

STATE OF MICHIGAN
COURT OF APPEALS

JIQIANG XU,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF COMMUNITY
HEALTH, GLENN COPELAND, and WON
SILVA,

Defendants-Appellees,

UNPUBLISHED

August 2, 2011

No. 294867

Ingham Circuit Court

LC No. 08-000746-CD

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendants' motion for summary disposition under MCR 2.116(C)(10) and dismissing his claims of discrimination, retaliation, and intrusion upon seclusion. We affirm.

Plaintiff, a man of Chinese origin, began working for defendant Michigan Department of Community Health (MDCH) in January 1999. Plaintiff was initially hired as a statistician level 9. Plaintiff alleged that as his responsibilities increased over time, he stayed at the same salary level. As of 2004, he had been promoted to level 11, but he nonetheless alleged that he was not sufficiently promoted because of his race, national origin, and age. Plaintiff recounted several contentious communications between himself and defendant Won Silva, his immediate supervisor at MDCH. Plaintiff also alleged that he was retaliated against by being placed under an attendance policy and being subject to other measures after having raised several complaints, including complaints regarding his treatment by Silva. He further alleged that defendants violated his right to privacy and intruded upon his seclusion by asking him to provide a doctor's note regarding any medical appointments when seeking sick leave.

Plaintiff sued defendants for violating his rights under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and the trial court granted defendants' motion for summary disposition, finding, in part, that plaintiff had provided no evidence of discrimination. We review the court's ruling de novo, viewing the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). "[A] trial court may grant summary disposition under MCR 2.116(C)(10) if there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law." *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001).

With respect to a claim for discrimination under the CRA, in order to avoid summary disposition when, as in this case, no direct evidence of discrimination exists,¹ a plaintiff must establish a prima facie case of discrimination by presenting evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Id.* at 463, citing *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

Plaintiff argues on appeal that “he has been passed over for promotion.” As proof of this assertion, plaintiff argues that defendant Glenn Copeland, his former direct supervisor, “refus[ed] to promote [plaintiff] to a level 12 or 13, despite his having done so for . . . a younger white male.” However, this argument is contradicted by plaintiff’s own deposition testimony. During his deposition, plaintiff acknowledged that he was offered a position at level 12, but turned it down because the supervisor in question would not demote a coworker.² Plaintiff also argues that two coworkers, “both non-Chinese women, have risen to level 13 in their areas.” Copeland testified that these two employees were not statisticians, but rather “department analysts” whose “duties and responsibilities . . . [were] primarily administrative in nature” and whose work [was] not comparable to that of plaintiff or other statisticians. Copeland explained that plaintiff’s job was in a different classification and that the situations of the two female employees were not comparable in terms of pay scales, duties, or responsibilities. Neither of these employees is similarly situated to plaintiff. See *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 369; 597 NW2d 250 (1999) (an inference of discrimination arises when similarly situated individuals are treated differently from the plaintiff).

Plaintiff also alleges that a younger white female was promoted to “Statistician Specialist 2,” while he was passed over for the position. However, even assuming, for purposes of argument, that plaintiff established a prima facie case of discrimination with respect to this claim, defendants articulated a legitimate, nondiscriminatory reason for its employment decision. See *Hazle*, 464 Mich at 464. A member of the interviewing panel stated that plaintiff “was not selected as one of the top three candidates for this position because he did not rate as high on the selection criteria as the three top candidates.” He provided extensive details regarding why the selected individual was hired. In light of this evidence, plaintiff, in order to survive defendants’ motion for summary disposition, was required to provide evidence demonstrating that discrimination was a motivating factor in defendants’ decision. *Id.* at 465. Plaintiff did not do so.

Plaintiff additionally argues that defendant’s disparate treatment was evidenced because he was admonished to stop surfing Chinese websites while other individuals were not similarly

¹ Contrary to plaintiff’s suggestion, there was no direct evidence of unlawful discrimination in this case.

² Plaintiff appears to be offering the evidence concerning the white male as background evidence of discrimination. See *Campbell v Dep’t of Human Services*, 286 Mich App 230, 232; 780 NW2d 586 (2009).

admonished. However, Silva testified that plaintiff's use of the Internet for non-work-related purposes was more extensive than other employees'. Plaintiff did not adequately establish that he was treated differently from similarly situated individuals. *Wilcoxon*, 235 Mich App at 369.³

Plaintiff also argues that defendants' disparate treatment was evidenced by their placement of plaintiff on the "lost-time" attendance policy. A labor relations representative for defendants testified that under the lost-time policy, "an employee is not paid for time that he or she is away from work without permission or without approval." Plaintiff argued below and on appeal that he had been properly adhering to a different attendance policy that was "expressly provided for in the collective bargaining agreement." According to plaintiff's testimony at his deposition, he was permitted to come and go as he pleased, as long as he worked eight hours each workday.⁴ Plaintiff testified that all of his supervisors, including Silva, permitted him to follow this policy. We note that plaintiff has not produced a copy of the policy nor provided a citation to the provision of the bargaining agreement wherein the policy is written. At any rate, with respect to the placement on the lost-time policy and with respect to the additional actions asserted by plaintiff, plaintiff, yet again, has not shown that he was treated differently from similarly situated individuals. *Wilcoxon*, 235 Mich App at 369. There was no inference of discrimination, and the trial court properly dismissed plaintiff's discrimination claim.

Next, plaintiff claims that the trial court erred in dismissing his claim of retaliation. We disagree. Plaintiff claims that defendants retaliated against him with harsh disciplinary measures after he notified the human resources department of various complaints concerning Silva and other coworkers.

In *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646, amended 473 Mich 1205 (2005), the Michigan Supreme Court noted that the issue in cases of retaliation brought under MCL 37.2701 is not whether a defendant treated the plaintiff badly or unfairly, but rather whether the "defendant retaliated against [the] plaintiff *specifically* for conduct . . . protected by the Civil Rights Act." (Emphasis in original.)

MCL 37.2701 provides, in pertinent part, as follows:

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.

³ Moreover, defendants were certainly entitled to reprimand plaintiff for activities that violated workforce policies.

⁴ The testimony is not entirely clear, but there was also a suggestion that the alleged policy related to compensatory leave in lieu of overtime, and on appeal plaintiff emphasizes this aspect of the policy.

The elements of the prima facie case are:

(1) that [the plaintiff] 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. [*Garg*, 472 Mich at 273.]

Plaintiff cites several instances in which his complaints were followed by various disciplinary actions by Silva. Specifically, he notes the issuance of a written reprimand, formal counseling memos, and placement under the lost-time policy. However, his argument consists of pointing out the temporal proximity between actions he took and the alleged adverse employment actions. “[I]n 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 has failed to show that the placement under the lost-time policy or the other actions were illegal responses to his protected activity, rather than legitimate responses to employment-related problems.

Finally, plaintiff claims that under the terms of the lost-time policy, Silva required him to divulge private medical information by mandating that he give her a doctor’s note following his use of sick leave. According to plaintiff, the note was to include the start and end time of the appointment and the reason for the appointment. Plaintiff alleged that his medical condition was personal and private and that defendants’ invasion of his privacy caused him to “suffer extreme distress and humiliation.”

Intrusion upon seclusion is part of the common-law tort of invasion of privacy. *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). The *LeGrow* Court stated that the three elements necessary to establish a prima facie case of intrusion upon seclusion are: “(1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable man.” *Id.* (citation and internal quotation marks omitted).

A detailed account of why an employee is seeking medical attention could touch upon matters that the employee would want to keep private. However, given that plaintiff does not state how detailed the note needed to be in terms of disclosing the reason for the appointment, plaintiff has failed to show that the required disclosure would be disclosure “highly offensive to a reasonable person.” *Harkey v Abate*, 131 Mich App 177, 182; 346 NW2d 74 (1983); see also 3 Restatement Torts, 2d, § 652B, cmt d, p 380 (“There is . . . no liability unless the interference with the plaintiff’s seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object.”). Under the circumstances, it cannot be said that defendants’ request would be “objectionable to a reasonable man.” See *Lewis*, 258 Mich App at 193 (citation and internal quotation marks omitted). The trial court correctly dismissed plaintiff’s claim of intrusion upon seclusion.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Patrick M. Meter