

STATE OF MICHIGAN
COURT OF APPEALS

ERVIN BARNES,

Plaintiff-Appellant,

v

INTERNATIONAL BUSINESS MACHINES
CORPORATION,

Defendant-Appellee.

UNPUBLISHED

December 12, 1997

No. 193475

Oakland Circuit Court

LC No. 95-503688-CZ

AFTER REMAND

Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

This case is before this Court for the second time. Previously, this Court reversed the trial court's denial of defendant's motion for change of venue. *Barnes v Int'l Business Machines Corp*, 212 Mich App 223; 537 NW2d 265 (1995). Plaintiff now appeals as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this employment discrimination case. We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as 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. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

Plaintiff, who is black, alleges that defendants discriminated against him on the basis of race under a theory of disparate treatment, contrary to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* To prove disparate treatment, a plaintiff must show that he was a member of the class entitled to protection under the act and that he was treated differently than persons of a different class for the same or similar conduct. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). After a prima facie case is made out by the plaintiff, the burden of production shifts to the defendant to articulate some legitimate,

non-discriminatory reason for its actions. If the defendant meets this burden of production, the plaintiff must prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a mere pretext. *Id.* at 711.

We conclude that plaintiff has failed to establish a prima facie case of racial discrimination. Plaintiff essentially claims that he was discriminated against on the basis of his race because he was not promoted to an executive-level position. We agree with the conclusion of the trial court that the white employees to whom plaintiff compares himself were not similarly situated. After an extensive review, the trial court determined that several of these employees received higher performance ratings than plaintiff did. With regard to the remaining employees, the trial court determined that the branches managed by the employees were not similar to the branch managed by plaintiff, or that the other employees' overall experience and employment histories were not comparable to plaintiff's.

Furthermore, plaintiff has failed to establish that race was one of the reasons or motives behind defendant's failure to promote him to an executive level position. See *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 539; 470 NW2d 678 (1991). The deposition testimony relied on by plaintiff regarding a coworker's statement to him constitutes inadmissible hearsay. A dispute regarding an issue of fact must be established by evidence that would be admissible at trial.¹ *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991).

In addition, plaintiff cites as evidence of discrimination his testimony that in 1979 his manager at the time told him that he had "the wrong ethnic background" to be a marketing manager. However, we cannot conclude that this testimony demonstrates that racial discrimination was behind defendant's failure to promote plaintiff to an executive-level position. The incident was isolated, plaintiff received promotions after it occurred, and there was no evidence that the manager in question had any input in promotional decisions regarding plaintiff in the 1990s.

Plaintiff attributes to his race the fact that he was provided with a staff of only two managers during his tenure as branch manager, while other branch managers were provided with a staff of four managers. However, plaintiff provided no evidence indicating that he was given a smaller staff because of his race. A plaintiff's conclusory allegations of discrimination do not constitute a genuine issue of material fact that makes summary disposition inappropriate. See *Sisson v Bd of Regents of the Univ of Michigan*, 174 Mich App 742, 748-749; 436 NW2d 747 (1989).

Even if plaintiff had articulated a prima facie case, defendant has articulated legitimate, non-discriminatory reasons for its actions. Defendant has presented evidence that poor results on employee opinion surveys can adversely affect promotion decisions, and plaintiff did not receive favorable ratings from his employees during his time as a branch manager.² Plaintiff did not receive the promotion that went to Chuck Alexander because the latter had obtained more favorable opinion surveys and had a stronger technical background. Finally, during the early 1990s, defendant experienced a period of downsizing and therefore gave out fewer promotions. Plaintiff has presented no evidence to demonstrate that these reasons were pretextual.

Affirmed.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Stephen J. Markman

¹ Plaintiff testified during his deposition that a coworker told him that a vice-president with defendant stated that “he was getting tired of forcing people to extend equal opportunities to minorities.” While the alleged statement might well be admissible as an admission of a party-opponent pursuant to MRE 801(d)(2), the coworker’s statement to plaintiff is hearsay and does not fit within any of the exceptions to the hearsay rule.

² Plaintiff acknowledged at his deposition that the results of the opinion survey were “bad” and “low” and wrote at the time that he was “heartbroken” over them.