# STATE OF MICHIGAN

# COURT OF APPEALS

PATRICK NNANABU,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS, ADRIAN CORRECTION FACILITY, and GUS HARRISON CORRECTIONAL FACILITY,

Defendants-Appellees.

UNPUBLISHED
March 21, 1997

No. 192877
Lenawee Circuit Court
LC No. 95-006458

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendants. We affirm in part, reverse in part, and remand.

Although the trial court's order granted defendants' motion pursuant to both MCR 2.116(C)(8) and (C)(10), our review of the record indicates that the parties relied on matters outside the pleadings to argue the motion. Therefore, we will construe the motion as having been granted solely pursuant to MCR 2.116(C)(10). See *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 705; 532 NW2d 186 (1995). On appeal, a trial court's determination of a motion for summary disposition is reviewed de novo. *Pinckney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). A motion for summary disposition under MCR 2.116(C)(10) may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* Giving the benefit of reasonable doubt to the nonmoving party, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Id.* A trial court should grant such a motion if it is satisfied that the claim suffers a deficiency that cannot be overcome. *SSC Associates v General Retirement System*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

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

On appeal, plaintiff contends that genuine issues of material fact exist with regard to his claim of racial discrimination. We agree. Under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, a prima facie case of race discrimination can be made by showing either intentional discrimination, disparate treatment, or disparate impact. *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538-539; 470 NW2d 678 (1991). In the instant case, plaintiff asserts a claim of disparate treatment. To prove disparate treatment, a plaintiff must show that he was a member of a class entitled to protection under the act and that he was treated differently than a person of a different class for the same or similar conduct. *Reisman*, *supra* at 538.

The burden of proof for employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, as stated by the United States Supreme Court in *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 252-253; 101 S Ct 1089; 67 L Ed 2d 207 (1981), also applies in employment discrimination cases brought under the Elliot-Larsen Civil Rights Act. *Sisson v Board of Regents of the University of Michigan*, 174 Mich App 742, 746; 436 NW2d 747 (1989). Under *Burdine*, the establishment of a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. *Burdine*, *supra*, at 254. The defendant may rebut the presumption of discrimination by articulating (not proving) a legitimate, nondiscriminatory reason for the adverse employment decision. *Lytle v Malady*, 209 Mich App 179, 186-187; 530 NW2d 135 (1995), citing *Burdine, supra* at 253-258. If the defendant articulates a legitimate, nondiscriminatory reason for the adverse action, the presumption of discrimination is dispelled, and the plaintiff bears the burden of proving both that the defendant's proffered reason was pretextual and that illegal discrimination was more likely the defendant's true motivation for the adverse employment decision. *Lytle, supra* at 187; see also *St Mary's Honor Center v Hicks*, 509 US 502, 515-517; 113 S Ct 2742; 125 L Ed 2d 407 (1993).

Plaintiff, a black man, has alleged several instances of disparate treatment. We find that there exist genuine issues of material fact regarding two of plaintiff's allegations. First, plaintiff has presented his deposition testimony stating that, during his tenure of employment with defendants, he was the only sergeant assigned to perform officer's duties, which were lower in rank. Conversely, defendants claim that there was no disparate treatment because white sergeants were also assigned officer's duties. Giving the benefit of reasonable doubt to plaintiff, a record might be developed regarding this issue upon which reasonable minds might differ. *Pinckney Schools*, *supra* at 525. Because, at the time summary disposition was granted, discovery had not been completed, we find that the issue was not ripe for resolution.

Likewise, plaintiff testified in his deposition that, although arrangements were customarily made to allow white sergeants assigned to the segregation unit to attend staff meetings, such arrangements were not made when plaintiff was assigned to the segregation unit. As a result, plaintiff was forced to miss an important staff meeting. Defendant has not proffered a legitimate, nondiscriminatory reason for this allegation of disparate treatment. See *Lytle, supra* at 186-187.

As to both of these allegations, plaintiff has presented documentary evidence upon which he may ultimately be able to establish disparate treatment, and thus a presumption of racial discrimination.

*Burdine, supra*, at 254. Thus, we hold that the trial court's grant of defendants' motion for summary disposition as to plaintiff's claim of racial discrimination was premature. *Pinckney Schools, supra* at 525. Accordingly, we reverse as to these claims and remand the case to the trial court.

Next, plaintiff contends that genuine issues of material fact exist regarding his claim of racial harassment. We disagree. The Elliot-Larsen Civil Rights Act provides that discrimination because of sex includes sexual harassment which creates a hostile work environment. MCL 37.2103(i)(*iii*); MSA 3.548(103)(i)(*iii*). This Court, in *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995), reasoned that, despite the "sex"-specific language of MCL 37.2103(i); MSA 3.548(103)(i), actionable claims of harassment are not limited solely to the category of sex. Specifically, the *Malan* Court upheld a jury verdict that found the defendant liable for national origin harassment. *Malan, supra* at 586.

The Michigan Supreme Court, in *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996), assuming, without deciding, that a hostile environment claim could be based on harassing conduct not of a sexual nature, listed five elements necessary to establish a prima facie case of discrimination based on a hostile work environment:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of [her protected status]; (3) the employee was subjected to unwelcome . . . conduct or communication [involving her protected status]; (4) the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior [*Id*. at 368-369, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993).]

A hostile work environment has been created by unwelcome conduct when a reasonable person, in the totality of circumstances, would perceive the conduct at issue as having substantially interfered with the plaintiff's employment or as having the purpose or effect of creating an intimidating, hostile, or offensive employment environment. See *Quinto, supra* at 369, citing *Radtke, supra* at 394.

Plaintiff's claim of a hostile work environment centers around statements by co-workers which plaintiff interpreted as racially motivated. Specifically, plaintiff complained that he was referred to as "sergeant jabjabdo" by one of his co-workers. However, this alleged slur occurred on only one instance. Plaintiff further complained that, approximately once a week he would encounter subordinate officers who addressed him as "hey yo man." However, plaintiff admitted that he never made management aware of their specific behavior. Giving the benefit of the doubt to plaintiff, see *Pinckney Schools, supra* at 525, we conclude that, at most, plaintiff faced only occasional exposure to perceived racial epithets. Under an analogous provision in Title VII, 42 USC 2000e, *et seq.*, the mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee does not affect the conditions of employment to a sufficiently significant degree to create a hostile work environment. *Meritor Savings Bank v Vinson*, 477 US 57, 67; 106 S Ct 2399; 91 L Ed 2d 49 (1986), citing *Rogers v Equal Opportunity Comm*, 454 F2d 234, 238 (CA 6, 1971). Therefore, we find plaintiff

has failed to present evidence that would allow a reasonable person to conclude, under the totality of circumstances, that the comments of plaintiff's co-workers were sufficiently severe or pervasive to create a racially-hostile work environment. *Quinto, supra* at 369; see also *Vinson, supra* at 67. Accordingly, we hold that the trial court properly granted defendants' motion for summary judgment as to plaintiff's claim of racial harassment. *SSC Associates, supra* at 365.

Finally, plaintiff contends that genuine issues of material fact exist regarding his claim of retaliation. We disagree. In order to establish a prima facie case of retaliation under the Elliot-Larsen Civil Rights Act, a plaintiff must establish (1) that he opposed violations of the act or participated in activities protected by the act and (2) that the opposition or participation was a significant factor in an adverse employment decision. *Booker v Brown & Williamson Tobacco Co, Inc,* 879 F2d 1304, 1310 (CA 6, 1989); *Polk v Yellow Freight System, Inc,* 801 F2d 190, 198-199 (CA 6, 1986); *Cox v Electronic Data Systems Corp,* 751 F Supp 680, 694-695 (ED Mich, 1990).

In determining whether a plaintiff's claim of retaliatory discharge is sufficient to withstand summary disposition, a court should consider the shifting burden analysis of *Burdine, supra*, at 252-253. See *Cox, supra* at 695, citing *Booker, supra* at 1311. Therefore, if the defendant alleges a legitimate, nondiscriminatory reason for its adverse employment decision, the plaintiff must tender specific factual evidence that could lead a reasonable jury to conclude that the defendant's reasons are pretextual. See *Lytle, supra* at 187-188; *Cox, supra* at 695; see also *Burdine, supra* at 255-256.

Plaintiff's filing of his initial complaint of racial discrimination and harassment was a protected activity under MCL 37.2701(a); MSA 3.548(701)(a). However, plaintiff failed to introduce any evidence that his participation in the protected activity was a significant factor in defendants' subsequent adverse employment decisions. *Booker, supra* at 1310; *Polk, supra* at 198-199; *Cox, supra* at 694-695. Both of plaintiff's disciplinary suspensions were for conduct that occurred prior to the filing of plaintiff's initial complaint and came as a result of investigations that commenced before the initial complaint was filed. Furthermore, in both cases, plaintiff admitted to all or part of the alleged conduct. Finally, defendants assert that plaintiffs' demotion was based on his unsatisfactory performance review which in turn was based on his two suspensions and another disciplinary action that took place before plaintiff filed has initial complaint. The mere fact that the adverse employment decisions occurred *after* plaintiff's charge of discrimination, standing alone, is insufficient to support a finding of retaliation, and the fact that plaintiff's performance problems and the investigations occurred *before* he filed his complaint weighs heavily against a finding of pretext. See *Booker, supra* at 1314; *Cox, supra* at 695. Therefore, we hold that plaintiff has failed to raise a genuine issue of material fact regarding his claim of retaliation. *Pinckney Schools, supra* at 525.

Affirmed in part, reversed in part, and remanded for further proceedings. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb