

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL DYBAS,

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

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UNPUBLISHED

July 23, 2009

No. 281547

Ingham Circuit Court

LC No. 06-001159-CL

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Plaintiff Michael Dybas appeals as of right the circuit court's decisions granting defendant Michigan State University's (MSU) motion for summary disposition on Dybas's claims for gender discrimination in hiring and retaliation. We affirm.

I. Basic Facts And Procedural History

In September 2006, Dybas filed a three-count complaint against MSU. In Count I, Dybas alleged that MSU discriminated against him by not hiring him for "tenure system faculty position 222" because of his gender as a white male. In Count II, Dybas alleged that MSU discriminated against him by not hiring him for "tenure system faculty position 293" because of his gender. And in Count III, Dybas alleged that MSU retaliated against him by reducing his workspace after he complained about the gender discrimination. Dybas explained in his complaint that in December 2004 he had applied for "two tenure system faculty positions (positions 222 and 293)" in MSU's Department of Civil and Environmental Engineering in the College of Engineering (the department). At the time that he applied for these two positions, Dybas was an Assistant Professor of Microbiology at MSU. According to Dybas, he was a qualified candidate for both positions. However, in December 2005, Dybas was informed that he was not selected for either position, which Dybas attributed to his gender. Dybas further alleged that in August 2005, he had filed a gender discrimination complaint with MSU. And Dybas alleged that in November 2005 he was informed that his work laboratory was being substantially reduced in size, which he attributed to his August 2005 complaint.

MSU answered that Dybas was not qualified because he did not hold a doctoral degree in chemical, civil, or environmental engineering, or in a field reasonably determined to be a closely related field, and because Dybas was not otherwise a competitive applicant. MSU denied that Dybas's gender was a factor in its decision not to choose Dybas to "be among the handful of

persons among the more than 100 candidates available to be invited to interview.” With respect to Dybas’s retaliation claim, MSU contended that “in November, 2005, [Dybas] was informed that a proposed plan for reallocation of lab space was open to discussion, nothing more.” MSU denied that Dybas’s filing of his gender discrimination complaint was a factor in this “proposed plan.”

MSU moved for partial summary disposition under MCR 2.116(C)(8), seeking dismissal of Dybas’s retaliation claim. MSU noted that “to make sense of the alleged sequence [in Dybas’s pleadings] one must assume that [Dybas’s] [August 2005] complaint related to the interview selection process for the faculty positions, rather than to the actual appointment decisions that were made in December, 2005.” MSU argued that the alleged reduced lab space did not constitute an adverse employment action that was sufficiently material to state an actionable retaliation claim. Dybas responded, contending that whether certain conduct constitutes an adverse employment action is a question for a jury and that a finding of an adverse employment action does not require a financial detriment to the employee. Dybas further argued that the size reduction in his lab “would clearly dissuade a reasonable worker from making a charge of discrimination.” After hearing oral arguments on the motion, the circuit court issued a ruling from the bench, finding that there was an issue of fact regarding whether the reduced lab space constituted an adverse employment action. The circuit court then entered a written order denying MSU’s motion for the reasons set forth in the court’s bench ruling.

MSU again moved for summary disposition under MCR 2.116(C)(10), notably conceding that Janie Fouke, Dean of the College of Engineering during the initial stages of the interview process, had exhibited a preference for female candidates. Indeed, an internal investigation found “irregularities” in the search process and recommended that a third tenure track position be authorized, subject to a “fair search” based “entirely on the merits of the candidates.” MSU conceded that Dybas had therefore set forth a prima case of discrimination.

Nevertheless, MSU maintained that there was no evidence that the unlawful discrimination was a factor in MSU’s decision not to interview or hire Dybas. Rather, MSU asserted that because Dybas “was not a competitive candidate, on the merits,” MSU had “a legitimate, nondiscriminatory reason for not hiring” him for the tenured faculty positions. MSU explained that Dybas was never a competitive applicant for the open faculty positions because, as a researcher whose training and education were in the field of microbiology rather than environmental engineering, he satisfied only the minimal requirements for the jobs.

MSU also argued that even if the faculty search committee had recommended Dybas for a position, Dean Satish Upda, who took over the hiring responsibility for the department from Dean Fouke, would have rejected the recommendation based on the fact that, at the relevant time, Dybas was subject to disciplinary action for assaulting a student. MSU additionally argued with respect to Dybas’s retaliation claim that there was no causal connection between Dybas’s complaint for not being interviewed and the “adjustment of office space.” MSU contended that lab space was valuable and limited resource and that “the addition of new faculty and changes in the [department] faculty research necessitated adjustments[.]”

Dybas responded, arguing that MSU’s argument regarding his qualifications was disingenuous. According to Dybas, the record showed that he was qualified for the position for which he applied, noting that the position posting specifically called for applicants that had a

Ph.D. in engineering “or a closely related discipline,” and who was qualified to teach “courses and conduct research that complements the current environmental engineering focus on *remediation*, chemistry, and *microbiology*.”<sup>1</sup> Dybas pointed out that at the time that he applied for the subject positions, he was an Assistant Professor of Microbiology at MSU, with an expertise in bioremediation. Dybas contended that the evidence showed even if he had been the most qualified candidate, he still would not have been selected for the positions because of his gender.

Indeed, Dybas asserted that he was clearly more qualified for the position than the female applicants who were ultimately offered the positions. Dybas argued that under *Laitinen v City of Saginaw*,<sup>2</sup> every male applicant for the first two faculty positions offered by MSU where gender bias was a factor in the hiring process had a valid cause of action because each male was denied an equal employment opportunity. Dybas argued that, viewing the evidence in a light most favorable to him, there were questions of fact regarding whether gender played a role in the decision not to interview or hire him and regarding whether his complaint played a role in the reduction of his lab space.

After hearing oral arguments on the motion, the circuit court stated that it would take the gender discrimination issue under advisement. However, with respect to the retaliation claim, the circuit court concluded that the reduction in lab space did not rise to a level supporting a retaliation claim. Accordingly, the circuit court ordered that the retaliation claim be dismissed. Shortly thereafter, the circuit court issued a written order stating the same.

After taking the gender discrimination issue under advisement, the circuit court issued a written opinion and order. The circuit court noted that after Dybas filed an internal complaint with MSU alleging gender bias in the selection process for the disputed positions, MSU found “irregularities in the search process, [but] it did not find ‘discrimination’ applicable to [Dybas].” In addition, the circuit court noted that MSU had rectified the situation with the search process by authorizing the department to fill a third position and directing the search committee to consider all the applicants, which included Dybas, without regard to gender. The circuit court cited the opinion of the search committee that other applicants had more impressive publication records, research, and more appropriate professional credentials than Dybas.

The circuit court also found that *Laitinen* was factually distinguishable from this case. The plaintiff in that case was an actual candidate for the disputed employment opportunity, rather than a mere applicant, because the plaintiff successfully completed the initial screening and interview process. However, although the plaintiff was ranked second out of the pool of candidates, he was passed over for a lower-ranking minority candidate. By contrast, here, Dybas “was never considered for an interview” and was not considered to be a “viable candidate” by any of the search committee members. Furthermore, “[t]he collective view of the search committee was that other candidates were ‘significantly above’ [Dybas] in terms of publications, research and potential work in emerging technology. . . . [Dybas] . . . was considered

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<sup>1</sup> Emphasis added.

<sup>2</sup> *Laitinen v City of Saginaw*, 213 Mich App 130; 539 NW2d 515 (1995).

‘borderline’ and . . . ‘not at all’ competitive for the positions.” The circuit court concluded that *Laitinen* does not “extend[] a cause of action to any candidate whatsoever, in any size applicant pool, who does not receive a job that is ultimately offered to a person of another gender where some gender preference exists.” The circuit court found that, “there must actually be some reasonable likelihood that an individual would in fact be seriously considered for such a position in order for that person to maintain a cause of action under *Laitinen* for discrimination-in-hiring.” Accordingly, the circuit court granted MSU’s motion, finding that “[t]here [was] no evidence that [Dybas] was in fact more qualified for the positions at issue than were the women candidates ultimately given those positions. . . . [N]o committee member considered [Dybas] to be a viable candidate for any of the open positions. . . . That [decision] was made without regard to [Dybas’s] gender.” Dybas now appeals.

## II. Motion for Summary Disposition

### A. Standard Of Review

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.<sup>3</sup> The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.<sup>4</sup> We review de novo the trial court’s ruling on a motion for summary disposition.<sup>5</sup>

### B. Gender Discrimination

#### 1. Applicable Legal Principles

Under the Elliott-Larsen Civil Rights Act (ELCRA or CRA),<sup>6</sup> an employer is prohibited from discriminating against an individual “with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.”<sup>7</sup> “Proof of discriminatory treatment in violation of the CRA may be established by direct evidence or by indirect or circumstantial evidence.”<sup>8</sup> Direct evidence demonstrates that unlawful discrimination was a motivating factor in the employer’s action.<sup>9</sup> “In cases involving direct evidence of discrimination, a plaintiff may prove unlawful

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<sup>3</sup> MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

<sup>4</sup> MCR 2.116(G)(5); *Maiden*, *supra* at 120.

<sup>5</sup> *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

<sup>6</sup> MCL 37.2101 *et seq.*

<sup>7</sup> MCL 37.2202(1)(a).

<sup>8</sup> *Sniecinski v Blue Cross & Blue Shield Of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003).

<sup>9</sup> *Id.* at 133.

discrimination in the same manner as a plaintiff would prove any other civil case.”<sup>10</sup> “Under the direct evidence test, a plaintiff must present direct proof that the discriminatory animus was causally related to the adverse employment decision.”<sup>11</sup>

In a direct evidence case involving mixed motives, i.e., where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant’s discriminatory animus was more likely than not a “substantial” or “motivating” factor in the decision. In addition, a plaintiff must establish her qualification or other eligibility for the position sought and present direct proof that the discriminatory animus was causally related to the adverse decision. Stated another way, a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision.<sup>[12]</sup>

When there is no direct evidence of discrimination, a plaintiff must establish a rebuttable prima facie case by presenting evidence that he was: (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) his failure to obtain the position occurred under circumstances giving rise to an inference of unlawful discrimination.<sup>13</sup> Because this prima facie case creates a presumption of unlawful discrimination, causation is also presumed.<sup>14</sup> A defendant may rebut the presumptions by articulating a legitimate, nondiscriminatory reason for the employment decision.<sup>15</sup> And if such a reason is established, “the presumption is rebutted, and the burden shifts back to the plaintiff to show that the defendant’s reasons were not the true reasons, but a mere pretext for discrimination.”<sup>16</sup>

## 2. Analysis

Dybas argues that *Laitinen* provides him with a cause of action because even if he “had been the most qualified candidate for these jobs, he still would not have been selected for [them] because of the gender discrimination.” We disagree.

In *Laitinen*, the plaintiff applied for a job and was one of nine candidates who successfully completed the initial screening and interview process; he also received the second

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<sup>10</sup> *Id.* at 132.

<sup>11</sup> *Id.* at 135.

<sup>12</sup> *Id.* at 133 (internal citations omitted).

<sup>13</sup> *Id.* at 133-134; see *McDonnell Douglas Corp v Green*, 411 US 792, 802-804; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

<sup>14</sup> *Sniecinski, supra* at 135.

<sup>15</sup> *Id.* at 134, 135.

<sup>16</sup> *Id.* at 134.

highest composite interview score of the group.<sup>17</sup> However, the defendant's affirmative action officer recommended the only black candidate in the pool for the job.<sup>18</sup> The chosen candidate's total composite score was lower than the plaintiff's, and although the plaintiff had not received the highest composite score, he complained that the defendant had discriminated against him based on its unlawful affirmative action plan.<sup>19</sup> The trial court disagreed, finding that the plaintiff would not have been offered the job in any event because he was not the highest scoring candidate and thus lacked standing to sue.<sup>20</sup> This Court reversed the lower court, stating that "[a] claim of unlawful discrimination may be based upon a loss of equal employment opportunity as well as loss of employment."<sup>21</sup> This Court held that "[p]roof that another job applicant . . . would have been selected for the job but for the alleged discrimination merely provides a defense to certain types of remedies, such as job reinstatement or back pay. It does not necessarily establish a lack of standing or a lack of any right of recovery whatsoever[.]"<sup>22</sup>

As found by the circuit court, *Laitinen* is factually distinguishable from this case. The plaintiff in *Laitinen* had been through a formal interview process and was a highly regarded candidate for the position he was ultimately denied. In contrast, here, Dybas was one of many applicants for the faculty positions and was never considered for an interview.

The record reveals that, during the early stages of the screening process, Prof. Tom Voice, chairperson of the selection committee, suggested that Dybas be included in "further discussion." Prof. Voice believed that, as an internal candidate, Dybas deserved more than cursory review, stating:

[Dybas] did some good work and made a contribution to our program that I felt was worth thinking about, even though he was viewed as a nontraditional or perhaps a less-likely-to-be-successful candidate because of both the nature of his—because of his degrees and because of the nature of the work he had done.

However, even after the further discussion requested by Prof. Voice, none of the selection committee members advocated interviewing him and the committee unanimously concluded that Dybas's application would not move forward.

As stated, Dybas points out that the job posting called for applicants that had a Ph.D. in engineering "or a closely related discipline," and who were qualified to teach "courses and conduct research that complements the current environmental engineering focus on remediation, chemistry, and microbiology." However, Prof. Voice explained that the search committee

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<sup>17</sup> *Laitinen*, *supra* at 131.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 131-132.

<sup>20</sup> *Id.* at 132.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 132-133.

“looked very carefully at people with nonengineering skills because of the difficulty they would have teaching, in particular, in an engineering program.” Prof. Voice further explained, “Of particular importance to us in engineering is that people have developed skills that are both quantitative, highly qualitative and have a design orientation, because that’s what we do as engineers.” According to Prof. Voice, Dybas did not have sufficient quantitative qualifications because “[h]is level of mathematical training . . . [was] relatively minimal” and he had no design background. Prof. Voice further explained,

Because the nature of his academic training was in a nonengineering field, questions were raised about whether he would be capable of teaching the types of courses we offer our students, which are different. They are not microbiology courses.

\* \* \*

My recollection was that he submitted a teaching statement, and my recollection is it was notably brief. Concern was expressed by the committee that it would be difficult for somebody with his training to contribute to the teaching program that we offer because the coursework he’s completed is all in the microbiology area.

Prof. Phanikumar Mantha testified that the unanimous committee view was that other applicants were “significantly above” Dybas in their publications, research, and potential work in emerging technology. Prof. Volodymr Tarabara testified that Dybas’s application met the stated criteria, but was “borderline” and that Dybas had a “low number” of publications per year. Prof. Syed Hashsham testified that Dybas was “not at all” competitive for the positions. And the department chair, Ronald Harichandran, stated that although Dybas was “marginally qualified” based on the job posting criteria, “there were others in the pool who were—who we assessed were stronger than [Dybas].”

Dybas was not denied an equal employment opportunity under *Laitinen* because he was considered equally with the other applicants in the early screening for the positions at issue. MSU has acknowledged before that Dean Fouke’s influence in the search for candidates led to gender bias in the hiring process, but Dybas was not adversely affected by this bias, and so cannot claim a cause of action under *Laitinen*. We agree with the circuit court’s conclusion that *Laitinen* requires a plaintiff to have a “reasonable likelihood” of serious consideration for a position in order to maintain a cause of action for employment discrimination was not reversible error.

Here, there was clearly direct evidence of discrimination in that it is undisputed that Dean Fouke exhibited a preference for female candidates. However, the evidence also shows that MSU’s discriminatory animus was not “more likely than not a ‘substantial’ or ‘motivating’ factor” in the decision to not consider Dybas for an interview.<sup>23</sup> MSU has clearly shown that it

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<sup>23</sup> *Sniecinski, supra* at 133 (internal citations omitted).

would have made the same decision even if the impermissible gender consideration had not played a role in the selection process.<sup>24</sup>

Moreover, we find it significant that after its internal investigation that found “irregularities” in the first two search procedures, MSU remedied the apparent gender bias in selecting candidates by creating a third tenure track position subject to a “fair search” based “entirely on the merits of the candidates.” Dybas was also a part of this pool of applicants and again was passed over for an interview. We conclude, therefore, that MSU would have and indeed *did* make the same decision regarding Dybas’s application even if impermissible gender considerations did play a role in the first two search procedures.

Accordingly, we conclude that the trial court did not err in granting MSU’s motion for summary disposition on Dybas’s claim of gender discrimination.<sup>25</sup>

### C. Retaliation

#### 1. Applicable Legal Principles

The ELCRA prohibits retaliation 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 the act.”<sup>26</sup> In order to demonstrate a prima facie case of retaliation, a plaintiff must show: “(1) that he 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.”<sup>27</sup>

An adverse employment action has been defined as “an employment decision that is materially adverse in that it is more than a mere inconvenience or an alteration of job responsibilities.”<sup>28</sup> Typically, there must be some “ultimate employment decision, such as a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices which might be unique to a particular situation.”<sup>29</sup> “There must be some

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<sup>24</sup> See *id.*

<sup>25</sup> We note that the recent United States Supreme Court decision in *Ricci v DeStefano*, \_\_\_ U.S. \_\_\_, \_\_\_ S Ct. \_\_\_, \_\_\_ L Ed 2d \_\_\_ (2009), in which the Court ruled that white firefighters in New Haven, Connecticut, were unfairly denied promotions because of their race, does not affect either our reasoning or the result in this case.

<sup>26</sup> MCL 37.2701 (a).

<sup>27</sup> *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); see also *Garg v Macomb Mental Health*, 472 Mich 263, 272-273; 696 NW2d 646, amended 473 Mich 1205 (2005);

<sup>28</sup> *Peña, supra* at 311 (citations and internal quotation marks omitted).

<sup>29</sup> *Id.* at 312 (internal quotations and citations omitted).

objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling."<sup>30</sup> "Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation[.]"<sup>31</sup> To hold an employer liable for retaliation, the plaintiff must show that the person who took the adverse action knew that the plaintiff had engaged in protected activity.<sup>32</sup>

## 2. Analysis

Dybas contests the trial court's finding that the reduction of his laboratory space did not warrant a retaliation claim. Dybas argues that clearly, "there is a fact question as to whether a causal connection existed between the protected activity and the removal of the lab space." According to Dybas, MSU restricted his ability to adequately do his job by reducing the size of his laboratory. Dybas asserts that "[c]ommon sense suggests that one way to discourage an employee . . . from bringing a discrimination charge would be to restrict his ability to do his job properly," and that thus, MSU's action was an adverse employment action.

Dybas claims that because the removal of his lab space came within five months of his gender discrimination complaint, and because, per his own assessment, he was an "excellent employee" (Dybas does not account for the effect of the disciplinary action taken against him by the department for assaulting a student on his professional record), a causal connection has been established between the protected activity and the alleged adverse employment action. The Michigan Supreme Court has stated that a "plaintiff must show something more than merely a coincidence in time between protected activity and adverse employment action" to establish causation.<sup>33</sup> Dybas has not provided any evidence that the reduction of his laboratory space and the timing of the reduction was an action intended to punish him for filing his gender discrimination complaint. Rather, the reduction may have been a mere coincidence. In addition, a period of five months between the filing of the complaint and the alleged adverse employment action does not necessarily implicate either causation or coincidence. Further, MSU asserts that the reduction in Dybas's space was part of a broader reorganization, and was not specifically targeted at Dybas, and Dybas has not offered any evidence to the contrary. Thus, without more, the trial court did not err in disposing of this claim on summary disposition.

Affirmed.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck  
/s/ Douglas B. Shapiro

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<sup>30</sup> *Id.*

<sup>31</sup> *GM v West*, 469 Mich 177, 186; 665 NW2d 468 (2003).

<sup>32</sup> *Garg, supra* at 275.

<sup>33</sup> *Garg, supra* at 286.