STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. MICK,

Plaintiff-Appellant,

v

LAKE ORION COMMUNITY SCHOOLS, ROBERT BASS, RICHARD KAST, CRAIG A. YOUNKMAN, GLORIA ROSSI, CHRISTINE LEHMAN and DAVID BEITER,

Defendants-Appellees.

UNPUBLISHED
June 3, 2004

No. 241121
Oakland Circuit Court
LC No. 00-027577-NZ

DAVID M. MICK,

Plaintiff-Appellee,

v

ROBERT BASS and RICHARD KAST,

Defendants-Appellees.

No. 241122
Oakland Circuit Court
LC No. 01-033085-NZ

Before: Schuette, P.J., and Cavanagh and White, JJ.

SCHUETTE, P.J. (*concurring in part and dissenting in part*).

I would affirm the decision of the trial court which granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) on his claims of retaliation and employment discrimination under the Michigan Civil Rights Act ("CRA"), MCL 37.2101 *et seq.*

I. ANALYSIS

A. Retaliation

Plaintiff first argues that the trial court improperly granted defendants' motion for summary disposition on his claims of retaliation regarding (1) his inability to obtain an administrative position as a school principal after he filed a claim with the United States Equal Employment Opportunity Commission (EEOC), (2) his removal from two paid positions as

committee chairman, (3) written disciplinary warnings that were subsequently removed from his personnel file, and (4) inaccuracies in his payroll check.

To establish a case for retaliation, plaintiff had to prove that: (1) he engaged in a protected activity; (2) the protected activity was known to defendants; (3) defendants took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the retaliation. MCL 37.2701(a); *Meyer v City of Center Line*, 242 Mich App 560, 566; 619 NW2d 182 (2000); *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). To establish causation, the plaintiff must show that his participation in activity protected by the CRA was "a significant factor" in the employer's adverse employment action, not just that there was a causal link between the two. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001).

After a review of the record, I conclude that plaintiff failed to establish the fourth element, causation, because the alleged acts were too remote from the filing of the EEOC claim. See *Cox v Electronic Data Systems Corp*, 751 F Supp 680, 695 (ED Mich, 1990)[1] (the plaintiff failed to establish causation regarding her retaliatory discharge claim when she was discharged two months after she filed the discrimination complaint). Here, plaintiff filed the EEOC claim in July 1998, plaintiff did not apply for another position as principal in defendant school district until 1999, after at least six months had passed. Similarly, plaintiff was not removed as chairman of the district-level Social Studies Curriculum Committee until October 2000, approximately two years after he filed the EEOC claim. Additionally, the documentary evidence established that plaintiff was not actually removed from the school improvement committee because (1) he was asked to step down and he resigned, and (2) he acknowledged in his deposition testimony that after he resigned, he was later asked if he wanted the position, which he declined. An isolated act by an employer that is subsequently remedied by a grievance process does not amount to an adverse employment action under the CRA. See *Dobbs-Weinstein v Vanderbilt Univ*, 185 F3d 542, 546 (CA 6, 1999). "To rule otherwise would encourage litigation before an employer has an opportunity to correct through internal grievance procedures any wrong it may have committed." *Id*. Even if I were to conclude that the loss of the chairman position of the school improvement committee constituted an adverse act, an interim period of at least one year passed between the time he filed the EEOC claim and the time that he resigned in 1999.

In addition, plaintiff asserts that he presented direct evidence of retaliation against him when he applied to Webber Elementary in 2001 in the form of an affidavit from a 2001 Webber Elementary hiring committee member. I disagree. Inadmissible hearsay does not create a genuine issue of material fact. *McCallum v Corrections Dep't*, 197 Mich App 589, 603; 496 NW2d 361 (1992). "Hearsay" is a statement, other than the one made by the declarant while

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[1] Michigan's employment-discrimination statute so closely mirrors federal law that Michigan courts often rely on federal precedent for guidance. See *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993), quoting *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525; 398 NW2d 368 (1986).

testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c).

Here, according to Michael Lorts' affidavit, the hiring committee was considering the possibility of extending an invitation to plaintiff for an interview, when a committee member asked what the ramifications were if a candidate was suing the district. Lorts further averred that a school board member in response to the question, stated words to *the effect* of, "it doesn't matter. It's a moot point. It won't go far." I agree with the trial court's conclusion that Lorts' affidavit did not establish a retaliatory motive. First, although the statement was made by a school board member, at the time that the comment was made, she was just one member of a ten-member hiring committee and was not the ultimate decision maker, contrary to plaintiff's assertion that she was a "major executive" whose opinion could be attributed to all defendants. If plaintiff's assertion was correct, he would have been the successful candidate for the principal position at Blanche Sims Elementary in 1996, when defendant Kast, the assistant superintendent of personnel and a member of the hiring committee, rated plaintiff as the top candidate. Lastly, the trial court also properly concluded that the initial question and the school board member's comment were vague because plaintiff was not identified in the question or the alleged response. As such, the comments are not indicative of retaliation against plaintiff. *Krohn v Sedgwick James*, 244 Mich App 289, 292, 298; 624 NW2d 212 (2001).

With respect to plaintiff's remaining allegations of retaliation: (1) incorrect paychecks that were later corrected, and (2) written disciplinary warnings that were later removed from his personnel file, these acts do not constitute adverse acts for purposes of a retaliation claim because they did not permanently affect his economic status or employment status. An adverse employment action "occurs when an employee suffers some personal loss or harm with respect to a term, condition or privilege of employment." *Meyer, supra,* 242 Mich App 570-571, quoting *Hoffman v Rubin*, 193 F3d 959, 964 (CA 8, 1999). Accordingly, I find that the trial court properly dismissed plaintiff's retaliation claim as a matter of law. *Barrett, supra,* 245 Mich App 315; *Meyer, supra,* 242 Mich App 566.

B. Gender Discrimination

I disagree with plaintiff's next assertion that defendants discriminated against him on the basis of gender. Plaintiff's claims of intentional discrimination were based upon the Civil Rights Act,[2] MCL 37.2101 *et seq.*, which prohibits employers from discharging or otherwise discriminating on the basis of prohibited considerations. MCL 37.2202(1)(a); See also *Debrow v Century 21 Great Lakes, Inc, (After Remand),* 463 Mich 534, 537; 620 NW2d 836 (2001). The evidentiary paths to proving discrimination vary depending on the type of proof involved, i.e.,

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[2] The pertinent portion of the act states:

(1) An employer shall not:

(a) . . . 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.]

direct or circumstantial evidence of discriminatory animus. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997); *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999); *Harrison v Olde Financial Corp*, 225 Mich App 601, 606, 609-610; 572 NW2d 679 (1997). On appeal, plaintiff asserted reverse discrimination and disparate impact.[3]

Plaintiff relies on *Allen v Comprehensive Health Svcs*, 222 Mich App 426, 433; 564 NW2d 914 (1997), which outlined the requirements of a reverse discrimination claim. In the absence of direct evidence of discrimination based on gender, a plaintiff in a reverse discrimination case may establish a prima facie claim of gender discrimination with regard to a promotion decision by showing:

> (i) background circumstances supporting the suspicion that the defendant is the unusual employer who discriminates against men; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a female employee of similar qualifications was promoted. [*Allen, supra*, 222 Mich App 433; cf. *Venable v General Motors*, 253 Mich App 473, 480; 656 NW2d 188 (2002) (holding that a plaintiff is not required to establish "background circumstances" in a reverse discrimination case).]

Here, elements two and three were not in dispute. Plaintiff applied for approximately nine positions, the parties never disputed that plaintiff was minimally qualified for a principal position and plaintiff was never the successful candidate for a principal position. In the trial court, the crux of plaintiff's claims of discrimination was his assertion that defendants were obligated to abide by Article XI of the Master Agreement ("union contract" or "collective bargaining agreement") between the Lake Orion Education Association ("union" or "LOEA"), which provided, in pertinent part:

ARTICLE XI - VACANCIES, PROMOTIONS AND TRANSFERS

> B. The Board *shall*, during the school year, notify the teaching staff of teaching, adult/community education and *supervisory vacancies*. The vacancies shall be posted in each building for five (5) school days during the school year. During the summer vacation, vacancies shall be posted for five (5) workdays in the central office. Teachers interested in positions may request to be placed upon a mailing list for summer postings, which the Board agrees to mail.

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[3] Plaintiff's claim of disparate impact is not properly before this Court; therefore, I would decline to address the claim because it was never raised in his complaint and defendants never expressly or impliedly consented to the claim. MCR 2.118(C)(1). See, e.g., *Amburgry v Sauder*, 238 Mich App 228, 248-249; 605 NW2d 84 (1999) (issue not alleged in complaint was not "tried" in the motion for summary disposition and trial court properly denied motion to amend complaint after summary disposition was granted).

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> *The Board agrees to give preferential consideration to members of its own teaching staff in filling all vacancies, according to seniority, certification, accreditation standards and qualifications*. Qualifications shall mean major, minor or graduate degree as posted. [Emphasis added.]

Plaintiff also argues that because defendants took complete subjective control over the hiring process in violation of the union contract, males and particularly plaintiff, were excluded from elementary school principal positions. I disagree. Defendants presented the testimony of one of the union negotiators, who testified that the union agreement did not apply to administrators. I also note that plaintiff (1) provided the trial court with only two pages of the union contract and (2) deposed defendant Kast with a document titled "Administrative Conditions of Employment." Consequently, plaintiff's argument that defendants breached contractual provisions is without merit.

I am not persuaded that the trial court erred when it rejected plaintiff's argument that defendants were the unique employer that had a predisposition to discriminate against men. In light of evidence that (1) twelve females were appointed to principal positions, and (2) at least nine males were appointed to twelve principal positions in elementary and middle schools. The trial court properly concluded that plaintiff failed to establish that defendants acted with discriminatory animus toward plaintiff on the basis of gender. *Venable, supra,* 253 Mich App 480; *Allen, supra,* 222 Mich App 433.

C. Statute of Limitations

Plaintiff's final claim is that the trial court erred by refusing to consider alleged discriminatory acts that occurred outside the three-year period of limitations before (1) July 6, 1998, against defendant Bass and defendant Kast, and (2) November 21, 1997, against all remaining defendants. Plaintiff relies on *Sumner v The Goodyear Tire & Rubber Co*, 427 Mich 505, 528; 398 NW2d 368 (1986), for the proposition that events outside the period of limitations may be considered if there is a continuing course of conduct with at least one discriminatory act occurring within the limitation period. However, in light of my conclusion that plaintiff has failed to establish discrimination as a matter of law regarding any of the hiring decisions, he is not entitled to appellate relief on this issue.

I would affirm as to all counts.

/s/ Bill Schuette