STATE OF MICHIGAN

COURT OF APPEALS

JOHN LINKER, Plaintiff-Appellant,	UNPUBLISHED November 25, 2003
V	No. 238342 Genesee Circuit Court
CITY OF FLINT and THERON WIGGINS, Defendants-Appellees.	LC No. 00-069235-CL

Before: Markey, P.J., and Saad and Wilder, JJ.

Wilder, J., *(dissenting)*.

I respectfully dissent. First, I disagree with the majority's conclusion that Wiggins' alleged remarks constitute direct evidence of discrimination. A plaintiff having direct evidence of discrimination may prove his case in the same manner as a plaintiff would prove any other civil case. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003), citing *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001). Under the direct evidence test, then, "a plaintiff must establish a causal link between the discriminatory animus and the adverse employment decision . . . [, i.e.,] direct proof that the discriminatory animus was causally related to the adverse employment decision." *Sniecinski, supra* at 134-135, citing *Price Waterhouse v Hopkins*, 490 US 228, 244; 109 S Ct 1775; 104 L Ed 2d 268 (1989), and *Harrison v Olde Financial Corp*, 225 Mich App 601, 606-607; 572 NW2d 679 (1997). Direct evidence is defined as "'evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions.'" *Sniecinski, supra* at 133, quoting *Hazle, supra* at 462.

I would conclude that the remarks attributed to Wiggins are insufficient as a matter of law to constitute direct evidence of discriminatory animus. Even accepting the statements as true and discriminatory, the record establishes that the statements were made at least one year prior to the adverse employment decision and were not made to or about plaintiff. Because the statements are not directly related to plaintiff and are "isolated and remote in time from the adverse employment action,"[1] they wholly fail to "establish a causal link between the

[1] *Krohn v Sedgwick James, Inc*, 244 Mich App 289, 300-301; 624 NW2d 212 (2001).

discriminatory animus and the adverse employment decision," *Sniecinski, supra* at 134-135, such that the jury would be required to conclude "that unlawful discrimination was at least a motivating factor in the employer's actions," *Sniecinski, supra* at 133, quoting *Hazle, supra*. I disagree with the majority's conclusion that because Wiggins remarks may be relevant under *Krohn v Sedgwick James, Inc*, 244 Mich App 289; 624 NW2d 212 (2001), they establish the necessary causal link to the adverse employment decision required to treat the remarks as direct evidence.

Second, although not addressed by the majority, I would also conclude that the plaintiff provided insufficient circumstantial evidence to survive summary disposition under the *McDonnell Douglas*[2] test. Assuming that the so-called "stray remarks"[3] and other evidence attributed to defendants establish a prima facie case, nevertheless, the record evidence fails to show that the legitimate, nondiscriminatory reason articulated by defendants for the adverse employment decision was a pretext for discrimination. A plaintiff can establish that the legitimate, nondiscriminatory reason articulated by a defendant is pretextual in several ways. The plaintiff may show that the articulated reason had no basis in fact, that the articulated reason has a basis in fact but was not the actual factor motivating the decision, or that the articulated reason was a factor motivating the decision, but was insufficient to justify the decision. *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998). In order to survive a motion for summary disposition, the plaintiff "must not merely raise a triable issue that the employer's proferred reason was pretextual, but that it was a pretext for [unlawful discrimination]." *Hazle, supra* at 466. In other words, "disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action." *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175; 579 NW2d 906 (1998).

The evidence established that when plaintiff sought promotion to the assistant fire chief position, he was rated third in the oral board examination that served as the underlying basis for the promotion decision. Two African-American applicants were ranked first and second. Plaintiff conceded at oral argument that there is no evidence of a discriminatory taint in the oral board examination process and that the oral scores must be treated as legitimate. The evidence further established that plaintiff only moved to the number one ranking on the eligibility list by virtue of his composite score, which factored in plaintiff's seniority in the department. It is also undisputed that the collective bargaining agreement permitted Wiggins, based on a prior Michigan Employment Relations Commission (MERC) ruling, to select any of the top three on the eligibility list, without regard to ranking on the eligibility list by virtue of seniority.

Defendants assert that with regard to both challenged promotions, Wiggins promoted the applicant who scored best on the oral examination irrespective of seniority, as he was permitted to do under the collective bargaining agreement. Nothing on the record rebuts this legitimate,

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[2] *McDonnell Douglas Corp v Green*, 411 US 792, 802, 804; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[3] Stray, because they were not directed to or about plaintiff.

nondiscriminatory reason for the adverse employment decision articulated by defendants. First and foremost, plaintiff acknowledges that the two African-American applicants who were promoted rather than plaintiff legitimately scored higher oral test scores than plaintiff. In my judgment, this concession constitutes an acknowledgement that the other two applicants were more qualified for the position than plaintiff. At most, however, plaintiff can only assert that he is equally as qualified as the successful applicants. No reasonable inference of discrimination can be drawn merely from the employer's selection of one qualified candidate over another, *Hazle, supra* at 470-471. Plaintiff also acknowledges that Wiggins could legitimately select an applicant with a higher test score and "pass over" an applicant whose higher composite score was due only to seniority, so long as the chosen applicant was in the top three on the eligibility list.[4] Thus, it is evident from the record that plaintiff cannot show either that the articulated reason had no basis in fact or that the articulated reason was an insufficient justification for the promotion decision.

In my view, plaintiff also fails to show the existence of a genuine issue of material fact as to whether the test score rankings were the actual factor motivating the promotion decisions. Plaintiff presents no evidence that Wiggins promoted African Americans with higher seniority but lower test scores than a white applicant, and also presents no evidence that Wiggins held any animus, racially motivated or otherwise, against plaintiff. In short, none of the evidence raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse decision. *Lytle, supra* at 175-176. Because the evidence relied on by plaintiff is either "isolated and remote in time from the adverse employment action,"[5] or attributed to the Mayor, who was not the decision maker,[6] I would hold that the evidence fails to establish a genuine issue of material fact that defendants' stated reason for the promotion decisions was a pretext for discrimination.

For all of the above-stated reasons, I would affirm the trial court's order granting summary disposition in favor of defendants.

/s/ Kurtis T. Wilder

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[4] The record also shows that when plaintiff competed for a prior promotion (to the position he held at the time this action was filed), he was promoted instead of the African-American applicant because, although their raw scores were identical, his composite score was higher. Thus, the undisputed evidence is that Wiggins accorded plaintiff's seniority the proper weight when plaintiff and competing applicants were equally qualified.

[5] *Krohn, supra* at 300-301. See also *Ritter v Hill 'N Dale Farm, Inc*, 231 F3d 1039, 1044-1045 (CA 7, 2000) ("[While] remarks can occasionally help to establish pretext, . . . pretext is not demonstrated by isolated statements unrelated to the employment decision at issue."), and *Straughn v Delta Air Lines, Inc*, 250 F3d 23, 35-37 (CA 1, 2001) ("Although statements directly related to the challenged employment action may be highly probative in the pretext inquiry, . . . mere generalized 'stray remarks,' arguably probative of bias against a protected class, normally are not probative of pretext absent some discernible evidentiary basis for assessing their temporal and contextual relevance.").

[6] See *Krohn, supra* at 297.