STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM JOHNSON,

Plaintiff-Appellant,

v

GENERAL MOTORS CORP,

Defendant-Appellee.

UNPUBLISHED

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

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

WHITE, J. (concurring in part and dissenting in part).

I concur in the dismissal of plaintiff's age discrimination claim. Plaintiff did not refute that defendant reorganized and down-sized its operations in 1991 and 1992.[1] Plaintiff therefore had the burden of presenting evidence that age was a determining factor in defendant's adverse employment actions, *Matras v Amoco Oil Co*, 424 Mich 675, 682-683; 385 NW2d 586 (1986); SJI2d 105.02, which plaintiff failed to do.[2] I also agree that the continuing violations doctrine is inapplicable because plaintiff failed to show that he would not have known to bring an action based on the stale events,[3] as required by *Sumner v Goodyear Tire Rubber & Co*, 427 Mich 505, 538; 398 NW2d 368 (1986).[4] I further agree that plaintiff presented insufficient evidence to survive defendant's motion as to any failure to promote claim[5] and racial harassment claim,[6] but conclude that plaintiff's racial discrimination and retaliation claims should not have been dismissed.

I cannot agree that plaintiff failed to identify any act of racial discrimination occurring within the three-year limitations period The facts viewed in a light most favorable to plaintiff are that plaintiff began employment with GM in 1965 as an hourly worker at a plant in Flint. He soon after became a salaried employee and was the first African-American district manager at GM in the 1970s. Plaintiff continued to work as a manager for almost ten years, until 1977, when he left to purchase a GM auto dealership. In 1985, plaintiff returned to GM, as an auction coordinator in charge of auction car sales to GM dealers nationwide. Plaintiff's 1986 evaluation stated that he possessed "excellent oral and communication skills." Both his 1986 and 1987 performance evaluations rated him as "should be considered now" for promotion, and his overall performance as "superior," the next to the highest category. Thereafter, plaintiff was not evaluated annually. An informal evaluation occurred in late 1990, after he formally complained about not being promoted based on his race. Defendant told plaintiff that

his "communication, managerial and organizational skills were lacking and that he would not be promoted." Defendant argued below that it then had an "independent skills assessment" of plaintiff done by an outside firm, whose testing results "coincided with GM management's determination that plaintiff's communication skills were sorely lacking."

When viewed in a light most favorable to plaintiff, there is a factual question whether defendant's actions were discriminatory and its stated reasons pretextual. While defendant initially identified communication, managerial and organizational skills, it appears from the assessment that plaintiff's managerial and organizational skills were strong. Further, while the 1990 assessment did identify a communications deficiency, the assessment was, overall, quite complimentary to plaintiff and rated plaintiff well. It did not state or imply that plaintiff should not be considered for promotion[7] or be stripped of his duties, as plaintiff was in 1991, or be demoted as he was in 1992.[8]

Plaintiff presented evidence that a number of other discriminatory and retaliatory incidents occurred within the limitations period. For example, plaintiff's response to defendant's motion argued, and excerpts of plaintiff's deposition testimony attached to his response support, that although plaintiff was responsible for handling any complaints about GM dealers nationwide and imposing discipline on the dealers, defendant's agents in 1991 suspended the lone African-American GM dealer in Alabama, without plaintiff's knowledge. Although complaints regarding dealers were to be channeled through plaintiff, in this instance, plaintiff was bypassed by neither being informed of the matter nor receiving copies of pertinent correspondence. Plaintiff testified that he complained about the allegedly racially discriminatory handling of the Alabama dealer to his superior, Mike McHale, around April or May 1991, and approximately one week later his responsibilities as auction dealer relations manager were removed and given to a white male, Gordon Warren. Leon McDaniel, to whom plaintiff apparently later reported, testified that plaintiff was then assigned no job responsibilities and that he had "no knowledge" of other employees being similarly assigned no job duties. Plaintiff testified that he attempted two or three times, unsuccessfully, to discuss that he had no job responsibilities with Dale Hermiller, who took over the department in which plaintiff was located in late 1991.

Plaintiff raised a genuine issue of fact whether his being stripped of his duties in 1991 was in retaliation for his complaining about what he perceived to be defendant's discriminatory conduct against Bell, the African-American GM dealer in Alabama. Plaintiff's retaliation claim was improperly dismissed because plaintiff presented evidence of a causal link between protected activity and adverse treatment by defendant. See *Kocenda v Detroit Edison Co,* 139 Mich App 721, 725; 363 NW2d 20 (1984).

Plaintiff additionally asserted that his demotion in August 1992 was discriminatory and that defendant's reason for demoting him, improprieties surrounding the GM Proud Program, was a mere pretext for further discriminating and retaliating against him. Plaintiff also argued, however, that the operative demotion occurred in 1991 when he was stripped of his duties.

On June 15, 1992 plaintiff's counsel requested plaintiff's personnel file pursuant to the Employee Right to Know Act, MCL 423.501 *et seq.;* MSA 17.62(1) *et seq*. Plaintiff's counsel sent a second letter making the same request on June 24, 1992. Although plaintiff had signed an authorization form for release of his file, defendant required plaintiff to sign another form on July 7, 1992. One week

later, on July 15, 1992, plaintiff was confronted by Amy LaBarge, defendant's Personnel Manager, and told he would be demoted because of improprieties regarding the GM Proud program, a sales incentive program. Plaintiff attached a memo from LaBarge and F.N. Sims to him which referred to their meeting of July 15, 1992, and stated that at that time plaintiff had been "advised that your job responsibilities would be changed and your pay and level would be adjusted downward."

Amy LaBarge's affidavit, which defendant heavily relied on below, stated that "[i]n or around August 1992," an investigation by the GM Internal Audit Staff revealed that plaintiff had improperly taken credit for sales through the GM Proud Program. However, the record indicates that part of the investigation was conducted on June 22, 1992, shortly after plaintiff's counsel requested plaintiff's personnel file, and part in August 1992.

Defendant argued below that two white employees were disciplined for similar conduct involving the GM Proud Program, Dale Hermiller and Denise Kozakiewicz. Defendant attached to its brief below a personnel transaction form stating that in September 1992 Kozakiewicz was demoted and her pay decreased "based on improprieties and investigation of activities related to the GM Proud Sales Program." Plaintiff did not address this evidence or rebut it, either below or on appeal. Regarding Hermiller, however, plaintiff attached deposition testimony of Hermiller's to his response to defendant's motion in which Hermiller testified that he was not disciplined as a result of anything having to do with the Proud program; that he, like plaintiff, had distributed cards to dealers without names of customers filled in; and that he had received credit for the sales.

Hermiller's deposition testimony contradicted defendant's argument that Hermiller was disciplined because of his activities in the Proud program. Hermiller testified that he voluntarily left GM in June 1992 because he had an opportunity to obtain a better position with a different company in Maryland, that he and GM had a "mutual parting of the ways." Moreover, several GM employees, in addition to plaintiff, testified at deposition that they had not seen any rules or documentation regarding the Proud program.[9]

A plaintiff can establish that the employer's stated legitimate reason is pretextual by showing 1) that the reasons had no basis in fact; 2) that, if there was a factual basis for the employer's reasons, the reasons were not the actual factors motivating the employment decision; or 3) that, if the reasons were factors, they were insufficient to justify the decision. *Dubey v Stroh Brewery Co,* 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

Plaintiff's failure to rebut the evidence that Kozakiewicz was disciplined for similar conduct is not fatal to his demotion claim because viewing the facts in a light most favorable to plaintiff, a jury could conclude that the operative "demotion" occurred in 1991, when he was stripped of his duties as auction coordinator, and that the August 1992 "demotion" did not change the status quo, i.e., that plaintiff had no job responsibilities. Further, plaintiff presented evidence from which a fact-finder could infer that the alleged GM Proud Program improprieties were not the true reason plaintiff was demoted. A reasonable juror could conclude that the demotion was in retaliation for plaintiff's counsel's request for plaintiff's personnel file, or could conclude that the demotion was intended to force plaintiff to leave GM, in further retaliation for his complaints of discrimination.

Plaintiff also testified, and submitted an affidavit in support of his response to defendant's motion, that, following his 1992 demotion, everyone in his department had left the World Headquarters building, so he was left alone there.[10] He was then transferred to the North American Automobile Organizations Fleet Operations at the Tech Center in Warren, and given an office without a telephone or secretary.

Plaintiff was discharged in March of 1994 by LaBarge, allegedly because of a phone conversation plaintiff had had with Bell, the African-American GM dealer in Alabama, in May 1993, at a time when Bell had a suit pending against GM. Both plaintiff and Bell were in their respective homes at the time of the phone conversation and, unknown to plaintiff, Bell was recording the conversation on advice of counsel. GM procured a copy of the taped phone conversation sometime in 1994, well after having twice demoted plaintiff, during discovery in Bell's case against GM. During the May 1993 phone conversation both men discussed their disillusionment with defendant's treatment of African-Americans. Defendant argued below that it discharged plaintiff because in the phone conversation he "misrepresented the business practices and policies of GM and GMAC . . . and made false and disparaging remarks regarding GM executives involved with the auction operations, as well as McDaniel and Powell, which served to undermine the integrity, effectiveness and reputation of the Corporation and the GM Minority Dealer Development Program." Defendant argued below that "GM's Guidelines for Employee Conduct specifically prohibit the type of duplicitous ex-parte communication in which plaintiff engaged," and that plaintiff made disparaging references to the two top ranking in GM's Minority Dealer Development Program, which served only to undermine their ability to implement the policies which GM had established to assist its minority dealer operators. The guideline GM relies on, however, states that employees should not respond to requests from "lawyers for private parties concerning litigation or an investigation."

The guideline does not apply on its face. Plaintiff presented sufficient evidence to present a jury submissible issue regarding whether this was a true reason for plaintiff's discharge or a pretext for terminating plaintiff. *Dubey, supra* at 565-566; 462 NW2d 758 (1990). A reasonable fact-finder could conclude that defendant had set about to terminate defendant well before obtaining the taped phone conversation, as a result of racial discrimination or retaliation, as evidenced by plaintiff's being stripped of his duties and later being officially demoted, and that defendant's reliance on the conversation, which did not violate the policy on its face, was a pretext.

I would reverse the grant of summary disposition as to plaintiff's racial discrimination and retaliation claims.

/s/ Helene N. White

[1] Plaintiff erroneously argues on appeal that defendant did not argue below that it had reorganized and reduced its work force. Defendant's brief in support of it's motion for summary disposition did argue that defendant implemented a reorganization and downsized.

[2] It appears that the circuit court improperly believed that an age discrimination claim may not be maintained in situations where a plaintiff's job responsibilities, after discharge or demotion, are not taken on by another. When an employer lays off employees or reorganizes for economic reasons, the plaintiff bears a greater burden of proof in showing discrimination and must present evidence that age was a determining factor in the employer's decision to discharge him. *Plieth v St Raymond Church*, 210 Mich App 568, 574; 534 NW2d 164 (1995). Even though an employer may be able to justify economic layoffs, it cannot decide which employees to lay off based on considerations that are prohibited by law, such as age, race or sex. *Featherly v Teledyne Industries*, 194 Mich App 352, 355; 486 NW2d 361 (1992). Additionally, under the CRA a plaintiff need not establish that his or her replacement was forty years of age or under; under the CRA the plaintiff must merely show that he or she was replaced with a younger person. *Matras, supra* at 683. The circuit court erroneously applied the standards of the Age Discrimination in Employment Act (ADEA), 29 USC 621 *et seq.*, which protects individuals forty years or older from age-based discrimination. *Simpson v Ernst & Young*, 100 F3d 436 (CA 6, 1996).

[3] Plaintiff argued below that he complained a number of times about defendant's discriminatory conduct, as far back as 1986, and that plaintiff's 1990 complaint was "merely one example of numerous instances of formal and informal oppositions of Plaintiff to his racially discriminatory treatment."

[4] The majority discusses a number of incidents that occurred outside the three year limitations period. Because I conclude that the continuing violations doctrine does not apply, I do not reach the question whether those incidents were evidence of discrimination.

[5] Defendant argued in its reply brief below that plaintiff voluntarily dismissed this claim in his second amended complaint, because any promotion-related claim was barred on res judicata grounds, apparently referring to a consent decree entered in *Huguley v General Motors*, 128 FRD 81 (ED MI, 1989), aff'd 925 F2d 1464 (CA 6, 1991). We need not address the applicability of *Huguley*, however, because plaintiff has failed to present evidence 1) that he applied for specific positions, 2) of who was promoted to the various positions about which he testified at deposition he was qualified for, and 3) of his qualifications for those positions, as compared to the qualifications of those who received the promotions. See *Allen v Comprehensive Health Services*, 222 Mich App 426; 564 NW2d 914 (1997)(involving a failure to promote claim, albeit in a reverse discrimination context.)

[6] Plaintiff did not provide sufficient evidence that the alleged harassment was intended to or did substantially interfere with his employment or created an intimidating, hostile or offensive work environment to survive defendant's motion. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Moreover, several of the alleged discriminatory remarks and incidents plaintiff relied on occurred outside the three-year limitations period, and some occurred before plaintiff left GM in 1977 to become a GM car dealership owner. Plaintiff returned to GM in 1985.

[7] As discussed in note 2, *supra*, plaintiff's failure to promote claim still fails.

[8] The independent assessment, dated August 16, 1990, stated that plaintiff's areas of interest included sales and business management, and financial management and administration. The assessment stated

that the personality inventories "provide a profile of an individual who is patient and stable, and who likes to be organized and scheduled," "[h]e is a warm and helping individual and is also open and trusting," "[h]e has a constructive outlook and is interested in the development of people . . . he values personal relationships and has a strong sense of self worth. . . likes to set and achieve goals." The assessment referred to plaintiff's communication skills in sections entitled "Abilities" and "Career Implications":

> Abilities
>
> He has above average ability in abstract thinking. He approached problems logically. He has strong interpersonal skills and relates to people with warmth and sincerity.
>
> He generally communicates effectively, but he does make errors in basic grammar which detract from his overall effectiveness. He sometimes chooses language which confuses people rather than influences them. He would be more effective if he used less complex language with which he is more comfortable instead of trying to 'stretch' his vocabulary. This sometimes creates undo [sic] vagueness in his communications.
>
> Career Implications
>
> According to this assessment, Mr. Johnson would be a good fit for several career areas. One area is his current position which involves administrative interests and abilities.
>
> Another area would be the training area, where he shows strong interest patterns and where he could apply his dealership experience. Positions where he coordinated dealer training programs would appear appropriate for him.
>
> A third area would be dealer relations. Here he could use his knowledge of dealerships to help coordinate between General Motors and its dealers.
>
> A fourth area for consideration for him would be to own and operate a small business in an area which might interest him. He could be particularly effective in the sales aspects of such business.
>
> Regardless of which career area he pursues, he should work at improving his oral communication in two ways. One, he should take a self-study course of some sort to review basic grammar in order to eliminate the errors he makes. Although this may seem like a minor issue, it affects his overall impact on others. Secondly, he could try to keep his language more simple and straightforward and avoid complex phrases which tend to confuse others and produce an appearance of vagueness. He should therefore be able to get his message across more effectively and improve his communication with others.

The assessment's conclusion was stated in a final section:

Summary

> Mr. Johnson appears to be an individual with good experience who will work hard in a situation where he feels he is utilizing his skills, and where he can get proper recognition for his contributions. He expresses frustration in his current situation with his job duties, his immediate supervisor, and his future opportunities. If these issues cannot be dealt with more to the satisfaction of Mr. Johnson and the company, some of the other options above should be explored with him.

[9] Defendant attached to its appellate brief an undated copy of a brochure entitled "GM Employee Sales Referral Program." Defendant did not establish that the brochure was distributed to its employees, however, or when it was distributed.

Defendant also relied on its "GM Guidelines for Employee Conduct," which proscribe employees from improperly using their positions in order to benefit themselves. I conclude that plaintiff presented sufficient evidence to rebut defendant's articulated reasons for its adverse actions such that the questions whether plaintiff's conduct violated this provision and, if so, whether such was a true reason for his second demotion should be a jury question.

[10] This evidence refutes defendant's contention that "[p]laintiff, like other employees during this time period, was left in a 'transitional' status and without a regular job to report to," and that by remaining at the World Headquarters building plaintiff's "chances of being redeployed were enhanced."