

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES TOUSSAINT,

Plaintiff-Appellant,

UNPUBLISHED
September 12, 1997

v

No. 189395
Wayne Circuit Court
LC No. 94-429447-CZ

LADBROKE RACING MICHIGAN, INC.,

Defendant-Appellee.

Before: Wahls, P.J., and Gage and W.J. Nykamp,* JJ.

PER CURIAM.

In this claim of religious discrimination in employment, plaintiff appeals by right from an order of summary disposition which was granted to defendant pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff sued defendant under the Civil Rights Act claiming employment discrimination on the basis of plaintiff's religion, in violation of MCL 37.2202; MSA 3.548(202). As defendant was aware, plaintiff belonged to the Worldwide Church of God, which prohibits its members from working on its Sabbath, which is Saturday. In July of 1991, plaintiff was promoted to head cashier for approximately two months. When he returned from a one-month leave of absence to attend a religious festival, he was demoted back to his former position, allegedly because he was not qualified for the head cashier position because he was not able to work on Saturdays.

Generally, a plaintiff may prove discrimination by one of two theories -- disparate treatment or disparate impact. *Lytle v Malady*, 209 Mich App 179, 184-185; 530 NW2d 135 (1995), rev'd in part on other grounds ___ Mich ___; ___ NW2d ___ (Docket No. 102515, issued 7/31/97). Plaintiff in this case is alleging disparate treatment rather than disparate impact. To establish a prima facie case under that theory, plaintiff must show that he was a member of a protected class, that he was qualified for the position, and that he was treated differently than a member of a different class for the same or similar conduct. *Id.*, p 186 n 2; *Merillat v Michigan State Univ*, 207 Mich App 240, 247; 523 NW2d 802 (1994). Once established, a prima facie case creates a rebuttable presumption of disparate

* Circuit judge, sitting on the Court of Appeals by assignment.

treatment. *Lytte, supra*, p 186. At this point, the burden of production shifts to the defendant to rebut the presumption of disparate treatment by articulating some legitimate, non-discriminatory reason for the adverse employment decision against the plaintiff. *Id.*, pp 186-187. The defendant's explanation must be clear and reasonably specific to afford the plaintiff a full and fair opportunity to demonstrate pretext. *Id.*, p 187. If the defendant meets this burden, discrimination is no longer presumed, and the plaintiff must show that the proffered reason was a pretext and that illegal discrimination was more likely to have been the real reason for the action. *Id.*

In this case, plaintiff presented evidence that he was a member of a religious organization, that defendant knew of his membership, and that he was able to perform the duties of the position. He also offered evidence from which a jury could conclude that he was treated differently than other employees, because others who held the position did not always work five consecutive days and were allowed to take Sundays or other days off as needed. Plaintiff thus met his burden of proof regarding his prima facie case.

Defendant asserts that it presented evidence of a legitimate, non-discriminatory reason for the demotion by showing that it had instituted a requirement that head cashiers work five consecutive days. This assertion is belied, however, by the fact that plaintiff worked in the position for two months without incident and was permitted to be off every Saturday. Even if defendant's articulated reason were facially valid, plaintiff offered evidence from which a jury could conclude that the reason was a pretext by showing that others who had held the position were not required to work five consecutive days. Finally, plaintiff's supervisor referred to plaintiff as "the Jew" even though plaintiff was not Jewish, and was heard to say, "I wonder if that Jew will be in today." It is commonly known that Jews also observe their Sabbath on Saturday. Viewing the evidence in a light most favorable to plaintiff and drawing all reasonable inferences in his favor, we find that he has raised a genuine issue of material fact that defendant's proffered reason for its actions was a pretext for religious discrimination. In addition, because the issue decided by the arbitrator was different than the present one, collateral estoppel does not apply. Accordingly, the trial court erred in granting summary disposition to defendant. *Lytte, supra*, p 191.

Reversed. We do not retain jurisdiction. Plaintiff being the prevailing party, he may tax costs pursuant to MCR 7.219.

/s/ Myron H. Wahls

/s/ Hilda R. Gage

/s/ Wesley J. Nykamp