S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

MICHAEL LAYTON

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY, RONALD L. FOSTER, LARRY BURTON and JOHN POPKA,

Defendants-Appellees.

UNPUBLISHED
November 1, 1996

No. 186149
LC No. 93-327791 NZ

Before: Wahls, P.J., and Cavanagh and J.F. Kowalski,* JJ.

PER CURIAM.

Plaintiff appeals as right from the order granting summary disposition in favor of defendants in this employment discrimination and whistleblower's protection action. We affirm.

Plaintiff, who is of Hawaiian, Polynesian national origin, was hired by defendant, Allstate Insurance Co. (Allstate), as a claims representative. On May 5, 1993, plaintiff filed a complaint of discrimination against defendants Allstate and its supervisory personnel, Ronald Foster, Larry Burton, and John Pupka with the Michigan Department of Civil Rights claiming that defendants failed to promote plaintiff on the basis of his national origin. On July 30, 1993, plaintiff was given written notice that his position was to be terminated. Plaintiff filed a complaint against defendants alleging employment discrimination in defendants' failure to promote plaintiff and by discharging plaintiff in violation of the Civil Rights Act, MCL 37.2201 *et seq*.; MSA 3.548(201) *et seq*. Plaintiff also claimed that defendants violated the whistleblower's protection act, MCL 15.361 *et seq*.; MSA 17.428(1) *et seq*. Thereafter, defendants brought a motion for summary disposition pursuant to MCR 2.116(C)(10), which was granted by the trial court.

Plaintiff first claims that the trial court erred in finding that plaintiff failed to present evidence to establish a claim for discrimination based on national origin. Defendants raised the defense that plaintiff was not promoted due to complaints from customers regarding his rude and unprofessional behavior and that plaintiff was ultimately terminated under a reduction in force initiative instituted by Allstate.

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* Circuit judge, sitting on the Court of Appeals by assignment.

MCL 37.2202(1)(a) and (b); MSA 3.548(1)(a) and (b) prohibits an employer from discriminating against an individual on the basis of national origin. A prima facie case of discrimination under MCL 37.2202(1)(a) and (b); MSA 3.548(202)(1)(a) and (b) can be made by showing either intentional discrimination or disparate treatment. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995); *Singal v General Motors Corp*, 179 Mich App 497, 502; 447 NW2d 152 (1989). Under the former, the plaintiff must show that he was a member of the affected class, that he was discharged, and that the person who discharged him was predisposed to discriminate against persons in the affected class and had actually acted on that disposition in discharging him. The latter requires a showing that the plaintiff was a member of the class entitled to protection under the act and that he was treated differently than persons of a different class for the same or similar conduct. *Id*. at 503.

In a case where the employer claims the discharge resulted from economically motivated reduction in force, a prima facie case of disparate treatment requires an initial showing, that (1) the plaintiff was within the protected class and was discharged or demoted, (2) the plaintiff was qualified to assume another position at the time of discharge or demotion, and (3) an improper consideration was a determining factor in the employer's decision to discharge or demote the plaintiff. Once established, a prima facie case creates a rebuttable presumption of disparate treatment. *Lytle, supra* at 185-186. At this point, the burden or production shifts to the defendants to rebut the presumption by articulating some legitimate nondiscriminatory reason for the adverse employment decision against plaintiff. *Id*. at 186-187. Thereafter, plaintiff must prove that the defendants' proffered reasons are a mere pretext and that illegal discrimination was more likely the defendants' true motivation in discharging or demoting the plaintiff. *Id*. at 187.

With regard to plaintiff's claim of discrimination by failure to promote, defendants contend that plaintiff was not promoted because of his substandard performance in the area of customer service. Defendant relies on plaintiff's performance evaluations, which specify instances of customer complaints regarding plaintiff's behavior. In opposition, plaintiff relies on his nomination for the company's chairman award. However, the focus of this award was on internal relationships with claims and agency. We find that this nomination does not create an issue of fact regarding defendant's reason for failing to promote plaintiff. The unrebutted evidence supports defendants' contention that plaintiff was not promoted due to substandard performance. Therefore, plaintiff failed to establish this claim.

Regarding plaintiff's discharge from employment, plaintiff relies on the testimony of Laura Wolney, an individual who typed benefits papers for the persons who were terminated because of reduction in force wherein she indicated that she typed the papers two months after plaintiff's claim of discrimination was filed with the Michigan Department of Civil Rights. In opposition, defendant provides an affidavit of Mark Wegener an individual involved in the process of deciding which individuals would be impacted by the reduction in force. Therein, Wegener indicated that plaintiff's name was placed on the list to be discharged in April 1993 and that when plaintiff's name was included he had no knowledge of plaintiff's complaint with the Michigan Department of Civil Rights. Plaintiff challenges the reliability of this affidavit. However, Wegener's affidavit is supported by his deposition testimony which plaintiff was given leave to take before the motion was decided. The affidavit does not

conflict with Wolney's testimony because the list could have been constructed well before she prepared the benefit sheets and sent the letters of notification. Therefore, the undisputed evidence clearly indicates that discrimination was not a determining factor in plaintiff's discharge.

Finally, plaintiff contends that the trial court improperly dismissed his claim under the whistleblower's protection act. To state a prima facie case under the whistleblower's protection act, the plaintiff must establish:

> (1) that plaintiff was engaged in protected activities as defined by the act, (2) that plaintiff was subsequently discharged, and (3) that a causal connection existed between the protected activity and the discharge. [*Dolan v Continental Airlines*, 208 Mich 316, 318; 526 NW2d 922 (1995) (quoting *Tyrna v Adamo, Inc*, 159 Mich App 592, 601; 407 NW2d 47 (1987)).]

Herein, plaintiff failed to show that plaintiff was subsequently discharged and that a causal connection between the protected activity and the discharge existed. As noted above, the undisputed evidence shows that although plaintiff was notified of his termination after he filed the civil rights complaint, his name was placed on the list the month before he filed the claim. In addition, the undisputed evidence showed that defendants did not have knowledge of plaintiff's claim when they placed his name on the list of those to be discharged. For these reasons, plaintiff fails to establish a cause of action under the whistleblower's protection act.

Affirmed.

/s/ Myron H. Wahls
/s/ Mark J. Cavanagh
/s/ John F. Kowalski