S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

RON RAMIREZ,

Plaintiff-Appellant,

v

UNITED PARCEL SERVICE,

Defendant-Appellee,

and

CURT BLEDSOE, DAN LANGDON, and JIM DERHAMMER,

Defendants.

UNPUBLISHED
February 15, 2005

No. 250731
Calhoun Circuit Court
LC No. 01-003586-NZ

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Plaintiff Ron Ramirez appeals as of right the trial court's order granting summary disposition in favor of defendant United Parcel Service (UPS) pursuant to MCR 2.116(C)(10) in this employment discrimination action. Plaintiff also appeals the trial court's order denying his motion for default judgment that was grounded on an argument that UPS committed discovery violations. We affirm.

Plaintiff sued defendant for national origin discrimination under the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq*., after UPS terminated plaintiff's employment for failure to follow management instructions. On appeal, plaintiff presents two arguments under the CRA in support of reversal. First, plaintiff contends that the trial court erred in dismissing his CRA claim that was predicated on an alleged hostile work environment, where there are genuine issues of material fact. Second, plaintiff argues that the trial court erred in dismissing his CRA claim that was predicated on intentional discrimination or disparate treatment arising out of the termination, as well as other terminations in which plaintiff was reinstated, where there exists numerous issues of material fact. Finally, plaintiff argues that he was entitled to entry of a default judgment, where UPS failed to produce requested discovery information, failed to comply with the trial court's order to compel discovery, and intentionally blocked access to discoverable information.

We review rulings on motions for summary disposition de novo. *Van v Zahorik*, 460 Mich 320, 326; 597 NW2d 15 (1999). Pursuant to MCR 2.116(C)(10), summary disposition is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, and other documentary evidence submitted in a light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

A plaintiff may prove a disparate treatment case of discrimination by either direct evidence of discrimination or indirect or circumstantial evidence of discrimination. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003). To prove a case with indirect evidence, our courts have adopted the burden-shifting approach set forth by the United States Supreme Court in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. Under *McDonnell Douglas*, a plaintiff can establish a prima facie case of discriminatory intent by showing: (1) the plaintiff was a member of a protected class, (2) the plaintiff suffered an adverse employment action, (3) the plaintiff was qualified for the employment position, and (4) the action taken by the defendant gives rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001).

There is no dispute that plaintiff is a member of a protected class, that he suffered an adverse employment action, i.e., the termination,[1] and that he was qualified to work as a driver for UPS. The fourth prong of the test set forth in *Hazle* is at issue, and for purposes of our discussion today, we shall assume that plaintiff submitted sufficient evidence to show that the adverse employment action gave rise to an inference of unlawful discrimination.

Once a plaintiff presents a prima facie case of discrimination and establishes a rebuttable presumption of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *Hazle, supra* at 464. This articulation requirement means that the defendant has the burden of producing evidence that the employer's actions were legitimate and nondiscriminatory. *Id.* Once a defendant offers a nondiscriminatory reason, the presumption under *McDonnell Douglas* drops away. *Id.* at 465. The *Hazle* Court explained the analysis which then follows:

> At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that

[1] Although plaintiff references previous terminations, which resulted in reinstatements, in his argument, he asserted below that his case hinged only on the 2001 termination claim, with the previous terminations to be considered solely as circumstantial evidence showing that the 2001 termination was the result of discriminatory animus. Therefore, our focus will be on the 2001 termination.

> discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." [*Id.* at 465-466 (citations omitted).]

In other words, in the context of summary disposition, the plaintiff's disproof of the defendant's nondiscriminatory reason must "also raise[] a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady* (*On Rehearing*), 458 Mich 153, 175; 579 NW2d 906 (1998).

Here, UPS submitted evidence showing that the termination, and prior terminations, occurred because of improper and inappropriate conduct on plaintiff's part, including evidence that the 2001 termination resulted not from any discriminatory reason but from plaintiff's failure to follow instructions and failure to cooperate in answering questions regarding an alleged door-slamming incident by plaintiff at one of his route stops. We have reviewed and considered plaintiff's deposition testimony, the affidavit of Mike Garcez,[2] and all of the documentary evidence submitted by the parties, as well as the arguments presented. We find that plaintiff failed to submit sufficient evidence necessary to create an issue of fact with respect to whether the 2001 termination was motivated by discriminatory animus. On the record before us, it is clear that UPS proceeded to terminate plaintiff on the belief that plaintiff was not forthcoming and cooperative regarding a door-slamming incident, and not because he is Hispanic. UPS submitted evidence of a legitimate, nondiscriminatory reason for its action, and plaintiff failed to raise a triable issue that discriminatory animus or intent was a motivating factor underlying UPS' adverse action. The trial court's order dismissing plaintiff's discrimination claim in regard to termination is affirmed.

To establish a prima facie case of a hostile work environment driven by discriminatory animus, a plaintiff must demonstrate that (1) he belonged to a protected group, (2) he was subjected to unwelcome communication or conduct on the basis of his protected status, (3) the unwelcome conduct was intended to or in fact did substantially interfere with the plaintiff's employment or created an intimidating, hostile, or offensive work environment, and (4) the employer is responsible for the actions of its employees under the doctrine of respondeat superior. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996).

We again find that the evidence submitted by plaintiff was insufficient to survive summary disposition. Plaintiff failed to establish the necessary connection or link between his status as a member in a protected group and the alleged interference in plaintiff's employment or the alleged hostile work environment.

Finally, plaintiff argues that the trial court erred in denying his motion for a default judgment that was pursued on the basis of alleged discovery violations. The trial court refused to

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[2] We note that many of the averments found in Garcez' affidavit, although not all, cannot be considered as they contain opinions, conclusory allegations, and inadmissible evidence. See *SSC Assoc Ltd Partnership v Gen Retirement Sys of the City of Detroit,* 192 Mich App 360, 364; 480 NW2d 275 (1991).

substantively address plaintiff's motion on the ground that it was untimely. We review a trial court's decision whether to impose discovery sanctions for an abuse of discretion. *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 697; 662 NW2d 804 (2003). A trial court may enter a default judgment against a party as a sanction for discovery violations. MCR 2.313(B)(2)(c). However, default is a severe sanction and should only be granted when the discovery violations constitute a "flagrant and wanton refusal to facilitate discovery and not when failure to comply with a discovery request is accidental or involuntary." *Mink v Masters,* 204 Mich App 242, 244; 514 NW2d 235 (1994).

Plaintiff's argument relies solely on a stipulated order regarding his motion to compel discovery that was entered on July 22, 2002, and agreed to on the record at a hearing held on June 3, 2002. Plaintiff asserts that UPS violated this order; therefore, plaintiff is entitled to a sanction defaulting defendant in this action. The stipulated order provides that counsel "for the respective parties shall meet and confer within 7-10 days from the hearing date . . . and resolve plaintiff's outstanding discovery insufficiencies and may call the court for assistance in the event of an impasse." Plaintiff's motion for default, however, was not filed until May 27, 2003, almost a year later. Additionally, the motion was filed more than two weeks after both parties moved for summary disposition and only six days before the motion hearing; discovery had closed. The trial court was within its discretion in rejecting the motion because it did not want to reopen discovery and because, as the trial court noted, if defendant truly violated the discovery order, the violations "should have been addressed a long time ago if in fact they were of significance to the plaintiff." Moreover, plaintiff does not specify on appeal what discoverable information it still seeks. There was no abuse of discretion.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell