# STATE OF MICHIGAN

# COURT OF APPEALS

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JEROME JACKSON,

Plaintiff-Appellant,

v

MICHIGAN STATE UNIVERSITY,

Defendant-Appellee.

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UNPUBLISHED
July 14, 2005

No. 261716
Ingham Circuit Court
LC No. 03-002026-CL

Before: Fitzgerald, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order of the circuit court granting summary disposition to defendant. This case arose from a claim of disability discrimination under § 202 of the Persons With Disabilities Civil Rights Act, MCL 37.1101 *et seq*. We affirm.

Plaintiff, who is blind, applied for a position as an admissions counselor in defendant's admissions office. It is undisputed that plaintiff's disability did not disqualify him for the position. Defendant and eighteen others were interviewed, and approximately half of these interviewees, including plaintiff, were asked to return to give a recruitment presentation for the admissions staff. Defendant hired Charles Buckner for the job instead of plaintiff or the other interviewees.

Plaintiff filed a complaint alleging that defendant's decision to hire Buckner rather than plaintiff was substantially predicated on plaintiff's disability. Defendant responded that plaintiff's blindness did not affect its decision, that there were several qualified candidates for the position, and that the reason plaintiff was not hired was because Buckner was the most qualified applicant. After discovery, defendant filed a motion for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that defendant's decision was not discriminatory. In response, plaintiff argued that there was sufficient direct and circumstantial evidence of defendant's discriminatory animus to establish an issue of fact for a jury to determine. The trial court disagreed and granted defendant's motion.

Plaintiff's argument on appeal is that there was sufficient direct and circumstantial evidence of defendant's discriminatory intent and that the lawsuit therefore should have survived defendant's motion for summary disposition. We disagree. We review the grant or denial of a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

MCL 37.1202(1) provides, in pertinent part, as follows:

> Except as otherwise required by federal law, an employer shall not:
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> (a) Fail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

Discriminatory animus may be shown by direct or circumstantial evidence. *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534, 539; 620 NW2d 836 (2001). If a plaintiff produces direct evidence of bias,

> the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. For 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." [*Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (internal citations omitted).]

As part of the hiring process, defendant contacted plaintiff's references, including Dr. John Eulenberg, for whom plaintiff had worked in the past. Plaintiff argues that Dr. Eulenberg's testimony regarding his conversation with Dr. Gordon Stanley, the head of the admissions department and the individual charged with making the ultimate hiring decision, provides direct evidence of discriminatory animus. Dr. Eulenberg testified that he had the impression that Dr. Stanley was uncomfortable with plaintiff's blindness and that when Dr. Eulenberg brought up plaintiff's use of adaptive technologies, Dr. Stanley failed to follow up by eliciting details regarding how plaintiff would accomplish certain tasks.

In *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289; 624 NW2d 212 (2001), we analyzed the issue of whether certain allegedly discriminatory remarks were admissible evidence of employment discrimination. In *Krohn*, plaintiff's supervisor had made the comment "out with the old and in with the new" at some point before the plaintiff lost her job, allegedly due to downsizing. *Id.* at 291, 294. *Krohn* relied on federal cases, including *Cooley v Carmike Cinemas, Inc*, 25 F3d 1325, 1330 (CA 6, 1994) in determining how the relevance of stray remarks in an employment discrimination case should be evaluated. *Krohn, supra* at 297-300. *Krohn* set forth the following framework for evaluating stray remarks:

> (1) Were the disputed remarks made by the decisionmaker or by an agent of the employer uninvolved in the challenged decision? (2) Were the disputed remarks isolated or part of a pattern of biased comments? (3) Were the disputed remarks made close in time or remote from the challenged decision? (4) Were the disputed remarks ambiguous or clearly reflective of discriminatory bias? [*Id*. at 292.]

Although Dr. Eulenberg was speaking with Dr. Stanley, the person who ultimately made the hiring decision, and although the conversation occurred close to the time that Dr. Stanley made his decision, plaintiff failed to show that that Dr. Stanley's remarks were part of a pattern of bias. Furthermore, the remarks could not reasonably be considered "reflective of discriminatory bias." Viewing Dr. Eulenberg's description of the conversation, we conclude that Dr. Stanley was merely asking a former employer about a job applicant's competence, which evidences a concern with making a good hiring decision, not discriminatory bias. Nor do we believe bias is evidenced by the fact that Dr. Stanley may not have asked the follow-up questions Dr. Eulenberg was expecting.[1] Dr. Eulenberg's testimony did not create a genuine issue of material fact concerning discriminatory animus.

Plaintiff also cites his own testimony about a conversation plaintiff had with Dr. Eulenberg shortly after Dr. Eulenberg spoke with Dr. Stanley. This evidence, however, is hearsay under MRE 801 and 802 and is not admissible under any exception to the hearsay rule. Accordingly, plaintiff's argument that summary disposition was improper on the ground that he presented direct evidence of discriminatory animus fails.

Plaintiff next argues that even if he did not proffer direct evidence of discrimination, there was sufficient circumstantial evidence to establish a genuine issue of material fact that defendant's decision not to hire him was discriminatory. When no direct evidence of discrimination is found, "[i]n order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]." *Hazle, supra* at 462.

> Under *McDonnell Douglas*, a plaintiff must first offer a "prima facie case" of discrimination. Here, plaintiff was required to present evidence that (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.
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> When the plaintiff "has sufficiently established a prima facie case, a presumption of discrimination arises."
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> * * *
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> [O]nce a plaintiff establishes a prima facie case of discrimination, the defendant has the opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by the plaintiff's prima facie case. The articulation requirement means that the defendant

[1] During the conversation, Dr. Eulenberg mentioned plaintiff's ability to use available computer technology that would aid him in completing his job, but Dr. Eulenberg felt that Dr. Stanley was not interested in talking about the technology. Despite that feeling, Dr. Eulenberg stated the following in his deposition: "I don't think I had any evidence or feeling about, from [Dr. Stanley's] words, that he was skeptical about [plaintiff] fulfilling the job."

> has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason. . . .
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> 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." . . . [A] plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." [*Hazle, supra* at 463-466 (internal citations and footnotes omitted).]

In *Dubey v Stroh Brewery Co*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990), we observed that a plaintiff can show that a stated nondiscriminatory reason is pretextual in three ways:

> (1) by showing the reasons had no basis in fact, (2) if they have a basis in fact, by showing that they were not the actual factors motivating the decision, or (3) if they were factors, by showing that they were jointly insufficient to justify the decision. The soundness of an employer's business judgment, however, may not be questioned as a means of showing pretext.

Plaintiff presented a prima facie case of disability discrimination. He is disabled and therefore a member of a protected class. He was not hired for a position for which he was qualified, and the person who was hired was not disabled; the situation gave rise "to an inference of unlawful discrimination." *Hazle, supra* at 463.

However, defendant articulated and established the existence of a legitimate, non-discriminatory reason for not hiring plaintiff, namely, that Buckner was the better candidate. Defendant proffered the affidavit of Paul Schroeder, a former Senior Associate Director of Admissions who was involved in the hiring process at issue here. Schroeder stated that, although he was not initially impressed with Buckner, he was impressed with Buckner's recruitment presentation. Schroeder also stated that, although plaintiff did not do poorly in his presentation, "the consensus view was that among all candidates Charles Buckner was superior." Defendant also presented an affidavit from Lucinda Briones, an admissions counselor who participated in the evaluation and hiring team. Briones recalled that Buckner's presentation was "confident, sharp and enthusiastic," and that staff members generally agreed that Buckner gave the best recruiting presentation. Briones stated that she and other staff members supported Buckner "as the most highly qualified candidate." Jim Cotter, the Senior Associate Director of Admissions, testified that he observed plaintiff's recruiting presentation and found it "[a]dequate" and "[t]o some degree engaging" but that it "[l]ack[ed] spontaneity" and seemed "[r]ehearsed." Conversely, Cotter testified that he heard Buckner described as "[g]lowing," "[p]assionate," "[t]remendously engaging," "[s]ensitive," "[k]nowledgeable," and "[c]onnected in a very important segment of the community." Cotter also noted that Buckner had experience counseling high school students at Lansing Public Schools. While not a requirement for the available position, Cotter stated that this experience "certainly" added "value." Cotter testified

that his ultimate recommendation was that Buckner be hired for the position and that he did not recommend a second or third choice.

Plaintiff countered defendant's claim that it had hired Buckner because of his superior recruitment presentation with evidence that before plaintiff filed his lawsuit, defendant sent a letter to the Equal Employment Opportunity Commission (EEOC) in response to an inquiry made regarding the matter. In that letter, defendant stated:

> The Charging Party was denied hire for the same reasons as were the few other candidates who were invited back for a second round of interviews: Charles Buckner, the person best suited to the job, was offered the job. Mr. Buckner had several years experience working in Lansing high school classrooms, and this facet of his experience distinguished him from other qualified candidates.

We conclude that plaintiff failed to submit sufficient evidence to create a genuine issue of material fact that defendant's reason for hiring Buckner was a pretext for discrimination. In both the letter to the EEOC and in its answer to the lawsuit, defendant claimed that its decision to hire Buckner was made because Buckner was the best candidate for the job. The fact that defendant, in addition to Buckner's high school experience, had an additional, later-stated reason why Buckner was the best candidate (i.e., that Buckner gave a superior presentation) does not establish that either justification was false.[2]

Viewing all the evidence in the light most favorable to the non-moving party, we conclude that plaintiff has failed to present sufficient direct or circumstantial evidence to raise a triable issue of fact that defendant's failure to hire him was based on discriminatory animus.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Donald S. Owens

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[2] We note that "mere disproof of an employer's proffered 'nondiscriminatory' reason is insufficient to survive summary disposition, unless such disproof also raises a triable question of discriminatory motive, not mere falsity." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 182; 579 NW2d 906 (1998). In other words, "'that there may be a triable question of *falsity* does not necessarily mean that there is a triable question of discrimination.'" *Town v Michigan Bell Telephone Co*, 455 Mich. 688, 698; 568 NW2d 64 (1997), quoting 1 Lindemann & Grossman, Employment Discrimination Law (3d ed), p 26 (emphasis in Lindemann & Grossman). We find no triable question of discriminatory motive in this case.