

STATE OF MICHIGAN
COURT OF APPEALS

DALROIS McBURROWS and PATRICIA
McBURROWS,

UNPUBLISHED
January 31, 2003

Plaintiffs-Appellants,

v

DEPARTMENT OF TRANSPORTATION,

No. 235446
Ingham Circuit Court
LC No. 00-091667-NO

Defendant-Appellee.

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Plaintiffs Dalrois McBurrows and Patricia McBurrows appeal as of right from an order granting summary disposition to defendant Michigan Department of Transportation under MCR 2.116(C)(10). We affirm.

Plaintiff Dalrois McBurrows¹, an African-American male, commenced this action alleging that defendant (1) violated the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.*, by refusing to promote him because of his race and gender, and (2) violated the Persons With Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, by retaliating against him because of an earlier complaint he made with the Michigan Department of Civil Rights (MDCR). The lower court concluded that plaintiff made a prima facie showing of both race and reverse sex discrimination, but held that plaintiff failed to show defendant's proffered reasons were pretextual. With respect to his retaliation claim, the court held plaintiff failed to establish a causal connection between his promotion denials and his MDCR claim.

This Court reviews de novo a trial court's grant of summary disposition. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995). On reviewing a motion for summary disposition under MCR 2.116(C)(10), the court must decide "whether any genuine issue of material fact exists in order to prevent entering a judgment for the moving party as a matter of law." *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 766 (1998). When deciding a summary disposition motion pursuant to MCR 2.116(C)(10), the

¹ Because Patricia McBurrows' claims are strictly derivative, the singular "plaintiff" is used to refer to plaintiff Dalrois McBurrows.

court must consider affidavits, together with the pleadings, depositions, admissions, and documentary evidence to the extent that their content would be admissible. MCR 2.116(G)(5) and (6). *Sprague v Farmers Insurance Exchange*, 251 Mich App 260, 265; 650 NW2d 374 (2002).

We first consider the propriety of granting defendant's motion for summary disposition as to the Farnum promotion based on the evidence considered by the trial court.² Plaintiff contends that the trial court erred by finding no genuine issue of material fact regarding the nondiscriminatory nature of defendant's proffered reasons for denying him the promotion. Although plaintiff has no direct evidence of discrimination, he may nonetheless establish a prima facie case by using the burden shifting framework established by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Bachman v Swan Harbour Associates*, 252 Mich App 400, 432-433; 653 NW2d 415 (2002). Under the *McDonnell Douglas* analysis, as applied in Michigan, to establish a prima facie case of discrimination, a plaintiff must show that (1) he was a member of the protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he suffered the adverse employment action under circumstances inferring discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998).

The trial court held that plaintiff established a prima facie case of race and reverse sex discrimination.³ The burden then shifted to defendant to produce a nondiscriminatory reason for its decision. *Lytle, supra* at 173. The trial court found that defendant met its burden of articulating "some legitimate, nondiscriminatory reason for the employee's rejection." *McDonnell Douglas, supra* at 802. Then, the court rejected plaintiff's evidence that defendant's proffered reasons were a pretext for discrimination.

We conclude, as did the trial court, that plaintiff failed to create a genuine issue of material fact with regard to whether defendant's explanation for choosing Ms. Farnum over him was a mere pretext for unlawful discrimination. *Town v Michigan Bell*, 455 Mich 688, 697-698; 568 NW2d 64 (1997). Neither Ms. Farnum's alleged friendship with Ms. Mortel, nor the failure to promote plaintiff despite his experience in air quality control, reveal any discriminatory animus in the decision. We likewise reject plaintiff's argument that we should find a question of

² The "Farnum promotion" refers to the December, 1997 decision by defendant to hire Renee Farnum, a white female, into the Transportation Planner 15 position for which plaintiff (and fourteen others) applied. Plaintiff's complaint asserts that this specific promotion denial was a discriminatory one. The other general allegations of promotion denial contained in the complaint were outside the three-year statute of limitations.

³ Although the trial court concluded that plaintiff had established a prima facie case of "reverse" sex discrimination, our Court has subsequently determined that additional elements of proof cannot be placed upon a male employee alleging sex discrimination. *Venable v General Motors Corp*, __ Mich App __; __ NW2d __ (2002) (Docket No. 219037, issued 10/22/02). In *Venable*, we held that requiring a caucasian or male to prove an additional element to establish a prima facie case of discrimination was not consistent with the language of the Civil Rights Act. *Venable, supra*, slip op at p 5. The *Venable* decision does not impact this case, however, because plaintiff established a prima facie case under the more stringent "reverse" discrimination standard.

material fact as to the pretextual nature of the decision because it was a subjective decision based on plaintiff's interview with the interview panel. "Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext" *Millbrook v IBP Inc*, 280 F3d 1169, 1176 (CA 7, 2002), quoting *Denney v City of Albany*, 247 F3d 1172, 1185 (CA 11, 2001).⁴ In conducting our de novo review, we have found nothing in the record on which a reasonable juror could conclude that defendant's proffered explanation was a mere pretext, and that defendant was actually motivated by unlawful race or sex discrimination.

Plaintiff argues, however, that the trial court erred in either refusing to allow him to amend his complaint, or failing to at least consider evidence of promotions defendant denied him that occurred after the complaint was filed, and that were not specifically referenced in his complaint. Both of plaintiff's positions are without merit.

Initially, we reject plaintiff's argument that the trial court should have granted him the right to amend his complaint. A trial court's decision whether to allow amendments to pleadings is reviewed for an abuse of discretion, *Dowerk v Charter Twp of Oxford*, 233 Mich App 62, 75; 592 NW2d 724 (1998), and it was not an abuse of discretion for the trial court to deny an oral request for an amendment made at the summary disposition hearing and well after the scheduling order deadline for filing motions to amend the pleadings. See *Jager v Nationwide Truck Brokers, Inc*, 252 Mich App 464, 487-488; 652 NW2d 503 (2002); *Dowerk, supra*.

Additionally, we find any alleged error by the trial court in failing to consider the evidence of plaintiff's subsequent promotion denials harmless. MCR 2.613(A). After de novo review of the entire lower court record, we conclude that plaintiff failed to establish any evidence that the circumstances surrounding the promotion denials, which occurred subsequent to the filing of the complaint, support his claim that he was subjected to race and gender discrimination when he did not receive the Farnum promotion. Other than his subjective claim that he was more qualified than the selected candidates, plaintiff presented no evidence to support his claim that defendant acted with racial animus. See *Hazle v Ford Motor Co*, 464 Mich 456, 476-477; 628 NW2d 515 (2001). An employee's subjective belief that he was more qualified for the position than the selected applicant by itself is insufficient to overcome a motion for summary disposition. *Id.* Further, the fact that plaintiff had been previously passed over for promotions does not in and of itself establish that the previous promotion denials were the product of unlawful discrimination. Thus, we find no error requiring reversal.

Plaintiff next argues that the trial court also erred by refusing to consider the memorandum of Mary Gibbs, who conducted an internal investigation of plaintiff's denial. However, the court held that the memorandum contained hearsay, and that its contents were inadmissible. Thus, plaintiff's argument fails because the court did consider the memorandum, but found it to contain hearsay, which was not admissible for purposes of the motion for

⁴ Though not binding precedent, federal decisions construing Title VII are persuasive authority in applying Michigan's civil rights statutes. *Alsbaugh v Commission on Law Enforcement Standards*, 246 Mich App 547, 555; 634 NW2d 161 (2001).

summary disposition. MCR 2.116(C)(10); MCR 2.116(G)(5); *Sprague, supra*. We find no error in that regard.

Finally, plaintiff contends that the trial court erred by finding no causal link between plaintiff's MDCR complaints and his denials of promotion. We disagree. To establish a prima facie case of unlawful retaliation under the PWDCRA, a plaintiff must show (1) that he 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. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); *Bachman, supra* at 435.

The evidence plaintiff produced established that defendant was aware of plaintiff's MDCR complaints. However, plaintiff must also establish some casual connection between the complaints and the alleged retaliatory conduct. Plaintiff failed to provide any substantial evidence suggesting a link between his MDCR complaints and his promotion denials. Although the timing between the decision and the protected activity can in some cases constitute circumstantial evidence as to a causal connection, *Wrenn v Gould*, 808 F2d 493, 501 (CA 6, 1987), in this case the time between the events was four months and there is no other evidence in the record establishing any inference that the two events were connected. Thus, the trial court did not err by holding that plaintiff failed to establish a genuine issue of material fact that there was a causal link between his promotion denials and his MDCR complaints.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald