

STATE OF MICHIGAN
COURT OF APPEALS

YAO KONDO,

Plaintiff/Appellant/Cross-Appellee,

v

PERRY'S DRUG STORES,

Defendant/Appellee/Cross-Appellant.

UNPUBLISHED
October 10, 1997

No. 193607
Wayne Circuit Court
LC No. 94-436974-NZ

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from a Wayne Circuit Court order granting summary disposition in favor of defendant pursuant to MCR 2.116(C)(8) and (10). Defendant cross-appeals from the court's order denying its motion for attorney fees pursuant to MCR 2.403(O). We affirm the trial court's grant of summary disposition in favor of defendant, and reverse the trial court's denial of defendant's motion for attorney fees.

Plaintiff first argues that the trial court erred in granting summary disposition with regard to his claim of national origin discrimination based on disparate treatment. We disagree. The Civil Rights Act prohibits an employer from discharging or otherwise discriminating against an employee because of, among other things, national origin. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a); *Singal v General Motors Corp*, 179 Mich App 497, 502; 447 NW2d 152 (1989). A prima facie case of discrimination under § 202 of the Civil Rights Act can be established by showing either intentional discrimination or disparate treatment. *Singal, supra* at 502. To establish a claim of discrimination based on disparate treatment, it must be shown that 1) plaintiff was a member of a class entitled to protection under the Civil Rights Act, and 2) plaintiff was treated differently than persons of a different class for the same or similar conduct. *Id.* at 503. Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to establish a legitimate, nondiscriminatory reason for its actions. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 358; 486 NW2d 361 (1992). If the defendant meets its burden, the plaintiff then has the burden of proving by a preponderance of the evidence that the legitimate reason offered by the defendant was merely a pretext. *Featherly, supra* at 358.

Here, plaintiff failed to establish a prima facie case of national origin discrimination based on disparate treatment. Plaintiff was born in the Ivory Coast, West Africa and, therefore, was a member of a class protected by the statutory prohibition against national origin discrimination. MCL 37.2202; MSA 3.548(202). However, plaintiff failed to establish that he was treated differently than persons of another class for the same or similar conduct. Plaintiff asserts that he was treated differently than non-African nationals because he was discharged for violating a store policy which other employees violated with impunity. In response to defendant's motion for summary disposition, plaintiff submitted the deposition testimony of two store clerks, Bertha Johnson and Linda Jackson, who testified that on several occasions they observed store employees other than plaintiff violating the policy prohibiting the taking of any merchandise without first paying for the merchandise.

Plaintiff asserts that he was treated differently than such employees, who were non-African, because he was discharged for violating the policy, while such employees were not even disciplined. However, we find that the trial court properly determined that the conduct to which Bertha Johnson and Linda Jackson testified was not similar to the conduct for which plaintiff was discharged. Plaintiff removed photographs from the store, and failed to pay for the photographs for several months, while the violations of the policy testified to by Johnson and Jackson were merely technical violations of the policy which involved the consumption of food items on store premises by employees who paid for the items contemporaneously with consumption or shortly thereafter. Furthermore, in support of its motion for summary disposition, defendant submitted the deposition testimony of a loss prevention officer employed by defendant who testified that he had investigated hundreds of defendant's employees for violations of the company policy at issue, that more than ninety percent of the investigated employees were born in the United States, and that those employees found to have removed company merchandise from the store without payment were discharged. Because plaintiff failed to show by documentary evidence that he was treated differently than other employees for the same or similar conduct, we believe the trial court properly granted summary disposition of plaintiff's claim for national origin discrimination based on disparate treatment pursuant to MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(8) on his claim for discrimination based on hostile employment environment. We disagree. Assuming that a hostile environment claim may be maintained on conduct not of a sexual nature involving a plaintiff's gender, age, or national origin, five elements are necessary to establish a prima facie case of discrimination based on a hostile environment: 1) the employee belonged to a protected group, 2) the employee was subjected to communication or conduct on the basis of his or her unprotected status, 3) the employee was subject to unwelcome conduct or communication involving his or 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. *Quinto v Cross and Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996). Furthermore, federal courts hold that to establish a claim of racial discrimination based on a hostile employment environment, a plaintiff must establish 1) repeated racial slurs which resulted in an unreasonably abusive or offensive work-related environment or adversely affected the reasonable employee's ability to perform the tasks required by the employer, and 2) that the employer knew or should have known of the alleged conduct and failed to take prompt remedial action. *Davis v*

Monsanto Chemical Company, 858 F2d 345, 349 (CA 6, 1988); *Byrnes v Frito-Lay, Inc.*, 811 F Supp 286, 293 (ED Mich 1993).

Here, plaintiff failed to allege any instances in which he was subjected to conduct directed at his race or national origin. Plaintiff did not allege that he was subjected to any slurs involving his race or national origin, or that his race or national origin was ever referred to in a derogatory manner. Accordingly, we find that the trial court properly granted summary disposition of plaintiff's claim of discrimination based on a hostile work environment pursuant to MCR 2.116(C)(8).

Plaintiff next argues that the trial court erred in dismissing his claim of retaliatory discharge pursuant to MCR 2.116(C)(8). While we agree that plaintiff's complaint stated a claim of retaliatory discharge and, therefore, summary disposition should not have been granted pursuant to MCR 2.116(C)(8), we nevertheless affirm because defendant was entitled to summary disposition of plaintiff's retaliatory discharge claim pursuant to MCR 2.116(C)(10).

MCL 37.2701; MSA 3.548(701) prohibits an employer from retaliating against an employee because the employee has opposed a violation of the Civil Rights Act. To establish a claim of retaliatory discharge, a plaintiff need not prove that an employer had actual knowledge that the employee filed a civil rights complaint, but need only establish a causal link between participation in the protected activity and the adverse treatment complained of. *Kocenda v The Detroit Edison Company*, 139 Mich App 721, 726; 363 NW2d 20 (1984). In his complaint, plaintiff alleged that the discrimination against him increased, and that he was discharged after notifying management that he was being paid a lower salary than similarly situated non-Africans. However, plaintiff failed to support his allegations with documentary evidence to oppose defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Although plaintiff submitted his deposition testimony that he complained to management that he was receiving a lower location adjustment than another employee at the same store and that he was not given the promotion he expected to receive, he presented no evidence indicating that he informed management that he believed the alleged inequities were the result of racial or national origin discrimination on the part of defendant. Because plaintiff did not support his allegations of retaliatory discharge, defendant was entitled to summary disposition of plaintiff's claim of retaliatory discharge pursuant to MCR 2.116(C)(10).

Finally, plaintiff asserts that the trial court erred in granting summary disposition of his breach of contract claim pursuant to MCR 2.116(C)(8). We disagree. To state a claim of breach of contract, a plaintiff must first establish the elements of a valid contract. *Pawlak v Redox Corp.*, 182 Mich App 758, 765; 453 NW 2d 304 (1990). The elements of a valid contract are 1) parties competent to contract, 2) a proper subject matter, 3) a legal consideration, 4) mutuality of agreement, and 5) mutuality of obligation. *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). Here, plaintiff failed to allege any consideration for defendant's alleged promise to pay him, a staff pharmacist at the relevant time, the same location adjustment as the head pharmacist. Therefore, the trial court properly granted summary disposition of plaintiff's breach of contract claim pursuant to MCR 2.116(C)(8).

On cross-appeal, defendant argues that the trial court erred in denying its motion for attorney fees pursuant to MCR 2.403(O). We agree. Plaintiff rejected a mediation award in his favor in the amount of \$35,000, which defendant accepted. According to MCR 2.403(O), a party who rejects a mediation evaluation must pay the opposing party's actual costs unless the party obtains a verdict more favorable than the evaluation. *Michigan Basic Property Ins Ass'n v Hackett Furniture Distributing Co, Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1992). "Actual costs" include a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation. MCR 2.403(O)(6). While the trial court has the discretion to determine the reasonableness of an attorney fee, there is no language in the court rule allowing the court the discretion to refuse to award an attorney fee as part of actual costs once it is determined that a party is required to pay mediation sanctions pursuant to MCR 2.403(O). Therefore, we find that the trial court erred in denying defendant's motion for attorney fees pursuant to MCR 2.403(O) and remand for a determination of a reasonable attorney fee.

Affirmed in part, and reversed and remanded for determination of a reasonable attorney fee. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra