

STATE OF MICHIGAN
COURT OF APPEALS

KAMOL BELLO,

Plaintiff-Appellee,

v

FORD MOTOR COMPANY,

Defendant-Appellant.

UNPUBLISHED

March 27, 2014

No. 310283

Wayne Circuit Court

LC No. 10-010867-CD

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant Ford Motor Company appeals by leave granted¹ the trial court order that denied its motion for summary disposition on plaintiff's claims of unlawful termination of employment. Plaintiff alleges that he was unlawfully discharged in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2202 *et seq.*, on the basis of race and, alternatively, in retaliation for filing a complaint of racial discrimination against his supervisor. Because plaintiff failed to establish a prima facie case of either racial discrimination or retaliation, we reverse.

Plaintiff is an African-American man of Nigerian descent. He possesses a bachelor's degree in chemical engineering, a master's degree in mathematics, and various professional certifications. In April 2001, Ford hired plaintiff as a "manufacturing process engineer" at salary grade 7. Plaintiff was employed by Ford in various engineering capacities, always at salary grade 7, until his employment was terminated on September 20, 2007.

During the time it employed plaintiff, Ford rated salaried employees on the following scale, in descending order: Outstanding, Excellent Plus, Excellent, Satisfactory Plus, Satisfactory, Satisfactory Minus, and Needs Improvement. Human Resources (HR) Business Operations Associate David Kamienecki averred that, in practice, the grades are actually highly skewed. Because over 80% of Ford's salaried professionals are rated "Excellent Plus," there are three separate ratings within that rating: EP1, EP2, and EP3, in descending order of favorability.

¹ *Bello v Ford Motor Co*, unpublished order of the Court of Appeals, entered September 24, 2012 (Docket No. 310283) (Stephens, J., would deny leave to appeal).

EP3-rated employees comprise the bottom 15% of the 80% rated “Excellent Plus.” Kamienecki asserted that an “Excellent” rating or lower places an employee in the bottom 5% of performers. Thus, an employee rated EP3 or below falls into the bottom 20% of all performers.

In February 2004, plaintiff received a “Satisfactory Minus” performance rating. Due to the low rating, plaintiff was placed on a “performance improvement plan” and attendance guidelines. Because plaintiff’s problems apparently involved habitual tardiness, the plan required him to email his supervisor from his work computer upon arrival each day.

By this time, plaintiff had been identified as a “low performer” who needed to be placed elsewhere. Supervisor Michael Tokarski stated that he offered to work with plaintiff. In 2005 and 2006, plaintiff’s interim and annual performance reviews, conducted by Tokarski, improved but remained below average. Tokarski averred that while he felt plaintiff’s performance was improving, he was still the lowest-rated of the four engineers Tokarski supervised. Kamienecki stated that plaintiff’s final 2006 rating was “EP3,” placing him the bottom 20% of performers before it was lowered to “Satisfactory Plus” in mid-2007, placing him in the bottom 5%.

In 2007, plaintiff again began exhibiting performance problems. Plaintiff began arriving to work after his 9:00 a.m. start time and was late to and missed several meetings. On May 16, 2007, after another tardy arrival, Tokarski informally counseled plaintiff and re-imposed the requirement that plaintiff email him upon his arrival each day. Plaintiff also received negative feedback from his “internal customers” and his coworkers complained about his performance. Tokarski assigned work pursuant to a “buddy system” – one engineer led the project with another in support. By 2007, all of plaintiff’s coworkers had requested that Tokarski not assign them to work with plaintiff, because they each ended up doing all the work.

In April 2007, Tokarski sought help from Ford’s HR department in dealing with plaintiff’s performance issues. In July 2007, Tokarski drafted, with Kamienecki’s approval, a performance improvement plan and interim performance review for plaintiff. The performance review rated plaintiff at “Satisfactory Plus.”

In late July 2007, Tokarski, Kamienecki, and Rob Gelven, Tokarski’s supervisor, met with Personnel Relations (PR) representative Karen Jirik to discuss plaintiff’s employment. According to Ford, “Personnel Relations” is a separate department located within its HR department with two functions: it advises HR on Ford’s policies and procedures and “operates an investigatory organization to address complaints and review allegations of misconduct by non-union salaried personnel and determine if any action is warranted (including termination).” Jirik concurred with Tokarski’s suggested “Satisfactory Plus” rating and the performance improvement plan, and agreed that plaintiff should be placed on attendance guidelines. Plaintiff was scheduled to be presented with the performance review, performance improvement plan, and attendance guidelines on August 17, 2007.

During the interim, on or about August 17, 2007, Nabin Nepal, plaintiff’s coworker, expressed concern to Tokarski that plaintiff appeared to be making regular personal international phone calls from his work phone. In response, Tokarski asked Ford’s Information Technology (IT) department for an itemized list of calls from plaintiff’s work phone. IT employee James

Appiah told Tokarski that he could not provide the data without HR approval, but did ask whether Tokarski was concerned about “calls to Nigeria.”

Plaintiff failed to appear as scheduled for the presentation of his performance review on August 17, 2007. By phone, he informed Tokarski that he was undergoing medical tests and did not return to work until August 24, 2007. Tokarski rescheduled the meeting for August 27, 2007 at 9:00 a.m. Plaintiff attempted to cancel the meeting, but after being directed to attend, arrived late. Plaintiff was presented with the “Satisfactory Plus” rating, which he considered poor, the performance improvement plan, and the attendance guidelines. He voiced his disagreement with the presentation and indicated that he would submit a rebuttal. As he left the meeting, plaintiff handed a typed complaint to Kamienecki. Dated August 20, 2007, the complaint alleged that Tokarski had discriminated and retaliated against plaintiff by unfairly criticizing his work performance.

Notably, the lengthy and detailed complaint contains absolutely no reference to or allegations of discrimination on the basis of race or national origin. Rather, the complaint details plaintiff’s perceived inequalities of workload between the engineers under Tokarski’s supervision. Plaintiff also detailed what he considered “harassment” regarding Tokarski’s desire to be aware of when plaintiff was taking time off work or arriving late. Plaintiff alleged that Tokarski continually put “derogatory” remarks in his work record; however, it appears that these remarks were purely work-related. Indeed, plaintiff’s complaint reveals that Tokarski met with him when he requested and it appears that Tokarski was merely taking steps to enforce the performance improvement plan in order to improve plaintiff’s performance. There is no evidence to support plaintiff’s allegation that Tokarski and plaintiff’s coworkers “conspired” to make his work performance appear less than adequate.

On August 28, 2007, Kamienecki emailed plaintiff’s complaint to PR representative Mary Carol Moody. Moody was tasked with investigating plaintiff’s accusations toward Tokarski and met with plaintiff on August 30, 2007. After listening to his allegations, Moody told plaintiff that she believed Tokarski had been concerned about plaintiff’s performance issues, citing several specific examples, which plaintiff rejected. Moody averred that, “he cut me off and became increasingly argumentative and loud.” She stated that plaintiff “never told me . . . that Mr. Tokarski or anyone else engaged in racial innuendo or made any racial derogatory statement.” Tokarski averred that he never used any racial slur in plaintiff’s presence and that, “I have never been accused by anyone during my 22 years of employment of any such conduct, nor would I engage in any such offensive conduct.” Deposed for this litigation, plaintiff testified that Tokarski once referred to him with a racial slur. Moody ultimately told plaintiff that she saw no evidence of discrimination or harassment.

Also on August 30, 2007, Moody interviewed Rich Levergood and Armand Giannamore, two of plaintiff’s coworkers. Both expressed their belief that Tokarski treated all of his subordinates fairly and that none were unfairly criticized. The coworkers told Moody that they had received complaints about plaintiff’s failure to adequately perform work and that they were unwilling to work with plaintiff on projects. Levergood also stated that plaintiff appeared to spend significant amounts of work time placing what appeared to be personal international phone calls.

After hearing Levergood's accusation, Moody investigated plaintiff's phone usage. She requested records of calls made from plaintiff's work phone from the IT department. She also learned, from Kamienecki, that the IT department had told Tokarski of phone calls made to Nigeria. Again, a request for phone records required HR approval. Director Richard Gross originally denied Moody's request, believing that the underlying allegation was that plaintiff was wasting work time on the phone, which was viewed as a performance issue to be managed. However, once Moody explained that the request pertained to possible personal international phone calls made at Ford's expense, Gross approved the request.

The phone records revealed many lengthy calls to Nigeria, Malawi, and other foreign countries. Moody stated that plaintiff had no business purpose for such calls. Many of the calls were made during non-business hours and during weekends and holidays. Moody cross-referenced the calls with plaintiff's badge access records and found that plaintiff was in the facility every time one of the calls was made. There were also several international calls made from phones located in conference rooms near plaintiff's office; Moody again found that plaintiff was in the facility when those calls were made. Moody stated that, for example, 22 calls were made to Nigeria from plaintiff's work phone over Memorial Day weekend 2007, when the facility was closed. Phone records for approximately seven months were reviewed, from January to July 2007, revealing over 146 hours of unauthorized international calls attributed to plaintiff. The total bill for the unauthorized calls was calculated at \$3,138.92.

Moody concluded that plaintiff had engaged in misconduct at Ford's expense. Per PR department policy, she investigated how other salaried employees who had been found to have committed similar misconduct had been treated. She identified two employees, one Caucasian and one African-American, who had both been terminated after a finding of phone abuse at Ford's expense.² The two previously terminated employees had incurred only \$230 and \$1,250 in charges, respectively.

Moody met with plaintiff on September 13, 2007 to question him about her findings. Plaintiff denied making any calls to Nigeria at Ford's expense. He stated that any international calls he made were charged to a personal phone card. He suggested that someone else must have placed the calls, but could not explain why he was shown to be in the facility when each call was made. "He also stated a clear understanding that it would have been wrong for him to make the calls in question on company time." The record contains a handwritten statement from plaintiff in which he again explained that any international calls were made on his personal phone card. Like plaintiff's internal complaint, the handwritten statement accuses plaintiff's superiors of "harassment," but makes no mention of racial discrimination. At the conclusion of the

² Plaintiff falsely implies that Gross testified that he could not recall whether any employee had ever been terminated for improper phone usage. Gross actually testified that, during his 39-year tenure with Ford, employees had been terminated for phone usage, but that he could not specifically recall those employees' names. Moreover, Gross stated that, due to his high level of management, he is not personally aware of many, if not most, terminations conducted by Ford.

September 13, 2007 meeting, Moody informed plaintiff that he would be placed on paid suspension pending the conclusion of the investigation into his misconduct.

The record contains a September 14, 2007 letter from plaintiff to Moody and his supervisors. This letter detailed plaintiff's disagreement with his performance rating. It also contains the first reference to unlawful discrimination: "I can not [sic] believe that my PR rating can be downgraded four steps below out of Personal Vendetta, Nationality Discrimination, and Disagreement with Mr. Mike Tokarski." However, the letter contains no actual allegations of racial or nationality discrimination, but merely reiterates what plaintiff believed to be deficiencies in his performance rating analysis.

Moody compiled a summary of her findings and recommended that plaintiff's employment be terminated. She sought no input from Tokarski or Gelven because decisions regarding misconduct by non-union salaried employees were the sole province of the PR department. Jirik and Julie Lavender, a PR manager and Moody's supervisor, reviewed Moody's findings and agreed with her recommendation. Moody scheduled a termination meeting and informed Tokarski and Gelven of the decision.

On September 20, 2007, in the presence of Moody and Kamienecki, Gelven informed plaintiff that his employment was terminated for misuse of company property at Ford's expense. Plaintiff again denied making personal phone calls on Ford equipment and stated that any international calls he made were charged to his personal phone card.

Three years later, on September 20, 2010, plaintiff filed the instant complaint *in propria persona*. He alleged that he was terminated at least in part on the basis of his race in violation of ELCRA. Plaintiff subsequently retained counsel on January 21, 2011. After substantial and litigious discovery, Ford moved for summary disposition under MCR 2.116(C)(7) and (C)(10).

From the bench, the trial court denied Ford's motion for summary disposition, but did not explain its reasoning:

The question is whether or not there are any genuine issues of material fact in this case. The Court has reviewed all of the material, has taken into consideration the arguments that have been presented, and the Court finds that there are genuine issues of material fact and that this Motion for Summary Disposition cannot stand.

And I would just add that I don't think that a motion on either side given the facts of this case would be appropriate, Motion for Summary Disposition on the part of Plaintiff nor Motion for Summary Disposition on the part of Defense would be appropriate in this case. The motion here is denied.

We review de novo a trial court's denial of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574. "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Ernsting*, 274 Mich App at 509-510. All

reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

“Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Ernsting*, 274 Mich App at 509. “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). “A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ.” *Ernsting*, 274 Mich App at 510.

Defendant argues that plaintiff failed to establish a prima facie case of racial discrimination under MCL 37.2202, which provides in relevant part:

(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* religion, *race*, color, national origin, age, sex, height, weight, or marital status. [Emphasis added.]

A plaintiff may prove discrimination with either direct or indirect evidence. See *Hazle v Ford Motor Co*, 464 Mich 456, 461-463; 628 NW2d 515 (2001). When providing direct evidence, “the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove in any other civil case.” *Id.* at 462. In discussing ELCRA, our Supreme Court observed that, “[f]or purposes of the analogous federal Civil Rights Act, the Sixth Circuit Court of Appeals has defined ‘direct evidence’ as ‘evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.’” *Id.*, quoting *Jacklyn v Schering-Plough Healthcare Prod Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

“In many cases, however, no direct evidence of impermissible bias can be located. In order to avoid summary disposition, the plaintiff must . . . proceed through the familiar steps set forth in [*McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973)].” *Hazle*, 464 Mich at 462. Under *McDonnell Douglas*, as applied here, plaintiff must establish a prima facie case by presenting evidence that he was: “(1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer’s adverse conduct.” *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). If plaintiff can establish a prima facie case, it gives rise to a presumption of discrimination on the part of Ford. *Hazle*, 464 Mich at 463-464.

Plaintiff does not appear to argue that he presented direct evidence of discrimination,³ arguing instead that he established a prima facie case of discrimination under *McDonnell Douglas*. Ford does not appear to dispute that plaintiff satisfied the first three elements necessary to establish a prima facie case. It is undisputed that plaintiff is an African-American and, therefore, a member of a protected class, suffered an adverse employment action in the form of his termination,⁴ and was qualified for the position. See *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 369; 597 NW2d 250 (1999) (“[b]eing qualified for a job, for purposes of establishing a prima facie case of discrimination, requires only minimal qualification”). Ford does argue, however, that plaintiff failed to establish the fourth element: that “others, similarly situated and outside the protected class, were unaffected by the employer’s adverse conduct.” *Town*, 455 Mich at 695.

Ford’s argument is correct. Plaintiff has submitted no evidence to suggest that other employees not members of a racial minority group placed personal international phone calls at Ford’s expense without being terminated. Indeed, the opposite is true. Ford presented evidence that two other individuals, one Caucasian and one African-American, were both terminated after incurring personal phone charges at a substantially less cost to Ford than did plaintiff. There was no evidence that Ford fails to take a consistent approach to employees who abuse its phone system for personal international phone calls, regardless of race. Similarly, plaintiff also failed to present evidence that he was unfairly targeted for a phone record audit. Plaintiff has not established that any other employee, nonminority or otherwise, was suspected of making unauthorized international phone calls at Ford’s expense and not audited. Accordingly, plaintiff has not presented evidence sufficient to establish the fourth element of a *McDonnell Douglas*

³ It could seemingly be argued that plaintiff’s testimony that Tokarski once referred to him with a racial slur constituted direct evidence of discrimination. However, this allegation was first mentioned in plaintiff’s deposition nearly four years after it allegedly occurred. Moreover, Tokarski denied the statement and plaintiff’s coworkers similarly stated that Tokarski never took any unfair or discriminatory action against plaintiff. Even assuming, *arguendo*, that Tokarski made the remark, it is insufficient to establish a prima facie case of discrimination under a direct evidence theory. The statement would constitute a single stray remark made by an individual that did not decide to terminate plaintiff’s employment nor participate in the underlying investigation. Moody and the PR department conducted the investigation after receiving a tip from Levergood, plaintiff’s coworker, not Tokarski. See *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 136 n 8; 666 NW2d 186 (2003).

⁴ To the extent plaintiff seeks recovery for any allegedly discriminatory employment actions that occurred before September 20, 2007, i.e., any event other than his termination, those claims are barred by three-year statute of limitations applicable to ELCRA. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 284-285; 696 NW2d 646 (2005). However, plaintiff is entitled to introduce evidence of such events in an attempt to establish a “pattern of discrimination.” *Campbell v Human Servs Dep’t*, 286 Mich App 230, 238; 780 NW2d 586 (2009).

prima facie case and the trial court erred by denying Ford's motion for summary disposition on plaintiff's claim of racial discrimination.⁵

Defendant next argues that it was entitled to summary disposition on plaintiff's claim that he was unlawfully terminated in retaliation for filing a complaint of racial discrimination against Tokarski.

To establish a prima facie case of retaliation under the Civil Rights Act, a plaintiff must show (1) that the plaintiff engaged in a protected activity, (2) that this was known by 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 City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000).]

As Ford impliedly acknowledges, there can be little dispute that plaintiff established the first three elements necessary to establish a prima facie case of retaliation. Plaintiff filed a complaint alleging that Tokarski discriminated against him, a protected activity, Ford certainly knew about that activity because the complaint was filed internally, and Ford terminated plaintiff, an adverse employment action. Ford does argue, however, that plaintiff failed to establish a causal connection between his filing of the complaint and his discharge.

Plaintiff offers two theories as to how the filing of his complaint against Tokarski was causally connected to his termination for unauthorized phone usage at Ford's expense.

First, plaintiff claims that Tokarski "conspired" with Moody to initiate the investigation into his phone records for the purpose of seeking his termination. There is simply no evidence of such a conspiracy. Moreover, Moody stated that she began investigating plaintiff's phone records after receiving information volunteered by plaintiff's coworker, not Tokarski. Only after initiating her investigation did Moody learn that Tokarski had previously contacted the IT department about plaintiff's phone records.

Second, plaintiff argues that the temporal proximity between the filing of his complaint and his termination sufficiently establishes causation. Our Supreme Court has stated that, "in order to show causation in a retaliatory discrimination case, '[p]laintiff must show something more than merely a coincidence in time between protected activity and adverse employment action.'" *Garg*, 472 Mich at 286, quoting *West v Gen Motors Corp*, 469 Mich 177, 186; 665 NW2d 468 (2003). Plaintiff gave his complaint to HR on August 27, 2007 and was terminated on September 20, 2007. While this was a short period of time, plaintiff has presented no evidence to suggest that it was more than a coincidence. Indeed, Moody appears to have fully investigated plaintiff's complaint. While doing so, she discovered concerns about plaintiff's phone usage from his coworker, not Tokarski. Plaintiff's improper phone usage, which is amply documented in the record, resulted in his termination. Plaintiff has presented no evidence that

⁵ Because we find that plaintiff failed to establish a prima facie case of racial discrimination under ELCRA, we decline to address defendant's alternative arguments.

would allow a reasonable factfinder to conclude that the filing of his complaint caused his superiors to conspire to investigate his phone records or seek his termination. Accordingly, plaintiff failed to establish a prima facie case of retaliatory employment action and the trial court erred by denying Ford's motion for summary disposition on plaintiff's retaliation claim.

Because plaintiff failed to present evidence sufficient to establish a prima facie case of racial discrimination or retaliation, the trial court erred by denying Ford's motion for summary disposition under MCR 2.116(C)(10). Accordingly, we reverse the trial court's denial of summary disposition and remand for entry of an order granting summary disposition on all of plaintiff's claims in favor of defendant Ford.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro