

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

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ROBERT J. ARCINIEGA,

Plaintiff-Appellant,

v

MICHIGAN STATE POLICE,

Defendant-Appellee.

UNPUBLISHED

December 11, 2003

No. 241706

Ingham Circuit Court

LC No. 01-093499-NO

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Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Plaintiff Robert Arciniega appeals as of right from the trial court's order granting the motion of defendant Michigan State Police (MSP) for summary disposition under MCR 2.116(C)(10). Arciniega, an Hispanic-American, claims the MSP discriminated against him in violation of the Michigan Civil Rights Act<sup>1</sup> (CRA), and the Civil Rights Act of 1964<sup>2</sup> (Title VII), by not promoting him from trooper to uniform desk sergeant. Arciniega asserts he was more qualified than the successful candidate and that the MSP's conduct during the selection process evidenced discrimination. Because Arciniega failed to produce a genuine issue of material fact that discrimination was a motivating factor in the MSP's decision, we affirm.

I. Basic Facts And Procedural History

Arciniega was a state trooper with the MSP since 1986. During that time, he served in various units including narcotics and the Drug Abuse Resistance Education program. Arciniega previously served in the military and received professional commendations both there and during his employment with the MSP. Arciniega also performed well on performance evaluations.

In late June 2000, the MSP posted a vacancy announcement for a uniform desk sergeant at its Traverse City post. Arciniega was among ten applicants for the position. Mark Harris, a Caucasian officer, ultimately received the promotion.

According to Colonel Michael Robinson, the MSP represents a diverse community and strives to be representative of that community while filling vacancies with the most qualified

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<sup>1</sup> MCL 37.2101 *et seq.*

<sup>2</sup> 42 USC 2000e *et seq.*

applicants. To accomplish that goal, the MSP uses a promotion procedure called the Target Selection Process (TSP), which was designed to ensure that everyone has a fair opportunity to be considered for the position and that the process is fair and competency based.

TSP is a multi-step process. Candidates must submit a résumé, cover letter, and recommendation, and take a written test. The post commander identifies the desired qualifications and characteristics through a series of predetermined “dimensions” and “priorities.” After the candidates undergo an interview with a “batch interview panel” of three officers of various ranks, they are ranked on a “comparison grid.” The post commander then conducts reference checks on the top three candidates and may re-rank the candidates to reflect the reference-check results. The post commander selects his top choice from the top three candidates and recommends that person to the district commander and bureau, who have the final say.

In accordance with the TSP, Arciniega submitted a recommendation form completed by Captain Tim Rod, who indicated that he “strongly” and “highly” recommended Arciniega. The interview panel consisted of Captain Rod, Lieutenant Russell Smith, and Lieutenant Terry Rouse. Lieutenant Stewart devised the screening criteria and dimension priorities to be used for the selection process. His criteria included building trust, job and motivational fitness, communication, work standard, coaching, decision-making, and technical and professional knowledge and skills.

During the TSP interview, each applicant is asked the same series of questions. Under the TSP, the candidates’ scores are not totaled together for one final score; only the scores for each individual dimension are summed. (In other words, if a candidate received a 3, 4, and 5 on “building trust,” and a 3, 3, and 5 on “motivation,” the candidate would score a twelve on building trust and an eleven on motivation, but the twelve and eleven would not be added together to produce one final score. Each dimension score is considered separately.)

The ten candidates were interviewed between July of 1999 and March of 2000. The following chart shows how Arciniega fared compared to the other nine candidates:

<i>Skills: from most important to least important</i>	<b>Arciniega’s scores (from 1 [low] to 5 [high])</b>	<b>Number of candidates who outscored Arciniega</b>	<b>Number of candidates who tied Arciniega</b>	<b>Number of candidates whom Arciniega outscored</b>
Building trust	4 weak	4	2	3
Job/motivational fitness	4	2	3	4
Communication	3	7	2	0
Work standards	3	7	2	0
Coaching	3	5	4	0
Decision making	3	8	1	0
Technical and professional knowledge and skill	3 weak	9	0	0

Following the batch interview and the completion of the comparison grid, the post commander, Lieutenant Mark Stewart, ranked the candidates in the following position: (1) Charles Hockanson, (2) Arciniega/John Beam, (3) Dan Hiltz/Mark Harris. According to the TSP procedure, Lieutenant Stewart was to conduct reference checks on the top three candidates, after which he was free to alter their order. However, Lieutenant Stewart did not conduct the required checks, although he proceeded as though he had. Lieutenant Stewart then chose Arciniega as the top finalist. Lieutenant Stewart was a personal friend of Arciniega and, while attending Arciniega's birthday party in late July 2000, Stewart presented him with a birthday card containing sergeant's stripes in front of Arciniega's family, friends, and colleagues.

When Captain Rod discovered that Lieutenant Stewart did not conduct the reference checks, he ordered him to do so and in early October 2000, Lieutenant Stewart completed a second, revised tracking form. This time, he listed the top three candidates as: (1) Charles Hockanson, (2) Russell Ammon, and (3) Ellen Laskowski. Lieutenant Stewart indicated that after the reference checks, he re-ranked the candidates as: (1) Arciniega, (2) John Beam, and (3) Mark Harris/Ellen Laskowski. And Lieutenant Stewart again chose Arciniega as the finalist. Thus, despite the fact Arciniega was not among the top three candidates eligible for a reference check, Lieutenant Stewart recommended him for the position.

After reviewing Lieutenant Stewart's second attempt and speaking to Stewart at length about his methodology, Captain Rod determined that the TSP was again not followed. Lieutenant Stewart indicated that he considered several factors that were outside the dimension criteria and Captain Rod stated that because Lieutenant Stewart's evaluation was not limited to the predetermined guided dimension criteria, he would not support Lieutenant Stewart's recommendation.

In mid-October 2000, Captain Rod called a meeting with Lieutenant Stewart in which they collectively completed a third tracking form. The results were: (1) Charles Hockanson/Russell Ammon, (2) Roger Bloom/Ellen Laskowski, and (3) Mark Harris. After considering the reference check results, they reordered the candidates as follows: (1) Russell Ammon, (2) Mark Harris, and (3) Ellen Laskowski.

Around the time the results were being determined, Ammon accepted a different position and withdrew from consideration. Thus, Harris was offered the job and accepted. Thereafter, Arciniega filed a grievance with EEOC alleging employment discrimination on the basis that he was more qualified than the successful candidate. Arciniega then filed a complaint in circuit court, claiming that the MSP violated the CRA by discriminating against him based on his race or national origin. He claimed that he was more qualified than Harris, that he was highly recommended for the position, that Captain Rod previously singled him out for discipline in an attempt to sully his work record and hinder future promotions, and that the MSP had no legitimate, nondiscriminatory reason for its action. After receiving a right-to-sue letter from the EEOC Arciniega amended his complaint to add a discrimination claim in violation of Title VII, 42 USC 2000e *et seq.*

The MSP moved for summary disposition under MCR 2.116(C)(10) and the trial court granted that motion. The trial court held that Arciniega did not present a genuine issue of material fact that the MSP's actions created an inference of discrimination, so he failed to establish a genuine issue of material fact regarding the fourth element of a *prima facie* case. The

trial court also held that even if Arciniega presented a genuine issue of material fact relating to a prima facie case, no reasonable jury could find from his evidence that discrimination was a motivating factor in the face of the MSP's proffered reasons for not promoting him.

After the trial court entered its order, Arciniega moved for reconsideration, restating his allegations pertaining to the MSP withholding evidence regarding other promotions and destroying evidence favorable to him. The trial court denied this motion.

## II. The *McDonnell-Douglas* Framework

### A. Standard Of Review

We review de novo a trial court's ruling on a summary disposition motion.<sup>3</sup> Where the motion was granted under MCR 2.116(C)(10), we "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'"<sup>4</sup>

### B. Burden Shifting

To succeed on an employment discrimination claim – be it based on race, sex, or age – a plaintiff must bring forth some evidence of bias.<sup>5</sup> Where a plaintiff has no direct evidence, as plaintiff concedes he does not here, the *McDonnell-Douglas*<sup>6</sup> framework is employed.<sup>7</sup> As applied to failure to promote claims, the framework requires the plaintiff to show a prima facie case of discrimination composed of four elements: "(1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination."<sup>8</sup> Despite slightly different wording, there is no difference between the analysis of a discrimination claim under the CRA and the analysis under Title VII.<sup>9</sup> In fact, the Michigan

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<sup>3</sup> *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

<sup>4</sup> *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

<sup>5</sup> *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001).

<sup>6</sup> *McDonnell Douglas v Green*, 411 US 792, 802; 36 L Ed 2d 668; 93 S Ct 1817 (1973).

<sup>7</sup> *Hazle*, *supra* at 462.

<sup>8</sup> *Id.* at 463, citing *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998), *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 254, n 6; 101 S Ct 1089; 67 L Ed 2d 207 (1981), and *McDonnell Douglas*, *supra* at 802.

<sup>9</sup> *Kresnak v City of Muskegon Heights*, 956 F Supp 1327, 1334 (WD Mich 1997), citing *Boutros v Canton Regional Transit Authority*, 997 F2d 198, 202 (CA 6 1993), *Mitchell v Toledo Hosp*, 964 F2d 577, 582 (CA 6 1992), *Rabidue v Osceola Refining Co*, 805 F2d 611, 617 (CA 6 1986), and *Daniels v Board of Ed*, 805 F2d 203, 207 (CA 6 1986).

Supreme Court has cautioned that “a prima facie case of unlawful discrimination can[not] be established merely by providing evidence that a qualified minority candidate was rejected in favor of a qualified nonminority candidate.”<sup>10</sup>

If the plaintiff succeeds in showing a prima facie case, a presumption of discrimination arises.<sup>11</sup> The defendant must then rebut the presumption by showing a legitimate, nondiscriminatory reason for the promotion decision.<sup>12</sup> If the employer does so, the burden shifts back to the plaintiff to “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.’”<sup>13</sup>

### C. The Fourth Element Of A Prima Facie Case

Only the fourth element is at issue here. To survive summary disposition, Arciniega needed to present a genuine issue of material fact that there was evidence “from which a jury, if unaware of defendants’ reasons, could infer unlawful discrimination.”<sup>14</sup> A plaintiff may raise an inference of discrimination by pointing to facts that – if unexplained – “‘are more likely than not based on consideration of impermissible factors.’”<sup>15</sup> As a matter of law, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates.<sup>16</sup> “Under such a scenario, an equally – if not more – reasonable inference would be that the employer simply selected the candidate that it believed to be most qualified for the position.”<sup>17</sup> In fact, an employer is entitled to discretion in making business decisions in the hiring process.<sup>18</sup>

As stated above, the MSP employs the TSP process. As we have noted, the post commander in charge of the hiring process, a personal friend of Arciniega, chose Arciniega as the top candidate, but this choice was rejected by the division commander. The record clearly demonstrates that not only did the post commander openly suggest that Arciniega would be promoted before the selection process began, he did not follow the TSP procedure and ranked Arciniega in the top three despite his inferior interview scores.

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<sup>10</sup> *Hazle, supra* at 471 n 14.

<sup>11</sup> *Id.*, citing *Lytle, supra* at 173.

<sup>12</sup> *Id.* at 463-464, citing *Lytle, supra* at 173.

<sup>13</sup> *Id.* at 465, quoting *Lytle, supra* at 176.

<sup>14</sup> *Hazle, supra* at 471.

<sup>15</sup> *Id.* at 463, quoting *Furnco Construction Corp v Waters*, 438 US 567; 98 S Ct 2943; 57 L Ed 2d 957 (1978).

<sup>16</sup> *Id.*; see also *Burdine, supra* at 259.

<sup>17</sup> *Id.*, citing *Teamsters v United States*, 431 US 324, 358 n 44; 97 S Ct 1843; 52 L Ed 2d 396 (1977).

<sup>18</sup> *Burdine, supra* at 259.

Arciniega contends he was more qualified because of his military background and because he had “twice as much experience and more breadth of experience” than the Caucasian person promoted. But according to the MSP job posting and defined criteria, military experience was neither a necessary qualification nor a stated consideration. Thus, Arciniega failed to produce a genuine issue of material fact that his military experience made him more qualified for the position. With regard to Arciniega’s claim that he was more experienced, he fails to account for his poor interview scores and the fact that the promoted person performed better during the interviews and in the reference-check phase. Thus, Arciniega failed to produce a genuine issue of material fact regarding his claimed superior qualifications.

Arciniega also argues that the following actions supported an inference of unlawful discrimination: The division commander took the unprecedented action of vetoing the post commander’s recommendation; the division commander conducted a reference check by contacting someone who was not Arciniega’s supervisor; and the division commander recommended Arciniega, then failed to promote him and treated him differently with regard to disciplinary matters. But these actions, on their face, do not unequivocally suggest discrimination because they are not “‘more likely than not based on consideration of impermissible factors.’”<sup>19</sup>

However, even if the division commander’s actions did evince discrimination, the burden shifted to the MSP to articulate “a legitimate, nondiscriminatory reason” for its promotion decision.<sup>20</sup> When determining whether defendant’s reason was legitimate and nondiscriminatory, the trial court was not permitted to “analyze the ‘soundness’ of that decision. In other words, courts must not second guess whether the employment decision was ‘wise, shrewd, prudent, or competent.’”<sup>21</sup> Rather, “the focus is on whether the decision was ‘lawful,’ that is, one that is not motivated by a ‘discriminatory animus.’”<sup>22</sup>

Here, the MSP claimed that based on his interview scores, Arciniega should not have been given a rank in the top three positions and was thus ineligible to advance any further in the process. The MSP also claimed that its ultimate promotion decision was based on the successful candidate’s high interview scores. The MSP’s contentions are supported by the record, as is its contention that the post commander flatly failed to follow the TSP procedure. For example, in the interviews, other candidates in every category outsourced Arciniega. Despite that fact, he was ranked number two out of ten. Then, without conducting the required reference checks, the post commander elevated Arciniega to the number one position. Thus, the MSP’s reasons were legitimate, and the burden shifted back to Arciniega to “demonstrate that the evidence in the case, when construed in his favor, was ‘sufficient to permit a reasonable trier of fact to conclude

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<sup>19</sup> *Hazle*, *supra* at 463, quoting *Furnco*, *supra* at 567.

<sup>20</sup> *Id.* at 464.

<sup>21</sup> *Id.* at 465, quoting *Town*, *supra* at 704.

<sup>22</sup> *Id.*, quoting *Burdine*, *supra* at 257.

that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.”<sup>23</sup>

Arciniega also claims that pretext should be found because the MSP offered various and false reasons for not promoting him. We conclude that the MSP’s reasons were both consistent and supported by the record. Contrary to the cases on which Arciniega relies, this case does not pose a contradiction between the record and the reasoning for not promoting Arciniega. Rather, the MSP offered only different examples to support its central contention that the TSP was not followed properly and that Arciniega was not a proper finalist for promotion. Because the record supports the MSP’s reasons, a reasonable jury could not have found that the MSP’s reasons were pretextual and the trial court’s dismissal of Arciniega’s claims was correct.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio

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<sup>23</sup> *Id.* at 465, quoting *Lytle*, *supra* at 176.