

STATE OF MICHIGAN
COURT OF APPEALS

JAMES LINDOW¹,

Plaintiff,

and

WILLIAM P. BRYAN,

Plaintiff-Appellant,

v

CITY OF SAGINAW,

Defendant-Appellee.

UNPUBLISHED

January 7, 2003

No. 229774

Saginaw Circuit Court

LC No. 96-016475-NZ

Before: Neff, P.J., and Hoekstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's entry of a directed verdict in favor of defendant in this age discrimination claim under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.* We reverse and remand.

I

Plaintiff was employed by defendant as a certified police officer for more than twenty years when, in 1987, he was placed on disability for a work-related knee injury. In 1995, plaintiff applied to return to work as a police officer because his knee no longer bothered him. However, his certification had lapsed during his disability leave, requiring that he be "recertified."

Plaintiff filed this age discrimination action against defendant when defendant would not reinstate him as a police officer unless he attended the police academy for certification. Plaintiff alleged both intentional discrimination and a disparate impact claim based on defendant's policy for reinstating former police officers. In regard to the latter claim, plaintiff alleged that defendant's practice of requiring former police officers to attend a police academy in order to be

¹ Plaintiff Lindow is not involved in this appeal.

reinstated, rather than a “waiver of training” program, constituted disparate impact discrimination because it improperly burdened relatively older former officers.

The trial court divided the trial into phases, with the jury deciding in the first phase whether defendant’s actions constituted discrimination, then in a second phase, hearing other issues related to plaintiff’s reinstatement, such as his qualifications, and reserving for a third phase the issue of damages.² After the jury found that defendant’s actions were discriminatory in phase one, and the proofs were concluded in phase two, the trial court granted defendant’s motion for a directed verdict, finding that plaintiff failed to present any evidence that he could satisfy the medical selection qualifications necessary for recertification and therefore failed to establish a prima facie case of age discrimination, i.e., that he would have been recertified absent the discrimination by defendant.

II

In reviewing a trial court’s decision on a motion for a directed verdict, the evidence and all reasonable inferences from it are examined in the light most favorable to the nonmoving party. Such a motion should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Clark v Kmart Corp*, 465 Mich 416, 418-419; 634 NW2d 347 (2001). If reasonable jurors could honestly reach different conclusions, the motion for a directed verdict must be denied. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).

The CRA prohibits employment discrimination on the basis of age. MCL 37.2202(1)(a). To prove age discrimination, a plaintiff must establish that age discrimination was a determining factor in the alleged adverse employment action. *Matras, supra* at 682; *Alsbaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 563; 634 NW2d 161 (2001).

Plaintiff contends that he was not reinstated as a result of defendant’s discriminatory requirement that he attend the police academy rather than an abbreviated waiver of training program. Defendant argues that plaintiff was not reinstated because he was not otherwise qualified for reinstatement, not because defendant discriminated against older former police officers. To avoid a directed verdict, plaintiff had to present evidence, which, viewed in a light most favorable to plaintiff, would permit a reasonable jury to conclude that age was a motivating factor in defendant’s failure to reinstate plaintiff, even if it was not the sole factor. *Hazle v Ford Motor Co*, 464 Mich 456, 466; 628 NW2d 515 (2001); *Matras, supra* at 682-683.

² The question of the propriety of the court’s trifurcation of the trial proceedings is not raised on appeal, and we therefore do not address this issue. However, while the trifurcation may have resolved certain evidentiary problems in the trial court, it also imposed an artificial partition of the ultimate issue in this case, i.e., whether age was a determining factor in defendant’s failure to reinstate plaintiff, both in the trial court and on appeal. To the extent that the parties raise on appeal procedural issues resulting from the trifurcation (such as whether the findings in phase one are conclusive on liability and the only remaining issue is damages), these issues are best resolved by the trial court in the first instance.

The trial court granted defendant's motion for directed verdict on the basis that plaintiff failed to establish the elements of a prima facie case of age discrimination because he failed to present evidence that he was medically qualified for certification as a police officer.³ In granting a directed verdict, the trial court applied the *McDonnell Douglas*⁴ standard for a prima facie case of discrimination, requiring plaintiff to establish that he was "qualified" for the position.⁵ However, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* framework in a direct evidence case. *Hazle, supra* at 462; *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539-540; 620 NW2d 836 (2001).

A claim of intentional age discrimination may be premised on either direct or circumstantial evidence. *Id.* at 539. Where direct evidence of discrimination is offered, a plaintiff is not required to establish a prima facie case of discrimination within the framework *McDonnell Douglas*, i.e., that 1) plaintiff belongs to a protected class, 2) plaintiff suffered an adverse employment action, 3) plaintiff was qualified for the position, and 4) the circumstances of the adverse action give rise to an inference of unlawful discrimination. *DeBrow, supra* at 537, 538 n 8; *Downey v Charlevoix County Bd of Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).

The *McDonnell Douglas* "prima facie case" is used merely to establish a rebuttable presumption of unlawful discrimination where a plaintiff can cite no direct evidence of discrimination. *DeBrow, supra* at 537-538; *Hazle, supra* at 462. In such instances, the courts "allow a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination." *DeBrow, supra* at 538 (footnote omitted).⁶ Where a plaintiff presents direct evidence of discrimination,

³ The court found that there was "a total failure of proof with regard to the Plaintiff's case that he could satisfy the Medical Selection Qualifications and the jury could only return a verdict in the Plaintiff's favor on this issue by speculating as to the Plaintiff's ability to meet the Medical Selection Qualifications."

⁴ *McDonnell Douglas Corp v Green*, 411 US 792, 93 S Ct 1817; 36 L Ed 2d 668 (1973).

⁵ In this regard, the court incorrectly stated that plaintiff must establish that "it was more likely than not that he would have been recertified, as opposed to actually certified," to establish the third element of the *McDonnell Douglas* prima facie case. In a discrimination case, the ultimate question under the *McDonnell Douglas* analysis and the ultimate factual inquiry for the jury are the same: whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision. *Hazle, supra* at 466. "The only difference is that, for purposes of a motion for summary disposition or directed verdict, a plaintiff need only create a question of material fact upon which reasonable minds could differ regarding whether discrimination was a motivating factor in the employer's decision." *Id.* See also *id.* at 465, n 10 (noting with regard to a prima facie case, the Court's past improper use of the term "preponderance," which is suggestive of a plaintiff's ultimate burden of persuasion, whereas in a motion for summary disposition, the nonmoving party must show only a genuine issue of material fact).

⁶ The *McDonnell Douglas* "prima facie case" does not describe the plaintiff's burden of production, as in the sense that a plaintiff has the burden of producing enough evidence to permit the trier of fact to infer the fact at issue. *Hazle, supra* at 464.

the case proceeds as an ordinary civil case, i.e., the plaintiff must prove unlawful discrimination as the plaintiff would prove any other civil case. *Hazle, supra* at 462.

In this case, plaintiff established direct evidence of age discrimination. Plaintiff testified that defendant's personnel director asked plaintiff why he wanted to come back to work as a police officer, first stating "you are too old," then correcting himself, and stating, " I mean, you've been gone for eight years, why would you want to come back now." Taken in a light most favorable to plaintiff, these statements are direct evidence of age animus, evidence that, if believed, requires a conclusion that unlawful discrimination was at least a motivating factor in the adverse employment action. *DeBrow, supra* at 538-540; *Downey, supra* at 633.

Once plaintiff presented direct evidence of discrimination, defendant had the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of plaintiff's protected status. *Id.* at 634. In a mixed motive case, the defendant assumes the burden of persuading the factfinder that consideration of plaintiff's protected status was not a determining factor in its employment action. *Id.* Thus, the trial court erred in requiring that plaintiff show by a preponderance of the evidence that he was medically qualified for certification and in granting a directed verdict on the basis of plaintiff's failure to present such proofs. *Id.*

Similarly, with regard to plaintiff's disparate impact claim, the court erred in directing a verdict in favor of defendant, in effect, on the basis of plaintiff's failure to prove he would have been reinstated even absent defendant's discriminatory policy.⁷ A plaintiff may establish a prima facie case of age discrimination under a disparate impact theory by showing that he is a member of a protected class and that a facially neutral practice disproportionately impacts or burdens the protected class more harshly than others. *Alspaugh, supra* at 564; *Reisman v Regents of Wayne State University*, 188 Mich App 526, 538-539; 470 NW2d 678 (1991). In phase one of the trial, the jury found that defendant had an employment policy that affected older persons more harshly. Contrary to the trial court's analysis, with regard to the disparate impact theory, defendant thereafter has the burden of showing that age nonetheless was not the determining factor in the adverse action against plaintiff, e.g., that plaintiff was not reinstated because he failed to meet the qualifications for reinstatement rather than because of the discriminatory policy.

While defendant may be successful in defending against plaintiff's claim on the basis of his lack of medical qualifications, we find it an improper basis for a directed verdict. Plaintiff presented sufficient evidence to establish his qualification for reinstatement, up to the point of defendant's discriminatory employment action, to permit a reasonable jury to find that he was not reinstated because of his age.

When plaintiff sought reinstatement, defendant required that he be examined by defendant's "disability pension doctor," Edgar Balcueva, who evaluates defendant's police officers for disability determinations. Dr. Balcueva testified that he found plaintiff to be

⁷ In phase one of the trial, the jury found that defendant had an employment policy that affected older persons more harshly and that the policy was not based on a reasonable business judgment.

mentally and physically fit to perform as a police officer under the guidelines given by defendant. He recommended that plaintiff be reinstated as a police officer.

Plaintiff's testimony and other evidence established that defendant's pension board voted on December 15, 1995, to bring him back to work, but he was then informed on December 19, 1995, that he would be on disability pension until he was certified by the "MLEOTC" (Michigan Law Enforcement Officers' Training Council). Plaintiff stated that defendant's personnel director told him for the first time that he would be required to attend a police academy in order to receive MLEOTC certification, rather than being recertified as was plaintiff's understanding.

Plaintiff testified that he successfully completed a "waiver of training" program and that he made defendant aware of this, but defendant would not take him back to work. Plaintiff also indicated that there was no written policy requiring him to attend an academy (as opposed to the waiver of training program) until the adoption of the written policy dated December 1, 1995, which was after plaintiff had applied to be reinstated as a police officer.

Plaintiff also testified that he was not required to meet physical training requirements while he was employed on defendant's police force as a condition of his employment and that, to his knowledge, this was never required of defendant's police officers. Further, there were other longtime officers whom he would not consider physically fit.

Raymond Beach, the director of the Michigan Commission on Law Enforcement Standards (formerly MLEOTC), testified that the medical requirements for being recertified as a police officer "go beyond just a normal routine physical examination and having a doctor pass," and include eyesight and hearing requirements and being free of organic and functional diseases and other impairments. However, on cross-examination, Beach indicated that plaintiff could be considered for reinstatement as a police officer under the waiver of training program because he was previously certified as a police officer before being off of such work for over two years. He also testified that the waiver of training requirements did not require previously certified police officers to do certain things that would be required of new recruits. Beach stated that it was unusual that defendant was trying to get plaintiff to attend a police academy.

In phase one of the trial, the jury determined that age was a motivating factor in defendant's action and that defendant's policy for reinstatement was discriminatory. Viewing the evidence in the light most favorable to plaintiff, reasonable jurors could conclude that plaintiff's age was a determining factor in defendant's refusal to reinstate plaintiff.

Discrimination cases are properly considered on the facts unique to the particular case. See *DeBrow, supra* at 538 n 8; *Matras, supra* at 684. Defendant imposed a discriminatory policy that, in effect, precluded the processing of plaintiff's request for reinstatement. Because plaintiff did not attend the police academy, defendant did not carry out its obligations to cause plaintiff to be medically examined or certify that he met the minimum employment standards for reinstatement following completion of the waiver of training program. As this Court observed on analogous facts in *Matras, id.* at 691, what would have occurred had defendant not imposed its discriminatory policy "is far more difficult to determine than what it actually did." Whether defendant would have required that plaintiff have a medical examination prior to reinstatement, whether the examination would have shown plaintiff to be medically unqualified for reinstatement as a police officer, and whether plaintiff would not have otherwise qualified for

reemployment with defendant is speculative. This determination, a comparison between factual and hypothetical, contrary-to-fact conditions is a matter of causation, “distinctly within the province of the jury” unless there is insufficient evidence for a reasonable person to reach the ultimate question. *Id.*

Defendant had responsibility for determining that plaintiff was medically qualified for reinstatement, by requiring an appropriate medical examination. Defendant was in the best position to show what would have happened had it not imposed its discriminatory policy requiring plaintiff to attend the police academy. *Id.* at 692. The burden of the production of evidence concerning plaintiff’s lack of medical qualification is properly placed on defendant. *Id.*

Further, it is conceivable that plaintiff could convince the jury that defendant employed or reinstated persons who were theoretically unqualified as police officers because defendant did not always consider whether candidates met all qualifications. Thus, contrary to the trial court’s analysis, plaintiff’s failure to meet the medical qualifications is not necessarily an impenetrable barrier to prevailing on his claim.

The trial court erred in directing a verdict for defendant. It substituted its judgment for that of the jury although there was sufficient evidence to conclude that age was a determining factor in defendant’s failure to reinstate plaintiff. *Id.* at 694. Nonetheless, we reject plaintiff’s argument that he was entitled to a directed verdict in his favor on the issue of defendant’s liability. The ultimate question is properly one for the jury in this case.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Peter D. O’Connell