STATE OF MICHIGAN

COURT OF APPEALS

CURTIS TAYLOR,

Plaintiff-Appellant,

v

AMERICAN PLASTIC TOYS, INC.,

Defendant-Appellee.

UNPUBLISHED
March 19, 2002

No. 227449
Ogemaw Circuit Court
LC No. 99-652900-CL

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant in this suit brought against plaintiff's former employer. In his complaint, plaintiff alleges that his discharge was the result of reverse gender discrimination in violation of the Michigan Civil Rights Act, MCL 37.2202, and that defendant's employees slandered him by publishing false assertions about his conduct. We affirm.

Plaintiff argues that his allegations and supporting documentation were sufficient to create a genuine issue of material fact regarding his gender discrimination claim. We review de novo a trial court's decision to grant summary disposition. *Arias v Talon Development Group, Inc*, 239 Mich App 265, 266; 608 NW2d 484 (2000). Unless there is direct evidence of discrimination,[1] the plaintiff in a reverse discrimination suit may establish a prima facie claim of gender discrimination with regard to a discharge decision by showing (1) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against men; (2) that the plaintiff was qualified for his position; (3) that, despite the plaintiff's qualifications, he was discharged; and (4) that a female employee of similar qualifications was treated differently.[2] See *Allen v Comprehensive Health Services*, 222 Mich

[1] Because plaintiff has offered no direct evidence of reverse discrimination (gender), he is constrained to rely on the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001).

[2] This test is an adaptation of the *McDonnell Douglas* test to prove a prima facie case of discrimination to fit the instant case, which alleges gender-based reverse discrimination in discharge. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173, n 19; 579 NW2d 906 (1998); *Allen v Comprehensive Health Services*, 222 Mich App 426, 433, n 5; 564 NW2d 914 (continued…)

App 426, 433; 564 NW2d 914 (1997) (describing a reverse discrimination plaintiff's prima facie claim of gender discrimination in a failure to promote case). Meeting this burden does not mean a plaintiff can overcome a motion for summary disposition; it merely creates a rebuttable presumption that the defendant acted with discriminatory intent. *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001); *Allen, supra* at 433-434. If the defendant articulates a legitimate, nondiscriminatory reason for its act, the presumption falls away and the burden shifts back to the plaintiff to demonstrate a question of fact that the employer's articulated reason is a pretext for discrimination. *Hazle, supra* at 464-465; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173-174; 579 NW2d 906 (1998).

In this case, plaintiff does not allege sufficient facts to present a prima facie case of reverse gender discrimination. Defendant provided undisputed evidence that a similarly situated female employee was fired shortly after plaintiff for violating the same policy. Plaintiff also provides no factual support for the first element; he merely argues that because defendant supposedly knew the complaints were untrue, the real reason for his discharge must have been based on his gender. Plaintiff cannot merely raise a triable issue that defendant's reason was pretextual, but that it was pretext for unlawful discrimination; he must affirmatively show that consideration of the protected characteristic was a motivating factor in his discharge. *Hazle, supra* at 465-466; *Lytle, supra* at 175-176. Oddly, plaintiff also indicates (and the documentary evidence supports) that the reason the women conspired against him was because he made them work too hard, but strict supervisors are not a class protected from discrimination. Furthermore, plaintiff does not point to any specific persons, male or female, whose treatment might support his allegation that defendant discriminates against its employees based on gender, and we infer from the available evidence that defendant's management positions are male-dominated, precluding a "reasonable" inference that plaintiff's bald assertions are supportable. Thus it is difficult to see how further discovery would result in any more factual support of this claim.

Plaintiff also argues that the trial court erred in granting summary disposition with respect to his slander claim. We disagree. Recently, in *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000), this Court explained:

> A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual. *Kevorkian v American Medical Ass'n*, 237 Mich App 1, 5; 602 NW2d 233 (1999); *Ireland v Edwards*, 230 Mich App 607, 619; 584 NW2d 632 (1998). Generally, a plaintiff may establish a claim of defamation by showing:
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> > (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence

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(…continued)

(1997).

> of special harm caused by the publication (defamation per quod). [*Kevorkian, supra* at 8-9; *Ireland, supra* at 614.][3]

The elements of defamation must be specifically pleaded. *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 77; 480 NW2d 297 (1991).

Here, plaintiff alleged that he was slandered when certain women complained to their group leader and a plant manager, and again when the plant manager told plaintiff's co-workers that plaintiff had been fired for sexually harassing the complainants. Even when viewed in a light most favorable to plaintiff, the complaints of the four women, accusing plaintiff of sexual harassment, do not amount to slander *by defendant* because if it was an intentional lie, it was not done in the discharge of their employment duties. See *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 341; 497 NW2d 585 (1993). The plant manager's statement was made after plaintiff's discharge, so it did not contribute to the economic and emotional damage that allegedly resulted from losing his job. Likewise, it did not harm plaintiff's reputation in the community because plaintiff himself attached to his pleadings statements by other employees asserting that they did not believe the accusations and they thought plaintiff would never do such a thing. *Kefgen, supra*. Finally, the overall impression is not that the plant manager was trying to spread rumors that plaintiff was a sexual harasser but, rather, that he thought the company president made a bad decision firing plaintiff for that reason. Nothing in the record indicates that the plant manager thought there was some other, discriminatory reason for plaintiff's discharge.[4] We therefore find that plaintiff's slander claim does not meet the required elements.

Finally, plaintiff argues that the failures of his pleadings could have been overcome had he been permitted to complete discovery. The trial court granted defendant's motion under MCR 2.116(C)(10), concluding that there was "no genuine issue of material fact." Under MCR 2.116(G)(4),

> [a] motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an 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. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

MCR 2.116(H)(1) further provides an avenue for plaintiffs encountering difficulty supplying the required factual support:

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[3] See also MCL 600.2911.

[4] Moreover, "substantial truth is an absolute defense to a defamation claim." *Collins v Detroit Free Press, Inc*, 245 Mich App 27, 33; 627 NW2d 5 (2001).

> A party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure. The affidavit must
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> (a) name these persons and state why their testimony cannot be procured, and
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> (b) state the nature of the probable testimony of these persons and the reason for the party's belief that these persons would testify to those facts.

The reviewing court must evaluate the disposition of the (C)(10) motion "by considering the substantively admissible evidence actually proffered in opposition to the motion. A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

In response to defendant's motion, plaintiff provided no factual support for his allegations that defendant discriminated against men, that a similarly situated female was treated differently, or that defendant made defamatory statements about him; he likewise did not provide the affidavits MCR 2.116(G)(4) requires when factual support is lacking. Furthermore, the evidence already on the record demonstrated that defendant did *not* treat a similarly situated female differently and that plaintiff did not suffer a loss to his reputation in the community.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra