STATE OF MICHIGAN

COURT OF APPEALS

THEOPHILUS MIXON, JR.,

Plaintiff-Appellant,

v

CITY OF HIGHLAND PARK,

Defendant-Appellee,

and

POLICE OFFICERS LABOR COUNCIL,

Defendant.

UNPUBLISHED
March 12, 2009

No. 280637
Wayne Circuit Court
LC No. 05-520895-CD

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

This appeal arises out of plaintiff Theophilus Mixon, Jr.'s suit against his former employer, defendant City of Highland Park (the City). In his complaint, Mixon claimed that the City violated the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*., when it denied his request for a full payout of all accrued employment benefits upon his retirement as a public safety officer on the basis of his race. On appeal, we must determine whether the trial court properly granted a directed verdict in favor of the City after the close of Mixon's proofs. Because we conclude that the trial court properly granted a directed verdict in favor of the City, we affirm.

I. Basic Facts and Procedural History

Before 1998, the City traditionally paid retiring or separating public safety officers compensation for unused fringe benefits including furlough (vacation) days, the sick bank system used before 1988, the new sick bank system, and a longevity bonus. This policy was more generous than required by the City's collective bargaining agreement with the officers' union, which did not require retirement payouts for all benefits.

In 1998, the City opened a special retirement "window" to encourage officers with seniority to retire. Ten officers, including three African-American officers, took advantage of this window. They received full payouts for unused benefits in accordance with the City's past

practice. The departure of seven white officers in 1998 left the department predominantly African-American.

After 1998, as the City's financial crisis worsened, the City ceased compensating retiring officers. The City made payouts only if required to do so by the Wage and Hour Division of the state Department of Consumer & Industry Services. This new policy continued after the state appointed an emergency financial manager to assume responsibility for the City's financial operations. Most of the retiring officers who were denied a full benefit payout after 1998 were African-American, but William McLean, a white officer who retired after 1998, also did not receive a full payout in accordance with the City's prior practices. He received a partial payout pursuant to an arbitration proceeding.

Mixon, an African-American officer, attempted to retire in 2003, but was denied a full benefit payout. He filed a complaint with the Wage and Hour Division, which determined that the City was obligated to pay Mixon $9,116.42, plus interest, to compensate him for benefits due under the City's gun allowance, uniform allowance, educational bonus, and new sick bank. The agency determined that a payout for furlough days, personal days, and the old sick bank was not due because the collective bargaining agreement did not require these payments. It also determined that the City was not obligated to pay Mixon for compensatory time and longevity, because these were not fringe benefits recognized by the wages and fringe benefits act, MCL 408.471 *et seq*. Mixon and the City entered into a settlement agreement in which the City agreed to pay Mixon $11,975 in settlement of his claims under the wages and fringe benefits act. The agreement recognized that Mixon reserved the right to pursue other claims, including furlough time and the old sick bank, in another forum.

Mixon thereafter sued the City for allegedly denying him full benefit payout because of his race. At the conclusion of Mixon's proofs at trial, the court granted the City's motion for a directed verdict. The court found that the differential treatment between employees was based solely on the date of their retirement and that there was no evidence of racial discrimination.

II. Directed Verdict

We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We consider the evidence presented up to the time of the motion in the light most favorable to Mixon, granting every reasonable inference and resolving any conflict in the evidence in his favor, to decide whether a question of fact existed. *Id.*

MCL 37.2202(1)(a) prohibits an employer from discriminating "against an individual with respect to employment . . . because of . . . race[.]" A plaintiff claiming employment discrimination under the CRA may prove his claim with direct evidence of discrimination, as a plaintiff would prove any other civil case. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Alternatively, a plaintiff may prove discrimination by indirect or circumstantial evidence, using the burden-shifting approach set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski, supra* at 133-134. In this case, Mixon relies on the latter approach, which permits him to present a "'rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that [he] was the victim of unlawful discrimination.'" *Id.* at 134, quoting *DeBrow v Century 21 Great Lakes, Inc*

(After Remand), 463 Mich 534, 538; 620 NW2d 836 (2001). The elements of the *McDonnell Douglas* prima facie case must be adapted to the particular situation. See *Sniecinski, supra* at 134 n 7; see also *Hazle, supra* at 463 n 6. Tailoring these elements to this case, Mixon was required to establish that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was eligible to receive a favorable action or decision, and (4) his denial of benefits occurred under circumstances giving rise to an inference of unlawful discrimination. *Sniecinski, supra* at 134. Mixon satisfied the first three elements. He is African-American, he was denied retirement benefits, and he met the conditions that previously enabled a retiring or separating public safety department employee to obtain the requested benefits.

With respect to the fourth element, Mixon contends that an inference of unlawful discrimination exists because white retirees were previously granted the benefits that he was denied. In order to show disparate treatment, Mixon had to show that he and the white retirees who received the benefits "were similarly situated, i.e., 'all of the relevant aspects' of his employment situation were 'nearly identical' to those of [a coworker's] employment situation." *Town v Michigan Bell Tel Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994).[1] Here, Mixon failed to establish that he was similarly situated to the white retirees who received a full payout for unused fringe benefits without resorting to legal action. The evidence established, and Mixon admitted, that all employees who retired during or before 1998 were given a full payout for unused fringe benefits, including benefits for which the collective bargaining agreement did not require a payout upon retirement or separation. This included three African-American employees who took advantage of the 1998 retirement window. There also was uncontroverted evidence that all subsequent retirees, including a white officer, were not given a full payout, and were required to resort to legal action to obtain only a partial payout. Thus, Mixon is dissimilar to the employees to whom he compares himself, because the relevant aspect of the retirement year is not the same. After 1998, the City ceased paying retirees for their unused benefits unless required to do so by settlement or other legally binding order. Consequently, persons retiring after 1998 are not similarly situated to persons retiring during or before 1998. Moreover, the evidence established that the City applied both its 1998 and post-1998 policies uniformly, without regard to race, thereby precluding any inference that Mixon's adverse outcome occurred under circumstances suggesting unlawful discrimination.

Because Mixon's own evidence, viewed in a light most favorable to him, failed to establish a question of fact regarding discrimination, the trial court did not err in granting the City's motion for a directed verdict.

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[1] In *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344 (CA 6, 1998), the Sixth Circuit clarified its statement in *Pierce* by stating that the plaintiff is not required to "demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated'; rather . . . the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the *relevant* aspects.'" *Id.* at 352 quoting *Pierce, supra*.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly