STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM S. JOHNSON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
September 12, 1997

No. 190340
Wayne Circuit Court
LC No. 93-311720

Before: Taylor, P.J., and Griffin and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition in favor of defendant in this employment discrimination action. We affirm.

I

Plaintiff first argues that the trial court erred in granting summary disposition of his racial harassment claim on the basis of the statute of limitations. We disagree.

Summary disposition is appropriate when a claim is not filed before the expiration of an applicable statute of limitations, MCR 2.116(C)(7). The period of limitation for a racial harassment claim under the Civil Rights Act (CRA), MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq*., is three years. MCL 600.5805(8); MSA 27A.5805(8); *Parker v Cadillac Gage Textron, Inc*, 214 Mich App 288, 289; 542 NW2d 365 (1995).

In order to set forth a prima facie case of racial harassment, plaintiff had to allege that he was a member of a protected class, that he was subjected to unwelcome racial harassment, that the harassment complained of was based on race, that the charged racial harassment had the effect of unreasonably interfering with his work performance and creating an intimidating, hostile, or offensive work environment, and that liability can be imposed on the basis of respondeat superior. See *Boutros v Canton Regional Transit Authority*, 997 F2d 198, 203 (CA 6, 1993), modified *Harris v Forklift Systems, Inc*, 510 US 17; 114 S Ct 367; 126 L Ed 2d 295 (1993). Conduct that is not severe or

pervasive enough to create an objectively hostile or abusive work environment is not actionable. *Harris, supra* at 21-22.

Plaintiff failed to identify any act of unwelcome racial harassment that occurred within the three-year period immediately preceding the filing of his complaint that rose to the level of conduct severe or pervasive enough to create an objectively hostile or abusive work environment. Therefore, no factual development could provide a basis for recovery and plaintiff's claim was time barred. MCL 600.5805(8); MSA 27A.5805(8); *Parker, supra* at 289. Further, plaintiff's reliance on the doctrine of continuing violations as recognized by the Supreme Court in *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 525-533; 398 NW2d 368 (1986), is misplaced because plaintiff was required to, but did not, show that the conduct occurring outside the statute of limitations period was such that he had no reason to assume that he could file an action based on that conduct. *Sumner, supra* at 538; see also Michigan Wrongful Discharge and Employment Discrimination Law, 2d ed, § 3.8 (noting that *Sumner* "establish[ed] the general rule that if the plaintiff seeks to include conduct otherwise barred by the statute of limitation, the plaintiff must show that he or she would not have known to bring an action based on the stale events."). Although this issue was not addressed below, plaintiff's response to defendant's motion makes clear that he was aware more than three years before he filed suit that he could file an action based on defendants' alleged conduct. Thus, plaintiff is precluded from relying on incidents that occurred outside the three-year limitation period.[1]

II

Plaintiff next argues that the trial court erred in granting summary disposition of his race discrimination claims. We disagree.

Summary disposition may be granted where, except with respect to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. In testing the factual sufficiency for a claim, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it. *Allen v Keating*, 205 Mich App 560, 563-563; 517 NW2d 830 (1994). The movant must specifically identify those matters that have no disputable issue of fact and then support its position with documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The party opposing the motion must then show by documentary evidence that a genuine issue of material fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994).

To prove intentional race discrimination, plaintiff had to show that he was a member of a protected class, that he was discharged, and that the person who discharged him was predisposed to discriminate against persons in the protected class and actually acted on that disposition in discharging him. *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538; 470 NW2d 678 (1991). If a plaintiff establishes a prima facie case of racial discrimination, the burden shifts to the defendant to articulate some nondiscriminatory reason for the discharge. Where an employer successfully rebuts a prima facie case of employment discrimination, the plaintiff must then show that the employer's articulated nondiscriminatory reason is mere pretext. *Victorson v Dep't of Treasury*, 439 Mich 131,

143; 482 NW2d 685 (1992). Mere speculation and inference will not sustain a claim of intentional discrimination. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 362-363; 486 NW2d 361 (1992).

In support of his intentional race discrimination claim, plaintiff alleged that his supervisor refused to consider his recommendation that an African-American employee be promoted because "she might give away all the big cars." Plaintiff argued that this remark showed the supervisor's refusal to hire or promote African-Americans on the basis of a belief in some racial stereotype that African-Americans are unqualified employees. Plaintiff further contended that defendant's ultimate promotion of a Caucasian evidenced discriminatory animus. Plaintiff failed to argue how this statement showed racial animus, and we find no support for plaintiff's conclusary contention that this statement was indicative of discrimination against all African-American employees. *Reisman, supra* at 538. Plaintiff further relies upon the following statement, also allegedly issued by his supervisor, in support of his claim of discrimination:

> Bill, you know, you and I have talked on several occasions. I am going to prevail upon you to keep me to be mindful [sic] of you people to the extent that, yes, I do have a problem of promoting people that I don't feel comfortable with. And, yes, I was reared in Detroit, but, you, know, I haven't had an inner circle relationship with blacks. So I do believe you can help me to overcome this particular concern so as we can move onto bigger and better things for you.

We conclude that this statement shows only that its maker did not act upon any racially motivated predisposition in his dealings with plaintiff. *Id.* Plaintiff asserts that he was given an office without a telephone or secretary at one point. However, this occurred when defendant was reorganizing its North American operations and there were others who found themselves in similar situations. In any event, this shows nothing more than poor utilization of resources. Therefore, having failed to show that defendant was both predisposed to discriminate against persons in the protected class and actually acted upon that predisposition, plaintiff failed to establish a prima facie intentional discrimination claim. *Id.*

Plaintiff further argues that the trial court erroneously granted summary disposition of his disparate treatment claim. We disagree.

To prove disparate treatment, plaintiff had to show that he was a member of a class entitled to protection and that he was treated differently than persons of a different class for the same or similar conduct. *Id.* Plaintiff first argues that one of his superiors agreed to promote him if he passed a battery of tests and that these tests were not given to other managerial employees of defendant. Plaintiff failed to provide the trial court, or this Court, with the relevant portions of deposition testimony evidencing this claim. Because a party opposing a summary disposition motion made pursuant to MCR 2.116(C)(10) must show by documentary evidence that a genuine issue of material fact exists, *Skinner, supra* at 160, we conclude that plaintiff failed to provide evidence sufficient to withstand defendant's motion for summary disposition.

Plaintiff argues that defendant required that salaried employees receive annual written evaluations, that he was denied such evaluations, that his ability to receive promotions was therefore impaired, and that his supervisors were not disciplined for this policy violation. Again, while plaintiff argues that he was denied annual performance reviews, he fails to refer this Court to any documentary evidence supporting that contention. MCR 2.116(C)(10); *Skinner*, *supra* at 160. Moreover, plaintiff failed to allege or show that any employee, not a member of his protected class, was provided with reviews and that he was therefore treated differently than persons of a different class for the same or similar conduct. *Id.*

Plaintiff next argues that he was more severely disciplined for misconduct in accruing "GM Proud" program rewards than similarly situated Caucasian employees. However, these other employees did not engage in the same or similar conduct. Here, plaintiff made use of his position as defendant's employee to review dealer contracts and requested that automobile dealers complete cards following sales at a time that he was in a position to benefit those dealers by repurchasing defective vehicles. The other employees' misconduct was not as egregious as plaintiff's. Thus, plaintiff failed to show that he was treated differently than persons of a different class for the same or similar conduct. *Id.*. Further, one of the other employees was asked to leave defendant's employ after the "GM Proud" incident and the other left its employ following a "mutual parting of the ways."[2]

Plaintiff also argues that his supervisor hired relatives to fill positions and that, although this violated defendant's hiring policies, the supervisor went unpunished. However, plaintiff failed to allege or show that he was disciplined for similarly violating defendant's hiring policies and a race discrimination claim must be supported by evidence showing that plaintiff was treated differently than persons of a different class for the same or similar conduct. *Id.*

Plaintiff further argues that his conversation with a former automobile dealer regarding pending litigation against defendant and for which defendant terminated his employment was protected speech and did not constitute legitimate grounds for discharge. However, the documentary evidence provided to the trial court showed that while engaged in that conversation, plaintiff criticized defendant's business practices and policies, as well as defendant's executives, gave advice regarding the successful prosecution of lawsuit against defendant, and improperly disclosed proprietary information regarding dealer financing practices. Moreover, plaintiff failed to allege or show that any other employee of defendant discussed litigation pending against defendant without repercussion. A disparate treatment claim must be supported by evidence showing that plaintiff was treated differently than persons of a different class for the same or similar conduct. *Id.* Therefore, because plaintiff failed to provide the trial court with documentary evidence showing that he was treated differently than persons of a different class for the same or similar conduct and further failed to articulate any basis showing that him employment was terminated as a consequence of his race, plaintiff failed to establish a prima facie race discrimination claim under a theory of disparate treatment.

III

Plaintiff next argues that the trial court erred in granting summary disposition of his retaliation claim. We disagree.

Employers are prohibited from retaliating against employees for making a charge, filing a complaint, testifying, assisting, or participating in an investigation, proceeding, or hearing under the CRA. MCL 37.2701; MSA 3.548(701). The elements of a retaliation claim under the CRA are that the plaintiff opposed violations of the CRA, and that the opposition was a significant factor in an adverse employment decision. *Johnson v Honeywell Information Systems, Inc*, 955 F2d 409, 415 (CA 6, 1992).

Plaintiff first argues that he was demoted one week after he complained of the suspension of an African-American automobile dealer in 1991. However, the documentary evidence provided to the trial court failed to allege or show that plaintiff's complaint as to the treatment of the dealer constituted discriminatory conduct by defendant prohibited by the CRA.[3] Furthermore, contrary to the dissent's conclusory statement, plaintiff failed to allege or show any causal connection between his demotion and the complaint. Moreover, the documentary evidence provided to the trial court did show that plaintiff's demotion was made on the basis of his improper conduct in the "GM Proud" program, which violated defendant's guidelines for employee conduct, as well as defendant's guidelines governing the "GM Proud" program itself. Therefore, plaintiff failed to show that if he opposed treatment prohibited by that CRA, that opposition was a significant factor in defendant's decision to terminate his employment. *Id.* at 415.

Plaintiff next argues that when he refused to defend his supervisor against a race discrimination claim, defendant denied him financing for an automobile dealership. However, the excerpts of deposition testimony upon which plaintiff relied in support of this claim were not presented to the court below. Our review is limited to the record developed at the trial court and a party may not expand the record on appeal. *Harkins v Dep't of Natural Resources*, 206 Mich App 317, 323; 520 NW2d 653 (1994). A party opposing a summary disposition motion made pursuant to MCR 2.116(C)(10) must show by documentary evidence that a genuine issue of material fact exists. *Skinner, supra* at 160. Here, plaintiff failed to provide evidence sufficient to withstand defendant's motion for summary disposition.

Plaintiff next argues that he filed a complaint in 1991 in which he made allegations of discriminatory treatment and consequently was encouraged to accept an offer of early retirement. However, our review of the documentary evidence reveals that defendant underwent an ongoing reorganization of its North American automotive operations in 1991 and 1992, which led to the implementation of incentive-based early separation programs. Consequently, some of defendant's employees, including plaintiff, were approached by members of defendant's management team to evaluate interest in early separation. Therefore, plaintiff failed to show that he opposed treatment prohibited by the CRA and that, if so, that such opposition was a significant factor in defendant's decision to terminate his employment. *Johnson, supra* at 415.

At the 1991 meeting, plaintiff indicated an interest in early separation in the event that defendant would invest in an automobile dealership on his behalf. However, there is no genuine issue of material fact that defendant's disinterest in assisting plaintiff in financing a dealership was unrelated to any conduct of plaintiff, but rather was a consequence of business judgment by defendant. Therefore, again,

plaintiff failed to show that he opposed treatment prohibited by the CRA and that, if so, opposition was a significant factor in defendant's decision to terminate his employment. *Id.*

Plaintiff finally argues that he was discharged after requesting copies of his personnel file in conjunction with this lawsuit. However, the documentary evidence provided to the trial court showed that plaintiff was discharged as a consequence of defendant's perceived inability to trust plaintiff to act in accordance with its policies or in its best interests following plaintiff's disclosure of proprietary information to a litigant against defendant.[4] Therefore, plaintiff failed to show that his opposition to treatment prohibited by that CRA was a significant factor in defendant's decision to terminate his employment. *Id.* Giving the benefit of doubt to plaintiff, we conclude that plaintiff failed to raise any genuine issue of material fact with regard to his retaliation claim and defendant was entitled to summary disposition as a matter of law. MCR 2.116(C)(10); *Weisman, supra* at 566-567.

IV

Plaintiff finally argues that the trial court erred in granting summary disposition of his age discrimination claim. We disagree.

To prove age discrimination, plaintiff had to show that he was a member of a protected class, was discharged, was qualified for the position, and that age was a determining factor in the employer's decision to terminate his employment. *Matras v Amoco Oil Co*, 424 Mich 675, 683; 385 NW2d 586 (1986). In support of his claim that his age was a determining factor in defendant's decision to terminate his employment, plaintiff relies upon a statement for which he failed to provide documentary evidence. Consequently, because a party opposing a summary disposition motion made pursuant to MCR 2.116(C)(10) must show by documentary evidence that a genuine issue of material fact exists, *Skinner, supra* at 160, plaintiff failed to provide evidence of age discrimination sufficient to withstand defendant's motion for summary disposition. Moreover, even if this statement had been properly presented to the court, it is subject to numerous interpretations and, standing alone, is not sufficient to create a genuine issue of material fact of age discrimination. Indeed, during the applicable period defendant was downsizing and approached all of its with incentives to consider leaving the company or to take an early retirement. Plaintiff failed to present evidence that age was a determining factor in defendant's adverse employment actions. Therefore, summary disposition of the age discrimination claim was proper. *Matras, supra* at 682-683.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin

[1] We discuss some incidents that occurred outside of the three-year limitations period elsewhere in the opinion. This is because the parties briefed the issues and to show that General Motors was entitled to summary disposition even if the continuing violations doctrine applied.

[2] As noted in the dissent, Hermiller left defendant's employ in June of 1992 and part of defendant's investigation of the "GM Proud" program did not occur until August 1992. Further, we reject the dissent's suggestion that the fact that neither plaintiff nor several other of defendant's employees saw rules regarding the "GM Proud" program is somehow relevant. The "GM Proud" program was a referral program. One does not need to see any rules to know it is wrong to receive credit for a referral one never made.

[3] Thus, contrary to the dissent, we find no protected activity.

[4] The dissent claims that plaintiff did not violate a policy forbidding employees to speak to lawyers for private parties concerning litigation. This is sophistry. The conversation violated the spirit of the policy even if it did not violate the letter of the policy. In any event, the conversation clearly violated defendant's policy forbidding employees from engaging in any activity that is detrimental to defendant.