STATE OF MICHIGAN

COURT OF APPEALS

ANGEL T. RIVERA, Plaintiff-Appellant,	UNPUBLISHED June 11, 2013
v	No. 310951 Calhoun Circuit Court
CITY OF BATTLE CREEK, Defendant-Appellee.	LC No. 11-000555-CD

Before: MURPHY, C.J., and FITZGERALD and HOEKSTRA, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant (the city) in this racial discrimination employment case under the Elliott Larsen Civil Rights Act (CRA), MCL 37.2501 *et seq*. We affirm.

Plaintiff has been employed by the city as a police officer since January 1986. During his tenure as a police officer, he has served as a patrol officer and has received many special assignments, including the Traffic Enforcement Unit, the Motorcycle Patrol Unit, and the Emergency Response Team. Additionally, he was certified as a Laser Instructor, a Radar Instructor, and on the Taser. Special assignments are not promotions, and do not change an officer's rank, status, wages, or benefits.

Plaintiff applied for the special assignment of canine handler in 2002, 2006, 2007, and 2008, but was not selected for the special assignment on any of those occasions. Following the 2002 application process, he purchased his own dog and trained with it on his own time. After not being selected as a canine Handler in 2007, and believing that he was the best applicant for the assignment in both 2006 and 2007, plaintiff approached Lt. John Chrenenko, the command officer of the canine unit, and requested an explanation as to why he did not receive the assignment. Lt. Chrenenko allegedly told plaintiff that he was "different" and that he needed to practice with the team as the other officers did. Sometime in 2007 or 2008, plaintiff approached Sgt. Penning about his master trainer goal. Sgt. Penning allegedly told plaintiff that he was "different." Plaintiff subsequently interpreted the comments that he was "different' as a comment on his Hispanic race. Believing that he was the most qualified applicant for the

assignment in 2006, 2007, and 2008, plaintiff filed the present action on February 22, 2011, alleging employment discrimination.[1] Plaintiff asserted that race was a motivating factor in the city's decision not to assign him to the position of canine handler and that the city's decision resulted in a "loss of earnings and career opportunities" for plaintiff.

The city moved for summary disposition, arguing that no factual basis existed to support plaintiff's legal conclusion that race was a motivating factor in the city's decision not to assign plaintiff as a canine handler in 2008 and that plaintiff suffered no adverse employment action as a result of not receiving the assignment.[2] The city also argued that plaintiff could not show that his failure to obtain the special assignment occurred under circumstances giving rise to an inference of unlawful discrimination, and that plaintiff could not show that the legitimate, non-discriminatory practice of choosing the highest scoring applicant, as determined by a panel of five members, was pretextual.[3]

Following a hearing on the motion, the trial court found that plaintiff had failed to present direct evidence of discrimination and, therefore, the court applied the burden-shifting framework established in *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973). The framework, long used by courts of this state, requires a showing that plaintiff 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." *Venable v Gen Motors Corp*, 253 Mich App 473, 476-477; 656 NW2d 188 (2002). Thus, to establish a rebuttable case of discrimination, a plaintiff must present 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) his termination occurred under circumstances giving rise to an inference of unlawful discrimination. *Sniecinski v BCBSM*, 469 Mich 124, 134; 666 NW2d 186 (2003). If a plaintiff is able to successfully establish a prima facie case of racial discrimination, the burden then shifts back to the defendant to put forth legitimate, nondiscriminatory reasons for its action. If the defendant does so, the burden shifts back to the plaintiff to show that the proffered reason was merely pretextual. See *id.*; *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994).

The trial court found that plaintiff satisfied the first and third elements by presenting evidence that he belonged to a protected class and that he was qualified for the position. The trial court found, however, that plaintiff failed to present evidence that he suffered an adverse employment action or that racial discrimination was a factor in the selection panel's decision to

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[1] Although plaintiff's complaint originally involved the 2002, 2006, and 2007 selection process for the special assignment of canine handler, the trial court granted summary disposition on the ground that the complaint was not timely with regard to those years, and that decision is not challenged on appeal.

[2] The city also noted that special assignments are not promotions under the collective bargaining agreement (CBA) and involve no change in pay, benefits, rank, or status.

[3] The interview board consists of a retired Michigan State Police officer, a police officer from a different police department, and three officers from the city.

appoint another individual to the canine handler assignment. Specifically, the trial court found with regard to the second element that the assignment was not a promotion and that no change in rank, status, or pay[4] would occur as a result of the assignment.[5] The trial court also found with regard to the fourth element that

> The panel charged with making this canine assignment consisted of five police officers, which is not in dispute, three were employed b the Defendant, City of Battle Creek, and two were not employed by the City of Battle Creek. And those two were Officer Miller from MSP, the Michigan State Police, and the other was officer Ling from Springfield P.D.; that the five panelists interviewed and considered the seven applicants.
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> In reviewing the evidence presented, there is, is, as I said before, there's nothing in the process itself which would support an inference that race discrimination was a factor in their decision, nor is there any evidence that the questions used by the panelists in their determination of the most qualified candidate were racially biased in some fashion. None of the five panelists, including the two outsiders selected the plaintiff as their top candidate. That fact is significant when contrasted to the plaintiff subjectively, that in fact was the most qualified candidate.

With regard to plaintiff's assertion that both Officer Chrenenko and Officer Penning had stated in the past that plaintiff was "different," the trial court found that the alleged comments were made before the selection process, that the comments were not race-based, and that the comments did not impact the selection panel's decision. The trial court further found that even assuming the comments were race-based, "there is no evidence . . . that's been presented to me, connecting those comments to the five-member panel's ultimate decision to select an applicant other than Officer Rivera." Thus, the court concluded that plaintiff failed to establish a prima facie case of racial discrimination. Lastly, the court found that

> [E]ven if there was a prima facia case, which I don't believe that there is, the defendant has articulated a valid, legitimate reason for selecting someone else. The burden would then shift back to the plaintiff to show that the reasons given for the action taken by the city are pretextual in nature, masking a discriminatory motive. From the evidence presented, there is not in my view evidence to support a claim of pretext.

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[4] The trial court also found that plaintiff failed to present sufficient evidence to support the assertion that canine handlers earn significantly more overtime pay. Additionally, the trial court noted that plaintiff admitted in his deposition that in 2010 he earned more than the officer who was appointed to the canine unit in 2008.

[5] The CBA specifically provides that a special assignment is not a promotion.

> The plaintiff's subjective belief that he was the most qualified candidate, and the failure, failure to assign him to the canine position must have been, therefore, racially motivated, is just that. It's his opinion, and it's not in my view, an actionable claim.

I

This Court reviews de novo the trial court's ruling on the summary disposition motion. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 536; 620 NW2d 836 (2001). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). The Court considers the pleadings and the other relevant record evidence in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Dancey v Travelers Prop Cas Co*, 288 Mich App 1, 7; 792 NW2d 372 (2010).

Proof of discrimination in violation of the CRA may be established either by direct evidence or by circumstantial evidence. *Sniecinski* 469 Mich at 132. "In cases involving direct evidence of discrimination, a plaintiff may prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Id* . Direct evidence is evidence that, if believed, requires a conclusion that discrimination was a motivating factor in the adverse employment action. *DeBrow*, 463 Mich at 539–540.

Plaintiff asserts that he presented direct evidence of racial discrimination. He argues that Lt. Chrenenko's comment in 2007 and Sgt. Penning's comment in 2007 or 2008 that plaintiff was "different" was sufficient evidence of racial discrimination to withstand defendant's motion for summary disposition. The trial court rejected plaintiff's assertion. The court concluded that the comments were not a reference to plaintiff's race, were not related to the selection panel's decision, and that the comments would be insufficient to support plaintiff's assertion of direct evidence of discrimination.

Taking the evidence in the light most favorable to plaintiff, the alleged comments that defendant was "different" do not demonstrate that defendant had a discriminatory motive with regard to plaintiff's race. Plaintiff admitted in his deposition that the comments were made in reference to the type of training that he was doing with his own dog. Lt. Chrenenko stated in his affidavit that he explained to plaintiff after he was not selected for the 2007 canine handler assignment that "the Shitzund trick dog training in which he had participated on his own time with his personal dog was different than the police working dog training that would be required of a City K-9 and handler." Lt. Chrenenko produced his handwritten notes on the essay that plaintiff had submitted during the 2007 selection process that reflect this statement. Lt. Chrenenko averred that he never said that plaintiff was "different" and that he never used the word "different" in any other context. Similarly, Sgt. Penning stated in his affidavit that "The only time I ever referred to anything being 'different' in conversation with Rivera was when I told him that the Shitzund trick dog training that he boasted about doing with his own personal dog is a different type of training from the working dog training done with the Battle Creek K-9 dogs and their officer handlers." Plaintiff failed to demonstrate a genuine issue of material fact because the only direct evidence of discrimination was plaintiff's self-serving deposition

testimony that he subjectively determined subsequent to his conversations with Lt. Chrenenko and Sgt. Penning that each must have been referring to plaintiff's race when making the comment about being different. This evidence does not create a genuine issue of material fact because it is blatantly contradicted by the record so that no reasonable jury could believe it.[6]

II

Plaintiff argues that the trial court erred when it determined that plaintiff failed to satisfy the second and fourth elements of the prima facie case. We shall first address plaintiff's claim that the trial court erred when it determined that he failed to establish that he suffered an adverse employment action.

Michigan courts have defined "adverse employment action" in the context of the CRA. For an employer's action to amount to an adverse employment action, the action must be "materially adverse," meaning that it must be more than a "mere inconvenience or an alteration of job responsibilities . . . ." *Meyer v City of Centerline*, 242 Mich App 560, 569; 619 NW2d 182 (2000). This definition of "adverse employment action" initially arose in federal courts, in the context of federal workplace discrimination laws. See, e.g., *Crady v Liberty Nat'l Bank & Trust Co of Indiana*, 993 F2d 132, 136 (CA 7, 1993). Michigan courts eventually adopted the definition for purposes of the CRA. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 362-366; 597 NW2d 250 (1999) (adopting *Crady's* definition of "adverse employment action" for CRA purposes).

As this Court explained in *Chen v Wayne State Univ*, 284 Mich App 172, 201, 208; 771 NW2d 820 (2009), there is no exhaustive list of what constitutes an adverse employment action; rather, what constitutes an adverse employment action must be determined on a case-by-case basis in light of the unique characteristics of the individual plaintiff's employment situation. *Id.* The fact that the plaintiff might have perceived the employment action to be adverse is not sufficient; the plaintiff must demonstrate that the employment action was objectively adverse. *Id.* at 201-202. Similarly, the plaintiff bears the burden of showing that the adverse action was materially adverse and not just a matter of inconvenience. *Id.* at 201. A materially adverse employment action is "akin to termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, [or] significantly diminished material responsibilities . . . ." *Id.* at 202 (quotation marks and citation omitted).

Here, plaintiff argued that he suffered an adverse employment action when he was not awarded the special assignment of canine handler because he was denied the opportunity for an increase in salary, a more prestigious title, and a material gain in benefits. However, there is no

[6] In *Scott v Harris*, 550 US 372, 380; 127 S Ct 1769; 167 L Ed 2d 686 92007), the United States Supreme Court, considering summary disposition under FR Civ P 56(c), which is parallel to MR 2.116(C)(10), held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary disposition." Under those circumstances, a "genuine" issue of material fact does not exist. *Id.*

dispute that a special assignment is not a promotion and does not alter rank, status, wages, or benefits. Further, the trial court properly noted that plaintiff failed to support his assertion that overtime pay received by those officers selected as canine handlers was attributable to their canine handler assignments. Plaintiff simply failed to establish that defendant's decision not to assign plaintiff to the special assignment of canine handler was akin to a termination, demotion with a salary or wage decrease, less distinguished title, material loss of benefits, or significantly decreased material responsibilities.

Next we address plaintiff's claim that defendant's decision to select another applicant for the 2008 special assignment occurred under circumstances giving rise to an inference of unlawful discrimination. Plaintiff again relies on Lt. Chrenenko's and Sgt. Penning's use of the term "different." However, as previously discussed, plaintiff failed to create a genuine issue of material fact with regard to whether the use of the word "different" was a reference to plaintiff's race. Further, plaintiff has failed to present evidence to demonstrate that the 2007 change in the selection process for special assignments that was implemented by the city at the request of the union was made for the purpose of making it more difficult for plaintiff to receive the special assignment. Plaintiff failed to establish the second and fourth elements of a prima facie case of discrimination, and the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra