STATE OF MICHIGAN

COURT OF APPEALS

MAHENDRA DALMIA and KIRAN DALMIA,

Plaintiffs-Appellants,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
May 9, 1997

No. 186669
Wayne Circuit Court
LC No. 93-307809

Before: Holbrook, P.J., and White and A.T. Davis, Jr.,* JJ.

PER CURIAM.

Plaintiffs appeal the circuit court's order granting summary disposition to defendant under MCR 2.116(C)(10) in this employment discrimination action alleging national origin discrimination and retaliation under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* We affirm the circuit court's dismissal of plaintiff's discrimination in promotion claim, and reverse the dismissal of plaintiff's retaliation claim.

Plaintiff first argues that the circuit court erred by dismissing the retaliation claim[1] when questions of fact remained regarding the causal link between defendant's adverse conduct and plaintiff's previous submission of a discrimination claim to defendant. We agree.

The CRA prohibits employers from retaliating against an employee for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the act. MCL 37.2701; MSA 3.548(701). *McLemore v Detroit Receiving Hosp*, 196 Mich App 391, 396; 493 NW2d 441 (1992). To establish a prima facie case of retaliation, the plaintiff must set forth facts showing that 1) the plaintiff engaged in protected activity; 2) he or she was the subject of adverse employment action; and 3) a causal link between the protected activity and the adverse action. *EEOC v Ohio Edison Co*, 7 F3d 541 (CA 6, 1993); *Kocenda v Detroit Edison Co*,139 Mich App 721, 726; 363 NW2d 20 (1984).

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

The facts viewed in a light most favorable to plaintiff, Mahendra Dalmia, who was born in India, are that plaintiff was hired as a Senior Manufacturing Engineer by defendant General Motors Corporation (GMC) in 1985 into a seventh-level position. Plaintiff had received a Bachelor of Science in Mechanical Engineering from Birla Institute of Technology in Pilani, India in 1972; a Master of Science in Mechanical Engineering from the University of Hawaii in 1974; and a Master of Business Administration from Case Western Reserve University in 1982. Before joining GMC, plaintiff had eleven years' experience with various American corporations in Illinois and Ohio, including as a design engineer, product engineer, assistant plant engineer, project manager of new product development, and manager of materials and production control. Plaintiff has been a United States citizen since 1982. At GMC, he consistently received outstanding or superior performance reviews and was repeatedly rated as ready for promotion to the eighth level.

Plaintiff further asserted that after having applied, unsuccessfully, for more than twenty-five eighth-level positions, he submitted an internal discrimination claim to defendant pursuant to defendant's "open door" policy in November 1991. At that time, plaintiff had been with GMC for more than six years and had been rated as ready for eighth-level positions in a variety of different fields by several supervisors. Defendant did not formally respond to plaintiff's internal complaint.[2] In May 1992, plaintiff's supervisor, Tom Tyler, advised him to leave GMC "as a piece of friendly advice." In June 1992, plaintiff was transferred to the Saturn facility in Romulus and reclassified to a lower job. Plaintiff was told that he was replacing a service garage mechanic with twenty-five years' experience, even though he had no auto-repair experience. His company car was taken away, he was made to sweep and mop floors, and had to share a desk and phone with three other non-engineering personnel. Plaintiff also argued below that by transferring him, defendant limited his access to job postings and placed him in a non-engineering environment, with no opportunity for promotion, and that since he submitted his complaint, none of his supervisors had determined him ready for an eighth-level position.

We conclude that plaintiff established a prima facie case of retaliation under the CRA. Plaintiff's internal complaint of November 1991 constituted protected activity under the CRA. *McLemore, supra* at 395-397. Plaintiff was the subject of adverse employment action – he was transferred from a managerial position in Warren to a lower category[3] position in Romulus, where he replaced an auto mechanic, was made to share a desk and phone with three non-engineering personnel, and his company car was taken away. Further, we conclude that plaintiff sufficiently established a causal link between his submission of an internal complaint and his transfer to survive defendant's motion. Before submitting his internal complaint to defendant, plaintiff had received outstanding or superior performance ratings and had been determined ready to be promoted to eighth-level positions in a number of fields. In contrast, after submitting his complaint, none of his supervisors found him ready for an eighth level position. Moreover, after plaintiff submitted his complaint, his supervisor advised him, in May 1992, to leave GMC. In June 1992, plaintiff was transferred to Romulus to replace a service garage mechanic, reclassified to a lower job, made to share a desk and phone with three non-engineering personnel, and mop and sweep floors, and his company car was taken away.

Given these circumstances, a rational trier of fact could conclude that defendant's adverse actions were motivated by plaintiff's having submitted an internal complaint.[4] We therefore reverse the circuit court's dismissal of plaintiff's retaliation claim.

Plaintiff also challenges the circuit court's grant of summary disposition to defendant on plaintiff's claim of failure to promote on the basis of national origin. Although plaintiff established a prima facie case by showing that he was a member of a protected class; was qualified for promotion to a higher level or grade; was not selected for positions at that higher level, and that the positions were given to non-members of his protected class, plaintiff failed to present sufficient evidence to raise a genuine issue of fact regarding whether defendant's articulated legitimate, nondiscriminatory reasons for failing to promote him were pretextual. See *Lytle v Malady*, 209 Mich App 179, 185-187; 520 NW2d 135 (1995), appeal granted 451 Mich 920 (1996). Even though comments plaintiff relied on in support of this claim were offensive and highly inappropriate, plaintiff did not establish that the comments were made by the decision makers responsible for denying him promotions or that the comments were related to the specific denials of promotion challenged. We also note that plaintiff did not allege below that these remarks created or contributed to a hostile environment. Summary disposition for defendant was therefore appropriate.

We affirm the circuit court's dismissal of plaintiff's failure to promote claim, and reverse the circuit court's dismissal of plaintiff's retaliation claim.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis

[1] Although plaintiff raised two claims of retaliatory transfer below, plaintiff has only challenged the trial court's summary disposition ruling with respect to the initial transfer, in June 1992.

[2] Although defendant argued to the contrary below in a reply brief to plaintiff's response to defendant's motion, the deposition testimony it cited in support was not submitted below.

[3] While defendant disputes whether this was, in fact, a demotion, plaintiff presented sufficient evidence to create an issue of fact.

[4] We note that the circuit court determined that it was undisputed that plaintiff's job was phased out. Defendant so argued in its motion for summary disposition, but attached no documentary evidence or affidavit in support of this argument, and the deposition testimony cited to support this argument in its reply brief below was not submitted below. On appeal, plaintiff argues that his deposition testimony refutes that his job was phased out. However, that testimony was not submitted below. Therefore,

while plaintiff argues on appeal that it is not undisputed that his job was phased out, it is understandable that the circuit court believed that it was undisputed that plaintiff's job was phased out.

Nonetheless, we conclude that even if defendant had provided support for its argument that plaintiff was transferred because his job was phased out, plaintiff must still be allowed to establish pretext. A plaintiff can establish that the employer's stated legitimate, nondiscriminatory reasons are mere pretexts by showing: 1) that the reasons had no basis in fact; 2) that, if they have basis in fact, by showing that they were not the actual factors motivating the employment decision; or 3) that, if they were the factors, they were jointly insufficient to justify the decision. *Byrnes v Frito-Lay, Inc*, 811 F Supp 286, 292 (ED Mi 1993), citing *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990). The soundness of an employer's business judgment may not be questioned as a means of showing pretext. *Id.* In this regard, we note that although defendant asserts that when plaintiff's job was phased out, plaintiff opted for the position to which he was transferred, plaintiff denies that he opted for the position over an alternative one, and maintains that defendant's decision was unilateral.