

STATE OF MICHIGAN  
COURT OF APPEALS

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HOWARD PAUL LARSON,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF  
CORRECTIONS,

Defendant-Appellee.

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UNPUBLISHED

September 15, 2005

No. 261585

Grand Traverse Circuit Court

LC No. 03-023344-CZ

Before: Murray, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition of plaintiff's claims for unlawful retaliation and age discrimination under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* The trial court granted summary disposition under MCR 2.116(C)(10), concluding that there was no genuine issue of material fact that plaintiff had not been engaged in protected activity under the CRA, or that plaintiff was discriminated against because of his age. We affirm.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). The court must consider the available pleadings, affidavits, depositions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party to determine if there is a genuine issue of material fact, or whether the moving party is entitled to judgment as a matter of law. *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000); *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

The CRA prohibits an employer from retaliating against an employee for pursuing rights protected under the CRA. *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001). A prima facie case of retaliation can be established if a plaintiff proves (1) that he was 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. *Peña v Ingham Co Rd Comm'n*, 255 Mich App 299, 310-311; 660 NW2d 351 (2003). A person is engaged in "protected activity" if the person has opposed a violation of the CRA or made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under that act. *Barrett, supra* at 318. While an employee need not specifically cite to the CRA, he

must do more than generally assert unfair treatment. *Id.* at 318-319. The employee must clearly convey to the objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA. *Id.* at 319.

In this case, although plaintiff maintains that he was retaliated against because he filed a grievance on behalf of another employee, the submitted evidence showed that the grievance did not relate to conduct protected by the CRA. Indeed, the employee on whose behalf the grievance was filed testified that she did not complain to plaintiff that she was sexually harassed or discriminated against, and did not view the grievance as relating to any complaints of sexual harassment or discrimination of any type. The trial court properly observed that while there may be other statutes prohibiting retaliation for engaging in union activity, the evidence failed to establish a genuine issue of material fact that plaintiff was engaged in activity protected by the CRA when he filed the grievance. We agree that an objective employer could not conclude that plaintiff was raising the specter of a claim pursuant to the CRA when he filed the grievance and, therefore, affirm the trial court's dismissal of plaintiff's claim for unlawful retaliation under the CRA.

The trial court also properly dismissed plaintiff's age discrimination claim. Intentional discrimination can be proven by either direct or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001); *Bachman v Swan Harbour Associates*, 252 Mich App 400, 432; 653 NW2d 415 (2002). When direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), framework, which is utilized in cases where there is circumstantial, rather than direct, evidence of discrimination. *Bachman, supra* at 432; *DeBrow, supra* at 537-538. Direct evidence of discrimination is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003); *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). In a case involving direct evidence of discrimination, the plaintiff bears the burden of proving both the discriminatory animus and its causal nexus to the challenged employment decision. *Id.*; *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

Where there is no direct evidence of discrimination, a plaintiff may base an age discrimination case on circumstantial evidence, in which case the *McDonnell Douglas* framework applies. *Bachman, supra* at 432-433. The plaintiff must first establish a prima facie case of age discrimination by proving, by a preponderance of the evidence, that (1) he was a member of the protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, but (4) that he was replaced by a younger person. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Once the plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's termination. *Id.* at 173. Once the defendant produces such evidence, the presumption drops away, and the burden of proof shifts back to the plaintiff. The plaintiff must show, by a preponderance of admissible direct or circumstantial evidence, that there was a triable issue that the employer's proffered reasons were not true reasons, but were a mere pretext for discrimination. *Id.* at 174. Therefore, in the context of summary disposition, a plaintiff must prove discrimination with

admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff. *Id.*

In this case, plaintiff argues that he submitted sufficient direct evidence of discrimination. He relies on evidence that William Cantinella (1) referred to “you old guys” five to ten times over a ten-year period when addressing him; (2) suggested to him that his poor performance was due to his age; and (3) told him he was not as efficient or hard-working as some of the younger workers. These comments do not require a conclusion that age was a reason that plaintiff was terminated. Vague comments such as these, sporadically made over the course of several years, and that are not made in relation to the employment decision at issue, are not probative of an employer’s discriminatory motivation. *Sniecinski, supra* at 136 n 8; *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 300; 624 NW2d 212 (2001). That these comments were not related to plaintiff’s termination was confirmed by plaintiff himself, who testified that he had no evidence that age was a factor in the decision to terminate his employment.

The trial court also correctly concluded that plaintiff failed to make out a prima facie case of age discrimination with circumstantial evidence, because the evidence established that plaintiff was replaced by a person the same age. Furthermore, defendant offered a legitimate, nondiscriminatory reason for plaintiff’s termination,<sup>1</sup> i.e., his poor performance, and the evidence did not permit a conclusion that this reason was a pretext for age discrimination.

Affirmed.

/s/ Christopher M. Murray  
/s/ Donald S. Owens  
/s/ Bill Schuette

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<sup>1</sup> We note that an arbitrator overturned plaintiff’s termination, and plaintiff has returned to work for the MDOC. Neither party has appealed the arbitrator’s decision, so plaintiff actually lost one year of pay, as he was reinstated without back pay.