STATE OF MICHIGAN

COURT OF APPEALS

RECARDO CLEMONS, Plaintiff-Appellant,	UNPUBLISHED October 18, 2011
v	No. 298993 Genesee Circuit Court
B.K. TEACHOUT INVESTIGATIONS, Defendant-Appellee.	LC No. 09-092044-CD

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendant and dismissing his claim for racial discrimination under Michigan's Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. We affirm.

This case arises out of a discharge from employment, which plaintiff claims was motivated by race discrimination. Plaintiff argues that the trial court erred in applying the proper standard for employment discrimination claims, finding there was no genuine issue of material fact, and failing to view the evidence in the light most favorable to the non-moving party.

When there is no direct evidence of racial discrimination, the four-step test announced in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), is applied to determine whether the plaintiff has established a viable employment discrimination case under the ELCRA. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). That is, to establish a prima facie case of discrimination a plaintiff must show that: (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position that he held, and (4) he was discharged under circumstances which give rise to an inference of unlawful discrimination. *Id.* at 463. The burden then shifts to the defendant employer to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination to overcome the presumption. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998); *Hazle*, 464 Mich at 464. If the employer advances such a reason, the plaintiff has the burden of proving by a preponderance of the evidence that the reason offered by the employer is merely a pretext for impermissible discrimination. *Hazle*, 464 Mich at 466; *Lytle*, 458 Mich at 173-174; *Barnell v Taubman*, 203 Mich App 110; 512 NW2d 13 (1993).

Pretext may be established in three different ways: (1) by showing that defendant's articulated reasons had no basis in fact; (2) by showing that the proffered reasons were not the

actual factors motivating the adverse employment decision; or (3) by showing that the proffered reasons were insufficient to justify the adverse action. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). Michigan courts have adopted an "intermediate position" as the proper standard for determining pretext.

> Under this position, disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that employer's proffered reason was pretextual, but that it was a pretext for . . . discrimination. [*Lytle*, 458 Mich at 175-176.]

In its opinion, the trial court held that the holding in *Lytle* imposes on plaintiff "the burden of responding to Defendant's proferred [sic: proffered] non-discriminating reason for discharge with evidence of pretext and a racially discriminatory motive." The trial court called this standard "pretext plus." However, the trial court's standard is indistinguishable from the "intermediate" standard followed by Michigan courts. The trial court did not err in applying this intermediate standard; it only erred in calling it "pretext plus."

Next, plaintiff argues that the trial court erred in finding there was no issue of material fact and failed to view the evidence in the light most favorable to plaintiff. We disagree.

Plaintiff failed to establish a reasonable basis for inferring racial animus as a motivating factor for his termination. Although there were a few factual disputes, none of them were material. First, plaintiff did not argue that there is no factual basis supporting his discipline. Instead, he argued there were genuine issues of fact regarding the basis of the discipline issued, namely the failure of the branch manager to investigate and punish alleged acts of misconduct on the part of plaintiff's co-workers. Plaintiff does not allege that the reasons offered by defendant for his dismissal were insufficient to motivate the adverse employment decision. Thus, plaintiff needed to show that the proffered reasons were pretextual, i.e., not the actual motivation behind his dismissal, and that racial animus was at work. *Mich Dep't of Div Rights ex rel Burnside v Fashion Bug*, 473 Mich 863; 702 NW2d 154 (2005); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997). Plaintiff argues that he was held to a different standard than a coworker. This is not sufficient to establish a prima facie case of disparate treatment given that one employee was a manager and another was an hourly worker, and their conduct was different. *Burnside*, 455 Mich 863.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell