

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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FOSTER NEWLIN,

Plaintiff-Appellant,

v

EASTERN MICHIGAN UNIVERSITY,

Defendant-Appellee.

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UNPUBLISHED

July 8, 2004

No. 247751

Washtenaw Circuit Court

LC No. 02-000762-CZ

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Plaintiff, Foster Newlin, appeals as of right from the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant on plaintiff's racial discrimination and retaliation claims. We affirm.

**I. FACTS**

Plaintiff argues that the deposition and affidavit testimony he presented to the trial court demonstrated genuine issues of material fact that he was fired from his job because he was African-American and because he made complaints to his supervisors that African-American employees were being discriminated on the job. Plaintiff also insists that the affidavit and deposition testimony demonstrate he was unfairly monitored by supervisors and subject to a form of "nepotism discrimination" whereby white relatives of certain supervisors were given overtime hours but African-American workers were not. Defendant's position is that plaintiff was fired for a non-discriminatory reason: a clear violation of a collectively bargained-for union policy that requires workers to notify defendant if they are going to be absent from work for three or more days.

Plaintiff was terminated from his position as a custodian for defendant Eastern Michigan University when, according to the July 26, 1999 notice of termination, plaintiff had "been absent from work since July 9, 1999, without proper notification." The letter indicated that plaintiff was terminated for violating the following policy:

An employee shall lose his/her seniority for the following reasons:

He/She is absent from his/her job for three (3) consecutive working days without notifying the Employer. In proper cases, exceptions may be made by the

employer. After such absence, the Employer shall send written notification to the employee at his/her last known address that he/she has lost his/her seniority, and his/her employment has been terminated. [Letter of termination.]

In his deposition, plaintiff indicates that he was absent from work beginning on July 3, 1999, because he was incarcerated for 25 days on a misdemeanor domestic assault charge. Plaintiff explained that when he learned he would have to go to jail, he telephoned one of his supervisors, Annie Williams, informing her that he would be missing work for “personal problems.” Plaintiff also indicated at his deposition that he allowed his brother to fill out a request for leave of absence form for him.

However, Annie Williams testified at her deposition that she never received a phone message directly from plaintiff. Instead, Williams indicated that plaintiff’s brother had left a voice message at Williams’ office, indicating that plaintiff would not be available to work. Moreover, despite the undisputed fact that plaintiff was absent from work due to his incarceration, the first request for leave of absence form plaintiff claimed was filled out by his brother, indicated that plaintiff was requesting leave because of a “family emergency—child.” Melinda Ostrander, the director of ground, motor pool and custodial services at EMU, denied plaintiff’s request for leave, indicating, “No documentation. Incomplete paperwork. Has missed excessive time already.” The next request for leave of absence, apparently filled out this time by plaintiff, only indicates that plaintiff was requesting leave due to “personal” reasons. Additionally, in her affidavit, Ostrander states the following regarding the requests for leave:

. . . I personally investigated both Foster Newlin’s request for leave of absence, and found the first one with family emergency was incomplete and attempted to follow-up with phone calls to Foster’s home but was told he was unavailable, and the second request based on personal was denied because Foster Newlin had been absent 33 weeks on leave in the last five out of six years and this was in addition to sick and annual time used.

Further, George Torok, the associate in the employee relations department that issued the letter of termination to plaintiff, testified in his deposition that the only reason plaintiff was terminated was because he violated the absentee policy [as quoted above from the termination letter] whereby he was required to call in if he was going to be absent for three consecutive days. Torok also indicated that even if plaintiff had called in regarding the first three days of his absence, under the policy, plaintiff was required to call in every three days

On June 27, 2001, plaintiff filed his discrimination complaint, alleging the following. Plaintiff alleged that since 1996, he had asked defendant to investigate his department because of alleged racial harassment and discrimination. Plaintiff also alleged that one of his supervisors was allowing a relative to work overtime and denying plaintiff his right to work overtime. Count I of plaintiff’s complaint alleged a violation of the Elliott-Larsen Civil Rights Act, MCL 37.2101, because defendant treated African-American employees differently than white employees. Plaintiff further alleged in Count II that his termination was a retaliation by defendant for plaintiff making complaints about discrimination and filing a grievance on May 10, 1999 that alleged discrimination by white supervisors against African-American workers. In support of his complaint, plaintiff provided his own deposition testimony regarding the alleged

discrimination, as well as a number of affidavits from other employees of defendant that allege discrimination by defendant.

On July 26, 2002, defendant filed an amended motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant argued that summary disposition was appropriate because defendant's nondiscriminatory legitimate reason for firing plaintiff was his failure to contact defendant when he was absent for more than three days. Additionally, defendant argued that plaintiff could also have been properly terminated from his position for falsifying his request for leave of absence. Defendant points out that it was undisputed that plaintiff was in jail during the time he missed work, but lied when he stated on the request form that he had a "family emergency". Therefore, plaintiff argues that there can be no prima facie showing of discrimination or retaliation because there was a legitimate nondiscriminatory reason for plaintiff's firing.

On February 7, 2002 the trial court heard oral arguments on defendant's motion for summary disposition. In granting defendant's motion for summary disposition the trial court stated:

. . . [T]he substantively admissible evidence, even when taken in a light most favorable to plaintiff, demonstrates that EMU requires an employee to call at least once every three days, that plaintiff and/or his brother called once, that plaintiff was absent for at least 25 days due to his incarceration, that his brother filed one request for leave of absence, and that both requests for leaves of absence were denied because they were not supported by proper complete documentation.

Additionally, plaintiff has provided no documentation to demonstrate that any white employees who were similarly situated were treated differently when they failed to provide proper notification of their absence and filed requests for leaves of absences that were denied for improper or complete documentation.

Finally, regarding plaintiff's retaliation claim, the trial court ruled that there was no evidence of a causal link between plaintiff's filing a grievance or complaining about discrimination and defendant's decision to terminate plaintiff's employment.

## II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). Here, defendant moved for summary disposition under MCR 2.116(C)(8) and (C)(10). Although the trial court did not specifically articulate which subrule it relied in granting defendant's motion, the court relied on matters outside of the pleadings and specifically found that there were no genuine issues of material fact. Therefore, review under subrule (C)(10) is appropriate. *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). This Court recently stated the legal standard to be applied when reviewing a motion for summary disposition brought under MCR 2.116(C)(10) in *Kell-Stehney & Assoc, Inc v MacDonald's Industrial Products, Inc*, 254 Mich App 608, 611-612; 658 NW2d 494 (2003):

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 163; 645 NW2d 643 (2002). A motion for summary disposition should be granted when, except in regard to the amount of damages, there is no genuine issue in regard to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. MCR 2.116(C)(10), (G)(4); *Veenstra, supra* at 164. In deciding a motion brought under this subsection, the trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in a light most favorable to the nonmoving party. *Veenstra, supra* at 164. The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material facts exists." *Id.* The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue regarding any material fact. *Veenstra, supra* at 164.

### III. ANALYSIS

#### A. Racial Discrimination

The Michigan Civil Rights Act, MCL 37.2101 *et seq.*, prohibits discrimination in employment based on race. The CRA, MCL 37.2202(1), provides, in relevant part:

An employer shall not do any of the following:

(a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

A plaintiff may establish a prima facie case of employment discrimination by proving either "disparate treatment" or "disparate impact" as a result of his national origin. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). Here, plaintiff alleged disparate treatment and was required to show that defendant "was predisposed to discriminate against [him] . . . and actually acted on that disposition." *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999). In making this showing, plaintiff could have relied on (1) indirect or circumstantial evidence of discrimination, using the burden-shifting framework originally set forth in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), or (2) direct evidence of discrimination. *Sniecinski v BCBSM*, 469 Mich 124, 132; 666 NW2d 186 (2003). Plaintiff presented no direct evidence of discrimination.

The *McDonnell Douglas* burden-shifting test was recently described in *Sniecinski* as follows:

In cases involving indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach set forth in *McDonnell* . . . . This approach allows "a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination." [*DeBrow v Century 21 (After Remand)*, 463 Mich 534, 538; 620 NW2d 836 (2001).] To establish a rebuttable prima facie case of discrimination, a plaintiff must present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) her failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination. *Hazle, supra* at 463; *Lytte v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998) (opinion by WEAVER, J.); see also *McDonnell Douglas, supra* at 802. [] Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Hazle, supra* at 464; *Lytte, supra* at 173 (opinion by WEAVER, J.). If a defendant produces such evidence, the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant's reasons were not the true reasons, but a mere pretext for discrimination. *Hazle, supra* at 465-466; *Lytte, supra* at 174 (opinion by WEAVER, J.). [*Sniecinski, supra.*]

Additionally, in a racial discrimination case, a plaintiff can meet the fourth prong of the *McDonnell Douglas* test by demonstrating that he was treated differently than persons of a different class for the same or similar conduct. *Meagher v Wayne State University*, 222 Mich App 700, 716; 565 NW2d 401 (1997).

In the present case, it is undisputed that plaintiff, as an African-American, is a member of a class protected by MCL 37.2202(1)(a), that he was qualified for the janitor position, and that he suffered an adverse employment action when he was terminated from his job. However, the trial court ruled that plaintiff had failed to establish a prima facie case because "plaintiff has provided no documentation to demonstrate that any white employees who were similarly situated were treated differently when they failed to provide proper notification of their absence and filed requests for leaves of absences that were denied for improper or complete documentation." We agree with the trial court's analysis.

The existence of a disputed fact must be established by admissible evidence, MCR 2.116(G)(6), *Veenstra, supra* at 163. Moreover, an affidavit submitted in support of or in opposition to a motion must "state with *particularity* facts admissible as evidence establishing or denying the grounds stated in the motion." MCR 2119(B)(1)(c). [Emphasis added.] Plaintiff's affidavit and deposition testimony do not establish that he was treated differently regarding the call-in policy or that other similarly situated white employees were not discharged under the same or similar circumstances. The statements in the affidavits supporting plaintiff's claim can best be characterized as conclusory and general allegations of discrimination rather than "specific facts showing that there is a genuine issue for trial." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The fact that plaintiff offers several affiants who could testify to "many incident of racial discrimination," does not establish particular admissible evidence of plaintiff's claim that he was

terminated because he was African-American. A mere promise to offer factual support at trial is insufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). A disputed fact must be established by admissible evidence. MCR 2.116(G)(6), *Id.* Plaintiff's affidavit and deposition testimony do not describe any specific instances where he was ever treated differently regarding the call-in policy or where other similarly situated white employees were not discharged under the same or similar circumstances. Therefore, we find that the trial court did not err in ruling that there were no genuine issues of material fact regarding a prima facie case of discrimination.

Even if plaintiff had been able to establish a prima facie case of discrimination, defendant articulated a sufficient nondiscriminatory reason for firing plaintiff: defendant violated the company policy on absenteeism. Defendant provided rich documentation on plaintiff's history of warnings and discipline letters regarding his absenteeism.

Therefore, because defendant offers a legitimate nondiscriminatory reason for the adverse employment action, the final step in the burden shifting analysis is for plaintiff to demonstrate that the action was actually a pretext to defendant's ulterior discriminatory motives. In *Feick v Monroe County*, 229 Mich App 335, 343; 582 NW2d 207 (1998), this Court stated:

A plaintiff can establish that a defendant's articulated legitimate, nondiscriminatory reasons are pretexts (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision.

Plaintiff provides no analysis in his brief regarding whether defendant's nondiscriminatory reason for terminating him was actually a pretext. Instead, plaintiff simply concludes:

The lower court erred by finding that EMU provided it with non-discriminatory reasons for his termination . . . . With the evidence submitted and taking that evidence in a light most favorable to the non-moving party (Newlin in this case), a jury could find that EMU's reasons were simply pretextual. [Plaintiff's brief, 12.]

By making such a conclusory argument on the issue of pretext, plaintiff has not carried the burden of establishing by a preponderance of the evidence that defendant's reasons for firing him had no basis in fact, were not the actual factors motivating defendant's decision, or were jointly insufficient. Therefore, in addition to failing to establish a prima facie case of discrimination, plaintiff has also failed to establish a causal connection between the alleged discrimination and the adverse employment action.

#### B. Retaliation

Plaintiff next argues that there was genuine issues of material fact that his firing was a retaliation for his many complaints and grievances concerning the unfair treatment of African-Americans. The retaliation provision of the CRA, MCL 37.2701(a), states:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a change, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

This Court has interpreted the retaliation provision to require that a plaintiff prove a prima face case by showing:

(1) that the plaintiff engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Barrett v Kirtland Cmty College*, 245 Mich App 306, 315-316; 628 NW2d 63 (2001), citing *Meyer v Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000), citing *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

Here, plaintiff has established the first three elements. However, he has failed to establish the fourth element. To establish the causation element, the plaintiff must show not just a causal link between her participation in activity protected by the CRA and her employer's adverse employment action, but that it was a "significant factor." *Barrett, supra* at 315 ; *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999); *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986). Defendant articulated a sufficient nondiscriminatory reason for firing plaintiff: he violated defendant's written absentee policy. Plaintiff was in jail for twenty-five consecutive days during the month of July 1999 and was not able to attend work. The only circumstantial evidence that plaintiff offers that defendant wrongfully retaliated against plaintiff is the general allegations of discrimination contained in plaintiff's supporting affidavits and deposition testimony. He cites no evidence whatsoever to suggest that his reporting of allegedly discriminatory behavior by his supervisors was a "significant factor" relating to an alleged retaliatory firing. *Barrett, supra* at 315. Thus, the trial court did not err when it ruled that there was no evidence of a causal link between plaintiff filing a grievance or complaining about discrimination and defendant's decision to terminate plaintiff's employment.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Bill Schuette