direct supervisor could make constant racial slurs and demonstrate a clear discriminatory animus toward the employee, forward to a human resources director a recommendation for dismissal that appears legitimate but is actually based on discrimination, and, if a *McDonnell-Douglas* prima facie case cannot be made,[3] be insulated from liability because the human resources director, while relying on the recommendation to dismiss, did not actually make the racial slurs.

We conclude that a question of fact existed concerning Collins' role in the decision to fire plaintiff. Moreover, the evidence of discriminatory comments made by Collins, together with the evidence of discriminatory comments made by another supervisor and by other staff members,[4] created a question of fact regarding whether discrimination played a role in plaintiff's discharge. Even though defendant provided evidence of a separate, legitimate reason for plaintiff's discharge, this case should nonetheless go to the jury. As stated in *DeBrow, supra* at 539, an age discrimination case:

---

[3] Indeed, in certain cases there may not be similarly-situated individuals for purposes of making a *McDonnell-Douglas* prima facie case.

[4] Indeed, the alleged fact that patients and staff members made these comments *regularly*, when viewed in light of the supervisors' own discriminatory comments, suggests that Collins and other supervisors might have encouraged an atmosphere of discrimination or done nothing to prevent the comments.

> While a factfinder might be convinced by other evidence regarding the circumstances of the plaintiff's removal that it was not motivated in any part by the plaintiff's age . . ., such weighing of evidence is for the factfinder, not for this Court in reviewing a grant of a motion for summary disposition.

Therefore, we conclude that the trial court erred in granting summary disposition for defendant[5].

Because plaintiff presented sufficient direct evidence of discrimination to avoid summary disposition, we need not address whether plaintiff established a jury-submittable case under the *McDonnell-Douglas* framework. See *id*.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Patrick M. Meter

[5] We disagree with the dissent's decision to address a potential hostile work environment claim. Indeed, it was plaintiff's duty in opposing the apparent complete dismissal of his claim by the trial court to argue that a tenable hostile work environment claim existed. Plaintiff made no such argument, either below or on appeal, and has accordingly abandoned the issue. We do not believe it is appropriate for us to sua sponte revive the possible claim.