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STATE OF MICHIGAN

COURT OF APPEALS

JASON BITTNER and ANTHONY WILFONG,

Plaintiffs-Appellants,

v

GENERAL MOTORS, LLC,

Defendant-Appellee.

UNPUBLISHED
June 20, 2024

No. 366160
Saginaw Circuit Court
LC No. 21-043803-CD

Before: CAMERON, P.J., and N. P. HOOD and YOUNG, JJ.

PER CURIAM.

In this employment-discrimination action alleging civil conspiracy and violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) (no genuine issue as to any material fact). We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of plaintiffs' allegations that defendant treated plaintiffs differently, and ultimately terminated their employment, because they are white. Specifically, plaintiffs asserted claims of disparate treatment, disparate impact, hostile work environment, and civil conspiracy. Defendant's code of conduct prohibited discriminatory actions and statements by employees and authorized disciplinary action, including employment termination.

Defendant began investigating plaintiffs after receiving complaints that plaintiffs were (1) regularly engaging in sexually derogatory commentary, (2) discussing drug use, (3) speaking derogatorily about a transgender employee, and (4) sometimes speaking in a homophobic manner. Defendant interviewed a total of 15 people, including plaintiffs and 13 other coworkers, many of whom were white. The vast majority of the interviewed coworkers substantiated the allegations made against plaintiffs. Plaintiffs denied all the allegations even after being told that numerous witnesses substantiated them. Ultimately, plaintiffs' employment was terminated on the basis of a recommendation by a panel of three white men. The trial court granted defendant's motion for summary disposition, and plaintiffs now appeal.

II. ANALYSIS

A. STANDARD OF REVIEW

"This Court [] reviews de novo decisions on motions for summary disposition brought under MCR 2.116(C)(10)." *Pace v Edel-Harrelson*, 499 Mich 1, 5; 878 NW2d 784 (2016). A motion for summary disposition under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition is proper where there is no "genuine issue regarding any material fact." *Id*. "A genuine issue of material fact exists when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Auto-Owners Ins Co v Campbell-Durocher Group Painting & Gen Contracting, LLC*, 322 Mich App 218, 224; 911 NW2d 493 (2017) (quotation marks and citation omitted). "These issues turn on questions of statutory interpretation, which we review de novo." *Saugatuck Dunes Coastal Alliance v Saugatuck Twp*, 509 Mich 561, 577; 983 NW2d 798 (2022).

B. LAW & ANALYSIS

Plaintiffs argue the trial court erred by granting defendant's motion for summary disposition because there are genuine issues of material fact concerning all their claims. We disagree.

1. DISPARATE TREATMENT

In Michigan, the CRA "prohibits employers from discriminating on the basis of race." *White v Dep't of Transp*, 334 Mich App 98, 107; 964 NW2d 88 (2020). It states, in pertinent part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, 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(1)(a).]

"The ultimate question in an employment discrimination case is whether the plaintiff was the victim of intentional discrimination." *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 606; 886 NW2d 135 (2016). "The courts have recognized two broad categories of claims under this section: disparate treatment and disparate impact claims." *White*, 334 Mich App at 107 (quotation marks and citation omitted). This first issue "concerns disparate treatment because plaintiff[s] allege[] that defendant intentionally discriminated against [them] on the basis of race." *Id*.

"In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628

NW2d 515 (2001). On the other hand, in cases where there is no direct evidence of impermissible bias, a plaintiff's claim of intentional discrimination should progress under the *McDonnell Douglas*[1] burden-shifting framework. See *White*, 334 Mich App at 107 (quotation marks and citation omitted).

> The framework . . . requires a showing that plaintiff 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. [*Venable v Gen Motors Corp (On Remand)*, 253 Mich App 473, 476-477; 656 NW2d 188 (2002) (quotation marks and citation omitted).]

"Once [a] plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998).

"A defendant may rebut the presumption . . . by articulating a legitimate, nondiscriminatory reason for the employment decision." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 135; 666 NW2d 186 (2003). If the defendant does so, the plaintiff "must then demonstrate that the articulated reason was merely a pretext for unlawful discrimination." *Campbell v Dep't of Human Servs*, 286 Mich App 230, 241; 780 NW2d 586 (2009).

We first note that plaintiffs' brief confusingly implies that they both did and did not present direct evidence of discrimination. At one point, plaintiffs allege there was direct evidence of racial discrimination in the form of a supervisor's statement telling one of the plaintiffs and another white employee not to do anything disrespectful during a moment of silence defendant held on Juneteenth. However, plaintiffs acknowledge the supervisor did not specifically mention race during the exchange. Instead, plaintiffs suggest the supervisor could not have had any reason to make such a statement other than the recipients' race, given that Juneteenth and the moment of silence were entirely about race. Direct evidence "is evidence that proves impermissible discriminatory bias without additional inference or presumption." *Hecht*, 499 at 607 n 34, citing *Hazle*, 464 Mich at 462. Plaintiffs specifically assert the supervisor's statement "*implies* that the white employees condone, or at a minimum are indifferent, toward racial violence and hate[.]" (Emphasis added.) Because plaintiffs' own argument necessarily requires an inference that the comment was discriminatory, it is not, by definition, direct evidence. *Hecht*, 499 at 607 n 34.

Because plaintiffs' direct-evidence argument is self-defeating, we move on to their circumstantial-evidence argument. Under the *McDonnell Douglas* framework, plaintiffs were required to present sufficient evidence to prove a prima facie case of discrimination. *White*, 334 Mich App at 107. The parties only dispute the fourth element; whether "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Venable*, 253 Mich App at 477 (quotation marks and citation omitted). To prove another individual was similarly situated, plaintiffs must show that "all of the relevant aspects of [their] employment situation were nearly identical to those of [the identified coworker's] employment situation." *Town v Mich Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997) (quotation marks

[1] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

and citation omitted). In this respect, plaintiffs must prove the individuals they presented as similarly situated were not fired for violating defendant's code of conduct even after accusations of sexually inappropriate comments were substantiated by many witnesses and the individuals refused to accept responsibility for their actions.

Plaintiffs do not allege such a person exists. Instead, plaintiffs contend this element was satisfied because (1) they had to fix the mistakes of their black coworkers; (2) other black employees were not terminated because of "foul language;" (3) defendant "created a racially-charged work environment" which emboldened black employees to discriminate against plaintiffs; (4) plaintiffs felt uncomfortable reporting their concerns about their black coworkers to management; and (5) two of plaintiffs' black coworkers were promoted after plaintiffs were fired, despite not being as skilled.

First, plaintiffs contend they were treated differently than their black coworkers because they had to fix their mistakes. However, plaintiffs themselves acknowledged they were asked to fix these mistakes not because they were white, but because they were simply more skilled at the job. Such does not constitute disparate treatment on the basis of race. Second, plaintiffs contend other nonwhite employees were not fired despite using "foul language," but this argument misses the mark. Plaintiffs were not fired for mere "foul language." Plaintiffs were fired after a lengthy investigation revealed their continued use of sexually derogatory commentary, homophobic speech, derogatory language about a transgender employee, and inappropriate language about drug use. Plaintiffs have not identified any other coworker, nonwhite or otherwise, who engaged in similar conduct but was not fired.

Third, plaintiffs allege defendant emboldened their black coworkers to treat plaintiffs differently because a black coworker moved his workstation away from one of the plaintiffs, saying "Band of Brothers." However, plaintiffs fail to explain how this instance demonstrates disparate treatment of a similarly situated individual. Plaintiffs were not fired because they moved their workstations away from their black colleagues while saying something similar to "Band of Brothers," so this action does not demonstrate any disparate treatment of members of different races.

Fourth, plaintiffs claim they did not report their concerns about their black coworkers for fear of retaliation, alleging their black colleagues had no such concerns since they complained about plaintiffs. However, this, too, is not evidence of disparate treatment. At most, this is evidence of disparate feelings between plaintiffs and the identified black coworkers. Further, plaintiffs knew about, but chose not to use, defendant's anonymous reporting system. Finally, while plaintiffs allege two of their black coworkers were promoted after plaintiffs were fired, they again fail to demonstrate how these coworkers were in any way similarly situated. Even ignoring the lack of concrete evidence these employees were promoted at all, neither of them had the same substantiated allegations against them and failed to take responsibility for their actions.

Because plaintiffs did not meet their burden under the first step of the *McDonnell Douglas* burden-shifting framework, the trial court properly granted summary disposition of their disparate-treatment claim in favor of defendant. *Id*. Plaintiffs' failure to establish a prima facie case renders their arguments about pretext and nondiscriminatory reasons for termination irrelevant.

2. DISPARATE IMPACT

"[T]o prevail under a disparate impact theory, plaintiffs must establish that they are members of a protected class and that a facially neutral practice disproportionately impacts or burdens them more harshly than others." *Alspaugh v Comm on Law Enforcement Stds*, 246 Mich App 547, 564; 634 NW2d 161 (2001). Contrary to a disparate-treatment claim, "[u]nder the disparate impact theory, proof of a discriminatory motive is not required." *Dep't of Civil Rights ex rel Peterson v Brighton Area Sch*, 171 Mich App 428, 438; 431 NW2d 65 (1988) (quotation marks and citation omitted). "A claim of disparate impact involves employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Smith v Goodwill Indus of West Mich, Inc*, 243 Mich App 438, 450-451; 622 NW2d 337 (2000) (quotation marks and citation omitted).

Plaintiffs' argument under this issue reveals either a serious misunderstanding of the law or its purposeful misapplication. As just established, and as recognized by plaintiffs in their briefs before both the trial court and this Court, a claim of disparate impact necessarily relies on disparate treatment under a facially neutral policy. Despite seemingly understanding this requirement, plaintiffs do not identify any facially neutral policy whatsoever. Instead, they claim defendant had racially motivated policies that favored black employees. By definition, this assertion cannot support a claim of disparate impact. *Id*. Because plaintiffs have failed to present any evidence of a facially neutral policy, their claim of disparate impact necessarily fails.

3. HOSTILE WORK ENVIRONMENT

To establish a prima facie case of hostile work environment, a plaintiff must prove:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Major v Village of Newberry*, 316 Mich App 527, 550; 892 NW2d 402 (2016) (citation omitted).]

Although the parties argue about several of these elements, summary disposition was most obviously warranted because plaintiffs failed to present any evidence of respondeat superior. *Id*.

"[S]trict imposition of vicarious liability on an employer is illogical in a pure hostile environment setting because, generally, in such a case, the supervisor acts outside the scope of actual or apparent authority to hire, fire, discipline, or promote." *Chambers v Trettco, Inc*, 463 Mich 297, 311; 614 NW2d 910 (2000) (quotation marks and citation omitted). "Respondeat superior liability exists when an employer has adequate notice of the harassment and fails to take appropriate corrective action." *Elezovic v Bennett*, 274 Mich App 1, 7; 731 NW2d 452 (2007). "An employer, of course, must have notice of alleged harassment before being held liable for not implementing action." *Radtke v Everett*, 442 Mich 368, 396-397; 501 NW2d 155 (1993).

In support of their claim of a hostile work environment, plaintiffs rely solely on their feelings of being uncomfortable because of defendant's support for racial justice and inclusion. However, plaintiffs openly acknowledged they did not tell anyone, be it a supervisor directly or via anonymous complaint,[2] about their discomfort. Because plaintiffs never told defendant about their concerns, they failed to present any evidence of respondeat superior. Because this element was not satisfied, we need not address any of the other elements for a hostile work environment.

4. CIVIL CONSPIRACY

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Jackson v Southfield Neighborhood Revitalization Initiative*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 361397); slip op at 28 (quotation marks and citation omitted). "However, a claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Id*. (quotation marks and citation omitted).

In the present case, plaintiffs claim that the "underlying tort" required for their civil-conspiracy claim is defendant's violation of the CRA. Specifically, plaintiffs contend defendant conspired with two of plaintiffs' black coworkers to violate plaintiffs' rights under the CRA. However, as explained, all of plaintiffs' claims of violations of the CRA lack merit and were rightly summarily disposed. Because plaintiffs have failed to provide evidence of an underlying tort, they cannot sustain their civil-conspiracy claim.

Affirmed.

/s/ Thomas C. Cameron
/s/ Noah P. Hood
/s/ Adrienne N. Young

[2] Plaintiffs' argument that they were afraid to report their concerns out of fear of retaliation not only fails to excuse them from the respondeat superior requirement in this claim, but it fails to account for defendant's anonymous reporting system.