

STATE OF MICHIGAN
COURT OF APPEALS

RONALD STAMPS,

Plaintiff-Appellant,

v

CITY OF FLINT,

Defendant-Appellee.

UNPUBLISHED
February 12, 2009

No. 280459
Genesee Circuit Court
LC No. 06-083578-CD

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Plaintiff filed this employment discrimination action against his employer, and claimed race and age discrimination, and unlawful retaliation, under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*¹ Defendant moved for, and the trial court granted, summary disposition under MCR 2.116(C)(7) and (10). For the reasons set forth below, we affirm.

I. Genuine Issue of Material Fact

Plaintiff argues that the trial court erred in finding that he failed to establish a genuine issue of material fact with respect to his claims for discrimination and retaliation.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties and construe that evidence in a light most favorable to the nonmoving party. MCR 2.116(G)(5). *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

¹ Plaintiff also brought a claim for intentional infliction of emotional distress, but has not challenged this dismissal.

The CRA prohibits an employer from discriminating against an employee on the basis of race or age. MCL 37.2202(1)(a). A prima facie case of discrimination requires a plaintiff to present evidence of the following elements: (1) he was a member of a protected class, (2) he was subject to an adverse employment action, (3) he was qualified for the position, and (4) that others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. *Town v Michigan Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). Plaintiff asserts that there is both direct and indirect evidence to support his claim for discrimination.

A plaintiff may prove a discrimination claim by either direct evidence of discriminatory animus or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. Under this approach, once a plaintiff presents a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Id.* at 134. If the defendant produces such evidence, the burden shifts back to the plaintiff to show that defendant's reasons were a mere pretext for discrimination. *Id.*

The CRA not only prohibits discriminatory conduct, but also provides that a person shall not "[r]etaliat[e] 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." MCL 37.2701(a). The purpose of MCL 37.2701 is "to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." *Meyer v City of Ctr Line*, 242 Mich App 560, 571-572; 619 NW2d 182 (2000), quoting *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1313 (CA 6, 1989). Therefore, a retaliation claim requires that the defendant must have specifically retaliated against the plaintiff for conduct protected by the CRA. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005). A prima facie case of retaliation requires that a plaintiff 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. [*Garg, supra* at 273, quoting *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).

The trial court dismissed plaintiff's discrimination and retaliation claims because he failed to come forward with any evidence to establish a genuine issue of material fact in support of either claim. When opposing a motion under MCR 2.116(C)(10), a party may not rest on the allegations in his pleadings, but must present evidentiary proofs showing that there is a genuine

issue of material fact for trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999). If such proofs are not presented, summary disposition is properly granted. *Id.*

On appeal, plaintiff does not offer a proper factual and legal analysis of his claims or explain why the trial court erred in granting summary disposition. Plaintiff simply recites the law on which he relies and asserts that he can factually establish his claims without identifying what evidence exists that factually supports the claims. MCR 7.212(C)(7) requires that facts cited in a brief be supported by specific references to the record. Further, this Court will not search the record for factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

Although plaintiff cites two exhibits attached to his brief on appeal, neither exhibit properly establishes the requisite factual support for plaintiff's claims. The first exhibit is plaintiff's own affidavit. However, the affidavit is essentially conclusory and fails to show that many of the matters alleged in the affidavit are based on plaintiff's personal knowledge. A genuine issue of material fact cannot be demonstrated with conclusory statements devoid of factual detail. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 470; 646 NW2d 455 (2002). Further, MCR 2.119(B)(1)(c) provides that an affidavit offered in support of a motion must affirmatively show that the affiant could, if sworn as a witness, testify competently to the facts stated therein. *Regents of the Univ of Michigan v State Farm Mut Ins Co*, 250 Mich App 719, 728; 650 NW2d 129 (2002). Plaintiff's affidavit refers to the circumstances of many other employees without alleging facts showing that plaintiff has personal knowledge of those circumstances. For these reasons, plaintiff's affidavit is insufficient to establish a genuine issue of material fact for trial.

The second exhibit on which plaintiff relies is a chart, apparently prepared by plaintiff, that summarizes plaintiff's various claims of discrimination and retaliation and the evidence that allegedly supports the various allegations. Evidence offered in support of, or opposition to, a motion for summary disposition may be considered only to the extent that the content or substance is admissible as evidence. MCR 2.116(G)(6); *FACE Trading, Inc v Dep't of Consumer & Industry Services*, 270 Mich App 653, 675; 717 NW2d 377 (2006). Plaintiff fails to explain, nor is it apparent, how plaintiff's chart qualifies for consideration under this rule. To the extent that the chart refers to evidence that plaintiff suggests he would be able to produce at trial, it is only a promise to produce evidence, which is insufficient to establish a genuine issue of material fact for trial. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 553; 487 NW2d 499 (1992).

Accordingly, the trial court properly determined that summary disposition of plaintiff's claims was proper pursuant to MCR 2.116(C)(10), because plaintiff failed to come forward with documentary evidence to establish a genuine issue of material fact in support of his claims.

II. Collateral Estoppel

We also hold that the trial court properly dismissed plaintiff's claims pursuant to MCR 2.116(C)(7), based on collateral estoppel. As explained in *Turner v Mercy Hospitals & Health Services of Detroit*, 210 Mich App 345, 348; 533 NW2d 365 (1995):

A defendant who files a motion for summary disposition under MCR 2.116(C)(7) may (but is not required to) file supportive material such as affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). If such documentation is submitted, the court must consider it. MCR 2.116(G)(5). If no such documentation is submitted, the court must review the plaintiff's complaint, accepting its well-pleaded allegations as true and construing them in a light most favorable to the plaintiff.

Whether a party is collaterally estopped from challenging an issue addressed in a prior proceeding involves a question of law, which is reviewed de novo. *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996).

Collateral estoppel precludes relitigation of an issue in a subsequent, different case between the same parties if the prior action resulted in a valid final judgment and the issue was actually and necessarily determined in the prior matter. *Id.* The ultimate issue in the second case must be the same as that in the first proceeding. *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990). The doctrine requires that the same parties must have had a full opportunity to litigate the issue in the prior proceeding and there must be mutuality of estoppel. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

To be necessarily determined in the first action, the issue must have been essential to the resulting judgment; a finding upon which the judgment did not depend cannot support collateral estoppel. [*Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 377; 521 NW2d 847 (1994).]

Collateral estoppel will apply only if the basis of the former "judgment can be clearly, definitely, and unequivocally ascertained." *Ditmore v Michalik*, 244 Mich App 569, 578; 625 NW2d 462 (2001).

In a prior federal action in which plaintiff and defendant were both parties, the federal court dismissed plaintiff's state claims for discrimination and retaliation without prejudice, but adjudicated plaintiff's federal claim under 42 USC 1983, which was also based on allegations of discrimination and retaliation. A court's summary disposition ruling is equivalent to a ruling on the merits. *The Mable Cleary Trust v The Edward-Marlah Muzyl Trust*, 262 Mich App 485, 510; 686 NW2d 770 (2004). A review of plaintiff's claims in both the federal action and the instant action reveals that they are based on the same factual allegations. The federal court determined that plaintiff failed to present a prima facie case of race, gender, or age discrimination, and also found no factual support for plaintiff's retaliation claim.² Because the factual bases for

² Although plaintiff properly observes that federal law does not govern the disposition of his state-law claims, this case does not involve the application of substantive federal law. Instead, it involves the application of factual issues previously decided in the federal action to plaintiff's state-law claims to determine whether a bar on the relitigation of those factual issues precludes plaintiff from prevailing on his state-law claims.

plaintiff's claims in both cases were the same, and the issues decided by the federal court are issues necessary for plaintiff to prevail on his state-law claims for discrimination and retaliation here, the trial court properly granted summary disposition under MCR 2.116(C)(7) on the basis of collateral estoppel.³

Affirmed.

/s/ Henry William Saad

/s/ Alton T. Davis

/s/ Deborah A. Servitto

³ Although we agree with plaintiff that res judicata does not apply to bar his claims, because the federal court dismissed the state law claims without prejudice, the trial court did not rely on res judicata.

Plaintiff also asserts in his statement of questions presented that he should not be precluded from raising new claims of discrimination and retaliation that arose after the date of federal court's decision in the related lawsuit. However, plaintiff fails to address the merits of this issue in the argument section of his brief and, this has abandoned this issue. *Wolfe v Wayne-Westland Community Schools*, 267 Mich App 130, 139; 703 NW2d 480 (2005).