STATE OF MICHIGAN

COURT OF APPEALS

ANGELO MACRENO, Plaintiff-Appellant,	UNPUBLISHED November 17, 2011
v	No. 298590 Oakland Circuit Court
ST. JAMES CAPITAL, Defendant-Appellee.	LC No. 2009-100648-CD

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiff's claims for gender discrimination and retaliation in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., in this action arising from the termination of plaintiff's employment. We affirm.

Plaintiff filed this action alleging that he was terminated from his employment with defendant in part because he complained about a "gender-hostile" comment made by a vice-president, who allegedly stated that plaintiff needed to "grow a set of balls." Defendant contended that plaintiff was terminated for insubordination, specifically his refusal to submit a leave slip when requested to do so. The trial court determined that plaintiff's complaint about the vice-president's comment did not involve protected activity because the comment concerned plaintiff's sexual orientation, not his gender. The court also concluded that plaintiff failed to show a prima facie case of discrimination by either direct or circumstantial evidence.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law."

We agree with the trial court that defendant was entitled to summary disposition with respect to plaintiff's gender-discrimination claim. Proof of discriminatory treatment in violation of the CRA may be established by direct evidence or by indirect evidence using the *McDonnell*

Douglas test.[1] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 132-134; 666 NW2d 186 (2003). However, whether a plaintiff relies on direct or indirect evidence, to survive a motion for summary disposition, the plaintiff's evidence must be sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176 (WEAVER, J.), 186 (MALLETT, C.J., concurring in part and dissenting in part); 579 NW2d 906 (1998).

Direct evidence of discrimination is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Sniecinski*, 469 Mich 132-133 (citations and internal quotation marks omitted). Plaintiff presented evidence of statements allegedly made by his supervisor, Mark Wiedelman, and by a vice-president, Lauri Wrubel. Viewed in the light most favorable to plaintiff, Wiedelman's remarks referred to plaintiff's gender and to Wiedelman's adjustment to having a male employee serve as his administrative assistant. However, the remarks do not show that Wiedelman harbored a discriminatory animus toward plaintiff or to his gender, much less that discriminatory animus was a motivating factor in the decision to discharge plaintiff. Viewed in the light most favorable to plaintiff, the evidence also showed that Wrubel made disparaging remarks about plaintiff by calling him "a flaming faggot," stating that he "acted gay," and stating that he needed to "grow some balls." However, Wrubel was not a decision-maker with respect to plaintiff's termination, and the remarks were not related to the decision-making process. In an effort to link Wrubel's remarks to his discharge, plaintiff notes that Wiedelman apologized for Wrubel's remarks at the meeting when Wiedelman discharged him.[2] Plaintiff argues that the apology "indicates that improper gender discrimination was part of Defendant's decision to terminate Plaintiff." However, Wiedelman's apology does not support a reasonable inference that he harbored any bias as reflected in the repudiated remarks, much less that he acted on it.

Plaintiff also refers to the elements of a prima facie case that are set forth in *Coleman-Nichols v Tixon*, 203 Mich App 645, 651; 513 NW2d 441 (1994), as follows:

> In order to establish a prima facie case of intentional sex discrimination, a plaintiff must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made.

This is one of the Michigan formulations for establishing a prima facie case of intentional discrimination using circumstantial evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 607 n 6; 572 NW2d 679 (1997).

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

[2] Wrubel was issued a written reprimand for her remarks and given a warning against making any further unprofessional remarks.

Here, however, Wiedelman's remarks do not show that he was predisposed to discriminate or that he acted upon such a predisposition in firing plaintiff. Even if Wrubel's comments could be considered evidence of her predisposition to discriminate, the remarks should not be imputed to Wiedelman. See *Harrison*, 225 Mich App at 608-609 n 7 (where a decision-maker considers the view of another, evidence that the other harbors a discriminatory animus may be imputed to the decision-maker). There is no evidence that Wiedelman considered Wrubel's opinion of plaintiff when firing him, other than to repudiate her comments and reprimand her for her unprofessional behavior.

The trial court did not err in granting defendant summary disposition with respect to plaintiff's gender-discrimination claim.

Moreover, we agree with the trial court that defendant was entitled to summary disposition with respect to plaintiff's claim for unlawful retaliation. MCL 37.2701 states, in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate 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.

A prima facie case of retaliation in violation of the CRA requires proof of the following:

> "(1) that [the plaintiff] 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 v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

The employee must establish that he engaged in activity protected under the CRA. *Barrett v Kirtland Community College*, 245 Mich App 306, 319; 628 NW2d 63 (2001). An employee need not specifically cite the CRA, but "must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." *Id*.

Plaintiff argues that his complaint about Wrubel's "set of balls" statement involved protected activity under the CRA and that the trial court erroneously concluded that the remark pertained to his sexual orientation.

The definition of "ball" in Random House Webster's College Dictionary (2d ed, 1997) includes: "**8.** balls, *Slang (often vulgar).* **a**. boldness; courage." We agree with plaintiff that the statement in question does not refer to sexual orientation. However, a complaint about the use of the term also does not clearly involve a complaint of discrimination because of sex. The complaint here was a complaint about another employee's use of a vulgar expression denoting a lack of courage or boldness. Because plaintiff's written complaint to Wiedelman about Wrubel's

use of that term did not "clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA," *Barrett*, 245 Mich App at 319, the trial court did not err in dismissing plaintiff's unlawful retaliation claim.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher