STATE OF MICHIGAN

COURT OF APPEALS

JOSEPH DERVISI, Plaintiff-Appellee,	UNPUBLISHED May 21, 2013
v	No. 308641 Saginaw Circuit Court
CITY OF SAGINAW, Defendant-Appellant.	LC No. 11-011540-CZ

Before: HOEKSTRA, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant City of Saginaw appeals by leave granted the February 2, 2012, order of the trial court that denied its motion for summary disposition on plaintiff's age discrimination claim. We reverse.

I. FACTUAL BACKGROUND

Traditionally, prospective Saginaw police officers were required to complete a police academy held at Delta College at their own expense and become either a certified or certifiable police officer prior to being hired. But in 2009, the Saginaw Police Department initiated a new recruitment program, through which it would select two prospective officers and finance their police academy tuition. After applications were received, the applicants were subjected to a written civil service examination and oral interview. The applicants were ranked according to their scores, and the department was required to hire the two highest-ranked applicants – in this case, plaintiff and Nathan Voleker. At the time they were hired, Voleker was 22, and plaintiff was 37. Plaintiff had extensive prior experience, which included being in the Air Force as part of its security police for four years, being a security guard at a hotel for one year, and being a field technician[1] at Dow Chemical for over ten years.

On August 18, 2009, plaintiff was notified in a letter that he had been appointed as a Saginaw Provisional Police Officer effective August 24, 2009. The letter provided that the

[1] Plaintiff testified at his deposition that his duties involved responding to fires, hazardous material incidents, and security issues.

"appointment [was] contingent upon successful completion of a background investigation, psychological evaluation and medical exam," which plaintiff successfully completed. The police academy took place at Delta College and lasted 17 weeks, running from August 18, 2009, through December 18, 2009.

Soon after the academy began, plaintiff began exhibiting unsatisfactory behavior, particularly during physical training sessions. In a letter dated September 8, 2009, Sergeant A.J. Tuer advised plaintiff that his "less than cooperative" behavior with academy physical training instructors was unacceptable and advised that any further violations could result in plaintiff's dismissal. In addition, Tuer and others from the police department arrived at the academy and met with plaintiff to discuss these concerns in what was described as a "counseling session." However, plaintiff's behavior did not improve and complaints and concerns continued to mount. In September, there were reported instances of plaintiff challenging instructors' authority and failing to follow directions. In October, another incident happened where plaintiff failed to follow instructions and failed to show the instructors the proper amount of respect.

On October 19, 2009, representatives of the Saginaw Police Department talked with plaintiff again about his unacceptable behavior. In letter dated November 12, 2009, academy physical training instructor Andy Myers again raised concerns about plaintiff's attitude and his poor level of physical fitness and opined, "I believe these actions and his attitude will continue even after he is on the road and in a[] [Field Training Officer] process." After a visit from Saginaw Police Chief Gerald Cliff, where Cliff discussed his concerns with plaintiff, Cliff wrote to Dennis Jordan, City of Saginaw Personnel Director, and recommended that plaintiff's employment be terminated. The letter stated that Cliff reached his decision because, due to "the nature, frequency and quantity of the complaints that we have received about this recruit during his tenure with the academy, it is inconceivable that he could successfully complete the Field Officer Training if retained." Jordan prepared a termination letter, dated December 11, 2009, that gave the following reasons for plaintiff's termination: "Poor Performance and Behavior while attending the Academy," "Lack of respect toward the instructional staff," "Lack of Effort," "Failing to follow directives," and "Argument toward instructional staff."

On January 20, 2011, plaintiff sued defendant in circuit court, alleging age discrimination in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. After discovery was conducted, defendant moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court denied defendant's motion, and this appeal followed.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304 n 3; 788 NW2d 679 (2010). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the

moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

III. ANALYSIS

Plaintiff claims that his termination was motivated by unlawful age discrimination in violation of MCL 37.2202, which provides in relevant part:

> (1) An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate 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.

In order to establish his age-discrimination claim, plaintiff must prove that there was a "causal link between the discriminatory animus and the adverse employment action." *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 134-135; 666 NW2d 186 (2003). A plaintiff may prove discrimination with either direct or indirect evidence. See *Hazle v Ford Motor Co*, 464 Mich 456, 461-463; 628 NW2d 515 (2001).

A. DIRECT EVIDENCE

Plaintiff can accomplish establishing discrimination by presenting evidence that directly shows that the decision to terminate his employment was motivated by his age. *Sniecinski*, 469 Mich at 132. In discussing the ELCRA, our Supreme Court observed that "[f]or purposes of the analogous federal Civil Rights Act, the Sixth Circuit Court of Appeals has defined 'direct evidence' as evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. (emphasis added, quotation omitted).

Plaintiff claims that the statements made by Academy Director Michael Wiltse and Academy Coordinator Galvann Smith constitute direct evidence of discrimination. We disagree.

Wiltse testified that, on November 12, 2009, he sent a memorandum regarding plaintiff to Cliff. Wiltse explained that recruits such as plaintiff, with military experience, were often held to a higher standard: "[W]e would lean on him to help better explain how to polish a boot, how to properly dress, how to prepare for a formal inspection, drill and ceremony because of his military experience." Wiltse's memorandum stated, in pertinent part:

> I feel the need to share observations on Recruit Dervisi.
>
> * * *
>
> I and Coordinator Smith had the opportunity to meet with Dervisi several days before the start of the academy to explain our expectations of him while attending the basic police academy. We went over details of the academy, as we do with every recruit. We discussed day to day activities, hours, our extensive

> physical training program, and our para-military expectations. We also discussed that he would not be treated any different than any other recruits because he was already employed by the Saginaw Police Department. *It was also told [to] him that expectations would be higher because of his military service, work, and life experience.* He explained that he understood and he was looking forward to the academy and serving the City of Saginaw and being a leader to the rest of the class.
>
> During the first several weeks of the academy, which is usually the most challenging, I had heard from several of our Physical Training instructors that Dervisi would exhibit signs of lack of respect towards the staff. He would do this by rolling his eyes, making excuses for his lack of effort, failing to follow directives, and being argumentative.
>
> * * *
>
> Because of this behavior and lack of response to counseling sessions, I have concerns about his dedication to serving the City of Saginaw as a police officer. It is my belief that he believes the basic academy is beneath him and the staff should treat him different because of his life experiences. The academy setting is a controlled learning environment where we put different stressors on the recruits during our physical training sessions. Dervisi has not exhibited the ability to control his emotions when physical and mental stress is placed on him. I have concerns that he will not be able to control those same emotions with the citizens of Saginaw or his superiors while serving on your police department. [(Emphasis added).]

Smith testified that he "personally expected more of Recruit Dervisi" due to his "life experiences, military experience as well as being an employee with Dow." Smith also stated that plaintiff entered the academy in poor physical condition and appeared to have a problem with authority.

Plaintiff cannot show that the statements of Wiltse and Smith constitute "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle*, 464 Mich at 462. First and foremost, neither Smith nor Wiltse was an employee of defendant and had only a tangential connection to plaintiff's termination. Moreover, Wiltse's and Smith's statements do not reflect an age-related discriminatory bias against plaintiff. Rather, they reflect serious misgivings about plaintiff's potential as a police officer *based on his deficient physical fitness and attitude*. The record indicates that plaintiff was counseled and warned numerous times, far more often than any other recruit, due to his insubordinate attitude and unsatisfactory performance during physical training. There is no evidence that his attitude and performance are directly correlated to his age. Thus, Wiltse's and Smith's statements do not lead to the conclusion that plaintiff's age was a motivating factor in his termination. If anything, the record indicates that Wiltse and Smith had high hopes for plaintiff's performance, given his prior work experiences, but those hopes quickly turned to disappointment when plaintiff continually displayed inappropriate behavior and attitude. In short, the statements, made by individuals who did not work for defendant and had

no authority to hire or fire plaintiff, are not direct evidence that defendant's termination of plaintiff was motivated by plaintiff's age.

B. INDIRECT EVIDENCE

If there is no direct evidence that an employer's decision was motivated by age, the plaintiff may nonetheless establish a prima facie case through indirect evidence of age discrimination. To do this, the plaintiff must present evidence from which a finder of fact could infer that the plaintiff was a victim of unlawful discrimination using the burden-shifting approach established in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Hazle*, 464 Mich at 462.

Under the *McDonnell Douglas* framework, a plaintiff must first establish a prima facie case by presenting evidence that (1) he belonged to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination. *Id*. at 463. If plaintiff can establish a prima facie case, it gives rise to a presumption of discrimination on the part of defendant. *Id*. at 463-464. This may then be rebutted by a showing that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *Id*. at 464. "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 discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id*. at 465 (quotation omitted).

Defendant does not dispute that the first two elements of the *McDonnell Douglas* framework are met, so our analysis will focus on the remaining elements.

Defendant first asserts that plaintiff was not qualified to be a police officer. We have stated that "[b]eing qualified for a job, for purposes of establishing a prima facie case of discrimination, requires only minimal qualification." *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 369; 597 NW2d 250 (1999). To become a Saginaw police officer, one must graduate from the police academy and be sworn in. Plaintiff completed neither requirement; however, he failed to do so only because defendant terminated his employment. Defendant cannot assert that its own actions rendered plaintiff unqualified for the position. Defendant argues that plaintiff's behavior at the academy rendered him unqualified. Admittedly, plaintiff's behavior raises serious questions about his potential fitness as a police officer. However, the third element of the *McDonnell Douglas* test requires only "minimal qualification." *Id*. Here, plaintiff passed the civil service examination and oral interview, was ranked among the top two applicants, and passed the requisite background, medical, and psychological evaluations. Further, defendant saw fit to hire plaintiff. Thus, for the purposes of establishing a prima facie case of age discrimination, we find that defendant was "qualified" for the position.

Regarding the fourth element, that the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination, defendant incorrectly relies on the fact that plaintiff cannot show that a younger person was hired in his place. As plaintiff correctly notes, the fourth element of a *McDonnell Douglas* prima facie case may be established in other ways. Plaintiff need only show that "others, similarly situated and outside the protected

class, were unaffected by the employer's adverse conduct." *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). But plaintiff's attempt to categorize co-recruit Voleker as someone who was "similarly situated" to plaintiff is unavailing.

From a distance, one might consider plaintiff and Voleker, who was younger, to be similarly situated since they both were admitted to the academy at the same time under defendant's new program. However, that is where the similarities end. The record shows that Voleker, unlike plaintiff, was only "counseled" once during his time at the academy, while plaintiff was counseled and reprimanded numerous times. There is no evidence that Voleker did not respond to this counseling, and the record contains no further disciplinary action or counseling against him. Importantly, Voleker's counseling did not involve allegations of repeated insubordination and failing to respect authority. Thus, while Voleker was much younger than plaintiff and was not terminated by defendant, he was not similarly situated. He was subject to one session of counseling that apparently rectified the situation. Plaintiff cannot say the same; he was repeatedly counseled regarding his behavior and failed to correct it. He was warned that continuation of that behavior could result in termination. Because plaintiff cannot show that another person similarly situated and younger was not terminated, he cannot establish the fourth element of a *McDonnell Douglas* prima facie case. Thus, the trial court erred in finding that plaintiff had established a prima facie case of age discrimination.

III. CONCLUSION

We conclude that plaintiff did not establish a prima facie case through either direct or indirect evidence. Accordingly, defendant is entitled to judgment as a matter of law on its motion for summary disposition. Because we find that defendant is entitled to summary disposition on these grounds, we need not address its other arguments on appeal.

Reversed. Defendant, the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder