

STATE OF MICHIGAN
COURT OF APPEALS

DANNY L. SNYDER and DORIS JEAN
SNYDER,

UNPUBLISHED
June 20, 2006

Plaintiffs-Appellants,

v

CITY OF ROMULUS, CHARLES KIRBY,
ALAN LAMBERT and DEBORAH HOFFMAN,

No. 264545
Wayne Circuit Court
LC No. 03-308134-CZ

Defendants-Appellees.

EMMETT BARNES, GORDON MALANIAK,
JOHN MYERS, MIKE ONDEJKO, ERIC
PAINTER, DARYL POE, JAMES RAFALSKI
and JOSEPH WEDESKY,

Plaintiffs-Appellants,

v

CITY OF ROMULUS, CHARLES KIRBY,
ALAN LAMBERT and DEBORAH HOFFMAN,

No. 264546
Wayne Circuit Court
LC No. 04-407058-CZ

Defendants-Appellees.

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In these consolidated cases, plaintiffs appeal as of right the circuit court's dismissal pursuant to MCR 2.116(C)(10) of their claims of age discrimination, retaliation and conspiracy brought under the Civil Rights Act (CRA), MCL 37.2201 *et seq.*, and the dismissal of their claim that defendants violated the Open Meetings Act (OMA), MCL 15.261 *et seq.* We affirm.

Plaintiffs are former senior command officers for defendant City of Romulus' Police Department. In the spring and summer of 2002 defendants adopted a reorganization plan, under which officers with 25 years or more seniority were offered an enhanced early retirement plan. At that time, most of the plaintiffs were in their mid and late 40s and 50s and alleged they had no

immediate plans to retire. Plaintiffs maintain that defendants' reorganization plan was a subterfuge for discriminating against them on the basis of their age, and that they were constructively discharged, i.e., were forced to take early retirement because their work lives were being made intolerable by defendants, with the end being to force plaintiffs to leave the police force. Defendants are the City of Romulus; Charles Kirby, Chief of Police; Alan Lambert, Mayor of Romulus, and Barbara Hoffman, Finance Director/Financial Officer for defendant City.

This Court reviews de novo the circuit court's grant of summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The circuit court must consider the affidavits, pleadings, and other evidence submitted in a light most favorable to the nonmoving party. *Id.* at 120. The burden then shifts to the moving nonmoving party to demonstrate the existence of a genuine issue of disputed fact. *Id.*

The CRA prohibits discrimination on the basis of age. MCL 37.2202(1)(a) provides:

(1) 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 . . . age.

MCL 37.2202(2) provides

(2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or a system that is not a subterfuge to evade the purposes of this section.

Absent direct evidence of discrimination, the shifting burden analysis of *McDonnell-Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), applies. A plaintiff establishes a prima facie case of discrimination under this framework by proving by a preponderance of the evidence that 1) he was a member of a protected class; 2) he suffered an adverse employment action; 3) he was qualified for the position; and 4) the adverse employment action occurred under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once a prima facie case is established, a presumption of discrimination arises. The burden then shifts to the defendant employer to articulate a legitimate nondiscriminatory reason for the adverse employment action. If the defendant does so, the presumption drops away and the burden shifts back to the plaintiff to establish that there is a triable issue of fact that the employer's proffered reasons were a mere pretext for discrimination. *Id.* at 174.

A plaintiff can establish pretext in three ways: by showing that the defendant's reasons for the adverse employment action 1) had no basis in fact, or 2) if they had a basis in fact, by showing they were not the actual factors motivating the decision, or 3) if they were factors, by showing that they were insufficient to justify the decision. *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990).

A

We conclude that, even assuming that plaintiffs established they were subjected to adverse employment actions, i.e., that they were constructively discharged by way of being forced into accepting the early retirement plan because their working conditions were being made intolerable, and thus made out a prima facie case of age discrimination, plaintiffs failed to present evidence that defendants' legitimate nondiscriminatory reason for the adverse employment action was a mere pretext for discrimination. Thus, summary disposition was properly granted.

Defendants submitted documentary evidence below that went unrefuted by plaintiffs, supporting that defendant City instituted a reduction in force/reorganization and the early retirement program to reduce the amount of the City budget allocated to the police department, and increase funding of the fire department such that it would be a full-time fire department (heretofore it had been a volunteer fire department). Defendant City presented evidence that it offered police officers with 25 or more years of service an early retirement program that permitted eligible officers to retire earlier and with increased pension benefits, in order to avoid demotions and layoffs. Defendants presented evidence that before the reorganization, defendant City's fire department had approximately 8 full-time firefighters, and that after the reorganization, it had 16 full-time firefighters. Defendants also presented evidence that the police department budget, which had accounted for approximately 25% of defendant City's entire budget, was reduced by approximately \$500,000 as a result of the reorganization, and that the fire department's budget increased substantially.

Plaintiffs failed to come forward with evidence that defendants' legitimate nondiscriminatory reason for implementing the reorganization/reduction in force/offering early retirement was a pretext for discrimination. Plaintiffs presented no evidence of age-related remarks other than defendant Mayor Lambert's remark to the press that police officers "may feel burned out" after 25 years of service. Although this remark supports plaintiffs' prima facie case in that it constitutes circumstantial evidence from which a reasonable fact-finder could infer age animus, plaintiffs still failed to present evidence that defendants' articulated legitimate nondiscriminatory reason for the adverse employment action was a mere pretext for age discrimination and thus their age discrimination claim fails.

B

Plaintiffs also assert that defendants Kirby, Lambert and Hoffman conspired in violation of the CRA to force plaintiffs to take early retirement. We disagree.

MCL 37.2701(a) and (f) prohibit a person from conspiring to retaliate or discriminate in violation of the CRA:

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 charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

* * *

(f) Coerce, intimidate, threaten or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise of enjoyment of, any right granted or protected by this act .

..

“A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). “An allegation of conspiracy, standing alone, is not actionable.” *Magid v Oak Park Racquet Club Assoc, Ltd*, 84 Mich App 522, 529; 269 NW2d 661 (1978). “A plaintiff must allege a civil wrong resulting in damage caused by the defendants.” *Id*.

Given our conclusion that plaintiffs’ age discrimination claim was properly dismissed, plaintiffs’ conspiracy claim fails automatically, as there can be no conspiracy to commit an illegal act where there is no showing of an illegal act. See *Admiral Ins Co, supra*. Plaintiffs’ assertion that the reorganization plan harmed the police department in that the extensive expertise of senior command officers was lost, does not amount to an inherently wrongful act sufficient to support a conspiracy claim. Plaintiffs’ argument that defendants conspired and created “their own retirement ordinance” is unsupported by the record. Additionally, although the enhanced early retirement program offered to plaintiffs was irrevocable, plaintiffs had 90 days to decide whether to opt for the early retirement program, and the record evidence supports that the development and implementation of the reorganization plan and retirement offer was a non-mandatory subject of bargaining.

C

Plaintiffs also assert that defendants retaliated against them, in violation of the CRA, by refusing to enter into a collective bargaining agreement unless the union agreed to give up all back-pay for plaintiffs in this litigation. Plaintiffs’ claim fails.

The CRA prohibits an employer from retaliating against an employee because the employee made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the Act. MCL 37.2701(a). In order to establish a prima facie case of retaliation under the CRA, a plaintiff must show that 1) he engaged in 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. *Meyer v Centerline*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).

We conclude that plaintiffs failed to establish a causal connection between the protected activity (the filing of the instant suits alleging age discrimination and other violations of the CRA), and the alleged adverse employment action (plaintiffs’ non-receipt of retroactive pay increases under a collective bargaining agreement signed in 2004). Plaintiffs maintained below that defendants retaliated against them by changing language in a collective bargaining agreement signed in 2004 (after both of the instant suits were filed) such that retroactive wage increases applied only to individuals still employed by defendant City. Plaintiffs presented no

evidence to support their assertion that the union “was forced” to vote on this provision or to support that defendants in some way controlled the collective bargaining process.

D

Plaintiffs also contend that the circuit court improperly denied their motion for rehearing. We disagree.

This Court reviews the circuit court’s denial of plaintiffs’ motion for rehearing for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). Defendants are correct that plaintiffs did not plead or otherwise advance a disparate impact theory of recovery, and that *Smith v City of Jackson*, 544 US 228; 125 S Ct 1536; 161 L Ed 2d 410 (2005),¹ the case plaintiffs relied on in moving for rehearing, provides no support for their claim. *Smith* is not on point because plaintiffs in this case advanced as their theory of recovery disparate treatment/intentional age discrimination, not disparate impact. We find no abuse of discretion.

E

Plaintiffs also contend that the circuit court improperly denied their motion for partial summary disposition of their OMA claim. Plaintiffs assert that the circuit court should not have allowed defendants to amend their affirmative defenses to add a statute of limitations defense, after which defendants moved for and were granted summary disposition on the basis that the OMA claim was barred by the statute of limitations. Under the circumstances here, we disagree.

It is undisputed that plaintiffs did not bring their OMA claim until well past the 180 day limitations period set forth under the Act at MCL 15.273(2), which provides: “An action under this section shall be commenced within 180 days after the date of the violation which gives rise to the cause of action.”

Plaintiffs argued below that the discovery rule should be applied to toll the period of limitations in this context, relying on the discussion in *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157-158; 626 NW2d 917 (2001):

The statute of limitations is a procedural device designed to promote judicial economy and protect defendants’ rights. However, our courts have applied the discovery rule to prevent unjust results ‘when a plaintiff would otherwise be denied a reasonable opportunity to bring suit due to the latent nature of the injury

¹ *Smith* held that the disparate impact theory of recovery is cognizable under the federal Age Discrimination in Employment Act (ADEA). Under a disparate impact theory a plaintiff must establish that a facially neutral practice or policy disproportionately impacts or burdens the protected class more harshly than others. *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 538-539; 470 NW2d 678 (1991).

or the inability to discover the causal connection between the injury and the defendant's [action]

To determine whether to strictly enforce the statute of limitations or to impose the discovery rule, this court 'must carefully balance when the plaintiff learned of her injuries, whether she was given a fair opportunity to bring her suit, and whether defendants' equitable interests would be unfairly prejudiced by tolling the statute of limitations.' The *Stephens [v Dixon]*, 449 Mich 531; 536 NW2d 755 (1995)] Court noted that our courts have applied the discovery rule in medical malpractice cases, *Johnson v Caldwell*, 371 Mich 368; 123 NW2d 785 (1963), negligent misrepresentation cases, *Williams v Polgar*, 391 Mich 6; 215 NW2d 149 (1974), products liability cases for asbestos-related injuries, *Larson v Johns-Manville Sales Corp*, 427 Mich 301, 309; 399 NW2d 1 (1986), and in pharmaceutical products liability cases, *Moll v Abbott Laboratories*, 444 Mich 1, 12-13; 506 NW2d 816 (1993). The Court emphasized that 'the concern for protecting defendants from 'time-flawed evidence, fading memories, lost documents, etc.' is less significant in these cases.'

On appeal, plaintiffs cite *Pat Boyle Chevrolet Inc v General Motors*, 250 Mich App 499; 655 NW2d 233 (2002), in which this Court applied the discovery rule where a party attempted to conceal a fraud. However, the Supreme Court reversed, 468 Mich 226, 231-232; 661 NW2d 557 (2003), holding that the discovery rule did not apply.

Defendants relied below on *Rasch v East Jordan*, 141 Mich App 336; 367 NW2d 856 (1985), in which the plaintiff sued his former employer for wrongful termination. After a jury verdict of no cause of action, the plaintiff appealed, asserting that the circuit court erred in denying his claim for damages under the OMA on the basis that it was untimely filed. This Court affirmed, noting:

Plaintiff argues that it was improperly granted because he raised a material issue of fact as to whether minutes of the meeting were ever published. However, that factual issue has no bearing on the time limits for bringing an action under this act. Plaintiff requested in his complaint \$500 in damages pursuant to MCL 15.273. . . An action under the exception must be commenced within 180 days after the date of the violation. MCL 15.273(2) . . . As more than 180 days has elapsed, it was irrelevant whether the minutes of the meeting were made available to the public. [*Rasch, supra* at 338-339.]

The circuit court in the instant case concluded that *Rasch, supra*, was controlling. We agree with the circuit court that plaintiffs presented no cases on point, and that summary disposition was proper under *Rasch, supra*.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot