

STATE OF MICHIGAN
COURT OF APPEALS

ORLANDO D. EDWARDS,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED

April 28, 2000

No. 210607

Wayne Circuit Court

LC No. 96-626808 CZ

Before: Wilder, P.J., and Bandstra and Cavanagh, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order directing a verdict in favor of defendant in this employment discrimination action brought under Michigan's Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and the Persons with Disabilities Civil Rights Act (PDCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*¹ We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I Facts

Plaintiff, a black male, began working as a corrections officer at the Scott Correctional Facility (hereafter SCF) when it opened in 1986. At that time, SCF was an all male inmate facility. In 1991, SCF became an all female inmate facility and, shortly thereafter, plaintiff was promoted to the position of resident unit officer. Plaintiff remained employed in that capacity until his discharge in 1995.

It is undisputed that in 1994 and 1995, plaintiff made verbal complaints of race discrimination in the workplace to prison warden Joan Yukins, personnel manager Carol Zachery, and his direct supervisor Deputy Robert Salis. In addition, plaintiff allegedly endured harassment, taunting, and threats of false accusations of sexual misconduct directed toward plaintiff by the female inmates, along with repeated threats of termination of employment by defendant's management. As a result, plaintiff went on medical leave in April 1995.

Dr. Arnold Weingarden, plaintiff's treating psychologist, diagnosed plaintiff with "situation adjustment disorder" and informed him that he would be unable to resume working at an all female

inmate facility. Thereafter, Dr. Weingarden sent four letters (dated April 13, May 17, June 12 and July 12, 1995) to defendant stating that a stress disorder prevented plaintiff from working, but supplying an expected return-to-work date in each letter. Dr. Weingarden's fifth letter to defendant, dated July 26, 1995, stated that plaintiff would be unable to resume working unless he was transferred to an all male inmate facility; this letter contained no return-to-work date for plaintiff. Zachery responded to plaintiff by letter dated August 16, 1995 informing him that he was not approved for an additional extension of his medical leave, and that he could initiate a transfer to another facility if he could not work with female inmates. Along with the letter, Zachery provided plaintiff with a handicap accommodation form. On August 25, 1995, plaintiff submitted the accommodation form to defendant requesting a transfer to an all male inmate facility because of an adjustment disorder that prevented him from supervising female inmates. While plaintiff's accommodation request was pending, he remained on unpaid medical leave and continued in this status until his discharge.

On August 17, 1995, prior to submitting his request for a transfer to another facility, plaintiff filed a written charge of race discrimination with the Department of Civil Rights. Plaintiff was officially discharged from employment one month later on September 19, 1995. In defendant's letter informing plaintiff that he was discharged from employment effective September 22, 1995, plaintiff was also advised that his request for a transfer was denied.

On May 20, 1996, plaintiff filed the instant action alleging that by terminating him and refusing to grant his reasonable accommodation request for a transfer to another facility, defendant discriminated against him on the basis of his race and a perceived handicap, and retaliated against him for filing a complaint with the Department of Civil Rights. At the close of the presentation of plaintiff's proofs, the trial court granted a directed verdict in favor of defendant on all three of plaintiff's claims: retaliation, race discrimination and handicap discrimination. The instant appeal ensued.

II Standard of Review

The grant of a motion for directed verdict is reviewed de novo on appeal. *Meagher v Wayne State University*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997). In reviewing a trial court's grant of a directed verdict, this Court views the evidence and all legitimate inferences that may be drawn from it in the light most favorable to the nonmoving party. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 703; 568 NW2d 64 (1997) (Opinion by Brickley, J, joined by Boyle and Weaver, JJ.); *Meagher, supra* at 708. A directed verdict is appropriate only when no factual question exists upon which reasonable minds may differ. *Meagher, supra*.

III Legal Analysis

A Retaliatory Discharge

Plaintiff contends that the trial court erred in directing a verdict in favor of defendant on the retaliation claim on the ground that plaintiff failed to rebut defendant's proffered reason for terminating

his employment. Plaintiff argues that because he presented direct evidence of retaliatory discrimination, he was not required to establish that defendant's articulated reason for its adverse employment actions was a pretext for discrimination, and the matter should have been submitted to the jury. We agree.

The CRA prohibits an employer from retaliating or discriminating against an employee for making a charge, filing a complaint of discrimination, or otherwise opposing discrimination in the workplace. MCL 37.2701; MSA 3.548(701); *Feick v Monroe Co*, 229 Mich App 335, 344; 582 NW2d 207 (1998). To establish a prima facie case of unlawful retaliation under the CRA, a plaintiff must show that (1) he engaged in protected activity; (2) the defendant knew of the activity; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the adverse action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Where a plaintiff presents circumstantial evidence of unlawful discrimination sufficient to constitute a prima facie case, a rebuttable presumption arises that the defendant acted due to a discriminatory animus, and the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its adverse employment action. *Harrison v Olde Financial Corp*, 225 Mich App 601, 607-608; 572 NW2d 679 (1997). If the defendant articulates a nondiscriminatory basis for its action, the burden shifts back to the plaintiff to rebut the defendant's proffered reason and prove by a preponderance of the evidence that the defendant's proffered reason was a mere pretext for discrimination. *Id.* at 608 citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Meagher, supra* at 711-712.

However, the *McDonnell Douglas* burden-shifting analysis does not apply in cases where the plaintiff presents direct evidence of his employer's discriminatory animus:

[W]hile the *McDonnell Douglas* burden-shifting analysis is appropriate in cases without direct evidence of discrimination, this case presents a different situation. Federal case law holds, and we agree, that the *McDonnell Douglas* evidentiary framework does not apply when a plaintiff presents direct evidence of discriminatory animus. [*Harrison, supra* at 609.]

"Direct evidence" of discrimination has been defined as "evidence that, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor'" in the adverse employment decision. *Id.* at 610 quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997). Thus, when direct evidence of discrimination is involved, the case is removed from the *McDonnell Douglas* analysis because the plaintiff no longer requires the inference of discrimination provided by the *McDonnell Douglas* "presumptive" prima facie case. *Harrison, supra* at 610, n 10 citing *Terbovitz v Fiscal Court of Adair Co, Kentucky*, 825 F2d 111, 114-115 (CA 6, 1987). Once a plaintiff has presented direct proof that the discriminatory animus was causally related to the employer's action, an employer may not avoid trial by merely articulating a nondiscriminatory reason for the action. Under such circumstances, the case must be submitted to the factfinder for a determination whether plaintiff's claims are true. *Harrison, supra* at 613.

In the instant case, plaintiff presented direct evidence that there was a causal connection between his protected activity, charging racial discrimination in the workplace and filing a complaint with the Department of Civil Rights, and defendant's adverse employment action, discharging plaintiff from employment and denying his request for a transfer to another facility. At trial, plaintiff testified that defendant's management, namely, the prison warden Joan Yukins, the personnel manager Carol Zachary, and plaintiff's direct supervisor Deputy Robert Salis, made discriminatory statements regarding plaintiff's allegation of racial discrimination. Plaintiff testified that Yukins told him that his continuing discrimination complaints would get him fired and prevent his transfer. Plaintiff further testified that Zachary told him he was a troublemaker who constantly made civil rights complaints, and this would get him fired and prevent his transfer. Finally, plaintiff testified that Salis told him his discrimination complaints were causing defendant a lot of problems, and that plaintiff would be fired if he did not stop. Plaintiff testified that these statements were made in direct response to his verbal complaints of racial discrimination at defendant's facility.

Plaintiff's testimony presented direct evidence of defendant's alleged discriminatory animus and its alleged intent to retaliate against plaintiff for his complaints of racial discrimination.² The trial court erred as a matter of law by applying the *McDonnell Douglas* burden-shifting analysis to these facts. *Harrison, supra* at 613. See *Norris v State Farm Fire & Casualty Co*, 229 Mich App 231, 235-236; 581 NW2d 746 (1998). Instead, the case should have been submitted to the factfinder for a determination whether plaintiff's claims are true. *Harrison, supra* at 613. Accordingly, we reverse the trial court's order directing a verdict in favor of defendant on plaintiff's retaliation claim, and remand for further proceedings.

B Handicap Discrimination

Plaintiff argues that the trial court erred in directing a verdict in favor of defendant on his handicap discrimination claim on the grounds that plaintiff failed to prove a causal relationship between his perceived handicap and defendant's failure to transfer him, and failed to rebut defendant's proffered reason for refusing to transfer him. We disagree.

The PDCRA prohibits an employer from discharging or otherwise discriminating against an employee who is actually disabled as well as those who are simply regarded as having a physical or mental disability. MCL 37.1103(e)(iii); MSA 3.550(103)(e)(iii); *Chiles v Machine Shop, Inc*, ___ Mich App ___; ___ NW2d ___ (Docket no. 207395, released November 5, 1999), slip op, p 6; *Sanchez v Lagoudakis*, 440 Mich 496, 506; 486 NW2d 657 (1992). Where an employer acts on a belief or perception that a person has a handicap and discriminates against that person on the basis of that belief, it is inconsequential whether that person actually has the handicap because the employer has undertaken the discriminatory action prohibited by the act. See *Sanchez, supra* at 506.

In this case, plaintiff does not argue that he was actually disabled as defined under the PDCRA at the time of defendant's allegedly discriminatory actions. Rather, plaintiff argues that defendant *perceived* him as emotionally disabled under § 103(e)(iii) of the PDCRA, and that defendant's failure to

transfer plaintiff to another facility was based on this perceived disability. In *Chiles*, this Court adopted a three-part test to determine whether there was sufficient evidence to establish that the defendant perceived the plaintiff as being disabled within the meaning of the PDCRA:

First, we consider whether respondent's [complaint] was a physical impairment. Second, we identify the life activity upon which respondent relies . . . and determine whether it constitutes a major life activity . . . Third, tying the two statutory phrases together, we ask whether the impairment substantially limited the major life activity. [*Chiles, supra* at slip op, p 7, citing *Bragdon v Abbott*, 524 US 624; 118 S Ct 2196; 141 L Ed 2d 540 (1998).]

Applying this test to the instant case, we agree with the trial court's finding that plaintiff did not produce sufficient evidence to establish that defendant's alleged perception of plaintiff as emotionally handicapped was causally related to plaintiff's failure to obtain a transfer to an all male inmate facility. Assuming for purposes of this appeal that plaintiff's "situation adjustment disorder" constituted a "disability" as defined in the PDCRA, plaintiff has nonetheless failed to present any evidence that defendant regarded his disability, perceived or real, as a substantial limitation on a major life activity. A "major life activity" has been defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216-218; 559 NW2d 61 (1996). Even assuming that "working" is a major life activity, an impairment that interferes with an individual's ability to perform a particular job, but does not significantly decrease that individual's ability to obtain satisfactory employment elsewhere, does not constitute a substantial limitation on the major life activity of working. *Chiles, supra* at slip op, p 7; *Stevens, supra* at 218. Rather, the impairment must significantly restrict an individual's ability to perform at least a wide range of jobs. *Id.* Plaintiff here simply failed to establish that defendant regarded plaintiff as having a substantial limitation in performing a wide range of jobs. Despite plaintiff's perceived emotional disability affecting his ability to supervise females inmates, he was still capable of performing his duties as a prison guard elsewhere. *Stevens, supra*. See also *Rourk v Oakwood Hosp Corp*, 458 Mich 25, 34; 580 NW2d 397 (1998).

The trial court also properly determined that plaintiff failed to rebut defendant's legitimate, nondiscriminatory reason for refusing to transfer him. It is undisputed that plaintiff was not eligible for a seniority-based transfer under his union's collective bargaining agreement because there was discipline on his record during the two years preceding the date of the transfer request. Therefore, the only type of transfer for which plaintiff was eligible was an exchange-transfer where the wardens of two facilities permit employees to switch positions. In this regard, the uncontroverted evidence established that it was plaintiff's responsibility to arrange the exchange-transfer on his own. In fact, plaintiff testified that he made significant efforts to arrange a transfer, but he failed to obtain any interviews at other facilities, and failed to find another employee willing to exchange positions. No evidence was presented that defendant took any action to prevent plaintiff from obtaining an exchange-transfer. Therefore, the trial court did not err in directing a verdict in favor of defendant on plaintiff's handicap discrimination claim.

C Racial Discrimination

Plaintiff contends that the trial court erred in dismissing his racial discrimination claim on the ground that he failed to rebut defendant's articulated reasons for terminating his employment and refusing to transfer him to another facility. Plaintiff does not dispute that he presented only circumstantial evidence of racial discrimination, and that the trial court correctly applied the *McDonnell Douglas* burden-shifting analysis requiring him to rebut defendant's legitimate, nondiscriminatory reasons for his termination and prove by a preponderance of the evidence that defendant's proffered reasons were mere pretext for discrimination. Instead, plaintiff argues that he presented sufficient evidence to establish that defendant's proffered explanations were pretext for racial discrimination, and that his racial discrimination claim should have been submitted to the jury. We disagree.

A plaintiff in a racial discrimination case may prove pretext in several ways:

A "mere pretext" may be proved (1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision. [*Meagher, supra* at 712; citations omitted.]

In this case, once plaintiff established a prima facie case of race discrimination, defendant offered a legitimate, nondiscriminatory reason for discharging plaintiff - that plaintiff did not return to work after his fifth request for an extension of medical leave was denied, and that defendant did not anticipate plaintiff ever returning to work in light of his psychologist's letter advising defendant that plaintiff could not resume working at an all female inmate facility. Defendant also offered a legitimate, nondiscriminatory reason for refusing to transfer plaintiff to an all male inmate facility - that he was ineligible for a seniority-based transfer, and that plaintiff failed to locate another facility willing to employ him or find another officer willing to exchange jobs with him.

Plaintiff offered the following evidence to rebut defendant's proffered reasons for discharging and refusing to transfer plaintiff: (1) Yukins told plaintiff that black officers were causing problems at SCF; (2) Zachary reported to the Department of Civil Rights that black officers at SCF received more discipline than white officers; (3) Regina Pierce testified that she was fired for assault and battery, while a white officer convicted of the same offense was not discharged; (4) Paula Moore testified that she felt Yukins treated blacks and whites differently; and (5) Yukins told plaintiff she would not transfer him, but later transferred a white officer to the Macomb facility. Examining this evidence in a light most favorable to plaintiff, we agree with the trial court's finding that plaintiff did not present sufficient evidence of pretext to rebut defendant's proffered reasons by a preponderance of the evidence and to enable a reasonable factfinder to infer that defendant's decision had a discriminatory basis. See *Towne, supra* at 701. Plaintiff did not present any evidence that defendant's reasons for terminating him and failing to transfer him had no basis in fact or that the proffered reasons were insufficient to justify the decisions. Plaintiff also failed to introduce evidence from which a reasonable factfinder could conclude that defendant's articulated reasons were not the actual factors motivating the decisions. *Feick, supra* at 343. Accordingly, the trial court did not err in directing a verdict in favor of defendant on plaintiff's racial discrimination claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

¹ The PDCRA was known as the Handicapper's Civil Rights Act at the time plaintiff initiated this lawsuit.

² While plaintiff also presented other testimony to support his retaliation claim, including the testimony of former co-workers regarding discriminatory statements they allegedly overheard, that testimony presented only circumstantial evidence of discriminatory animus.