

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

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CHARLES SMITH,

Plaintiff-Appellant,

v

WAL-MART CORPORATION and RUSSELL  
WENCL,

Defendants-Appellees.

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UNPUBLISHED

October 14, 2003

No. 240569

Midland Circuit Court

LC No. 00-003052-NZ

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of summary disposition for defendants under MCR 2.116(C)(10). We affirm.

Plaintiff was hired by Wal-Mart in December 1998 as a loss prevention associate, but was terminated in May 1999 for consistently low productivity. Plaintiff then filed suit under Michigan's Civil Rights Act, MCL 37.2201, *et seq.*, alleging that his termination was the result of racial discrimination. Specifically, plaintiff charged that defendants were predisposed to discriminate against him and that he was treated differently from similarly situated non-minorities.

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), claiming that plaintiff presented no evidence to support his claim that they were predisposed to discriminate against plaintiff or other members of the class based on race. Although the trial court first denied defendants' motion for summary disposition based on plaintiff's affidavit statements that he had not been evaluated equally regarding his apprehension numbers and that he had been replaced by a Caucasian male, the trial court granted defendants' second motion for summary disposition under MCR 2.116(C)(10). The Court found that the non-minority employees plaintiff referenced were not similarly situated because they had not engaged in the same type of conduct as plaintiff and that the evidence failed to support plaintiff's claim that others were similarly situated but not similarly disciplined.

“In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), [this Court] consider[s] the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in a light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists.” *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

Under the burden-shifting test established in *McDonnell-Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), a plaintiff must initially establish a prima facie case of race discrimination.<sup>1</sup> *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001), citing *McDonnell-Douglas Corp*, *supra* at 802. Once the plaintiff presents a prima facie case, the burden shifts to the defendant to show some legitimate, nondiscriminatory reason for the employee’s termination. *Id.* at 464. The burden then shifts back to the plaintiff to show the defendant’s reason for terminating the plaintiff was a pretext for discrimination. *Id.* at 465-466.

Plaintiff was required to prove four elements to establish a prima facie case of discrimination. *Lytle v Malady*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Specifically, he was required to show 1) he belonged to a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) that others who were outside the protected class and similarly situated were not affected by the adverse conduct of the employer. *Id.* The first two elements are not at issue.

Our Supreme Court has stated, “An employee is qualified if he was performing his job at a level that met the employer’s legitimate expectations.” *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699; 568 NW2d 64 (1997). Here, plaintiff was unable to create a genuine issue of material fact that he was qualified for the position. Plaintiff was counseled on three separate occasions regarding his consistently low apprehension numbers. He was also counseled regarding changing his work schedule without notification or approval from a supervisor, and he was ultimately terminated for poor productivity. As a result, the evidence shows that plaintiff was not meeting his employer’s expectations regarding his job performance.

Even if plaintiff could show that he was qualified for the position and performing at his employer’s expectation level, he was still required to create a genuine issue of material fact that he was terminated under circumstances that gave rise to an inference of discrimination. Plaintiff argued that he was similarly situated to other loss prevention associates outside the protected class and that they were treated more favorably regarding apprehension numbers. To succeed, plaintiff was required to show that “‘all of the relevant aspects’ of his employment situation were ‘nearly identical’ to those of [his co-workers’] employment situation.” *Town*, *supra* at 699-700.

Plaintiff stated he was similarly situated to a specific Caucasian employee because his duties were identical to hers. However, plaintiff’s primary responsibility in his first three months of employment was to apprehend shoplifters, while this employee’s duties included training new loss prevention associates and installing cameras in the new store. Additionally, for the period of February through May 1999, plaintiff had one-fourth the total number of apprehensions as the

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<sup>1</sup> There was no direct evidence of racial bias in this case.

referenced employee. Although this employee did show decreased apprehension numbers for November 1998 through January 1999, it was during this time period that she was training three new loss prevention associates as well as leading the loss prevention team in completing the entire camera installation for the new Midland store. Because she could not be apprehending shoplifters while training other employees or setting up surveillance cameras, lower apprehension numbers during that time period would be expected. In turn, those numbers failed to prove that this employee was treated differently from plaintiff, who was not responsible for such duties. As a result, plaintiff has not presented a prima facie case of race discrimination.

However, even if we determine that plaintiff established a prima facie case of race discrimination, then the burden merely shifted to defendants to show a nondiscriminatory reason for termination. Because defendants claimed they fired plaintiff for poor productivity, they offered a nondiscriminatory reason that rebutted the prima facie presumption of discrimination.

Finally, plaintiff offered no evidence to show that any of defendants' proffered reasons for termination were pretext. Because plaintiff offered only his opinion that Wal-Mart's reason for terminating him was not a legitimate, nondiscriminatory one, plaintiff's claim must fail.

Because plaintiff produced no genuine issues of material fact suggesting that racial discrimination was a motive for his termination, we affirm the trial court's grant of summary disposition to defendants.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Janet T. Neff  
/s/ Christopher M. Murray