STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0879

Paul Mittelstadt,
Appellant,

vs.

Emergency Physicians Professional Association,
Respondent.

Filed April 21, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-07-3335

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Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Poritsky, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant contends that the district court erred by granting summary judgment to his former employer on his age-discrimination claim. Because appellant has not demonstrated the existence of any genuine issues of material fact and because the district court's sole error in its application of the law was harmless, we affirm.

FACTS

Appellant Paul Mittelstadt was born on November 19, 1951, and attended medical school at the University of Minnesota. While appellant is board-certified in emergency medicine, he did not do a residency in emergency medicine after medical school.

Appellant started working for respondent Emergency Physicians Professional Association (EPPA) in 1988. EPPA employs approximately 125 physicians, staffing emergency rooms (ERs) in six hospitals. Roughly 90% of EPPA's physicians have residency training in emergency medicine, and all new hires must have emergency-medicine residency training.

Appellant worked for EPPA until 1994, when he voluntarily left EPPA to practice in a more rural area. Appellant returned to EPPA in 1997. During appellant's second stint with EPPA, he worked as a staff emergency-medicine physician, primarily at Unity Hospital. Like all physicians at EPPA, appellant was employed through a series of one-year contracts.

From 1999 to 2003, while working at Unity Hospital, appellant received annual performance evaluations from his peers and William Keig, M.D., who was then EPPA's

medical director at Unity Hospital. Appellant's evaluations were generally consistent from year to year. The evaluations praised appellant for being well-liked, being able to see a high volume of patients, and generally meeting the expectations of the job. But the evaluations also stated that the quality of appellant's dictation was poor and that he should slow down in order to be more thorough with patients.

In July 2003, Kurt Belk, M.D., became EPPA's medical director at Unity Hospital. In June 2004, EPPA learned that it was going to lose its contract with Methodist Hospital, a location with 22 ER physicians. Because EPPA anticipated the need to eliminate five physician positions or to compensate by reducing individuals' hours, EPPA began to consider which physicians' contracts might not be renewed.[1]

In November 2004, Dr. Belk provided appellant with his annual evaluation. The evaluation questioned appellant's ability to intubate and stated that Dr. Belk had seen appellant prescribe inappropriate antibiotics, that appellant's "work-ups/care" and documentation were sometimes weak, and that appellant was often 5–10 minutes late. The evaluation also instructed appellant to consider the "worst case scenario" in patient evaluations more often; to admit into the hospital patients who were sick, even if no definite diagnosis was made; to provide more detail in charts; to slow down; and to improve his "standard of care."

In addition, appellant's evaluation contained peer feedback and ratings on a five-point scale from 11 of appellant's physician partners addressing patient care,

[1] EPPA ultimately kept its contract with Methodist. But the matter was not resolved until March or April 2005.

responsibility, organization, and administrative care. This component of a physician's performance review had been used by EPPA for 6-7 years. Appellant's score in each category was lower than the average partner score at both Unity Hospital and EPPA generally. The peer evaluation also asked evaluators to answer "yes" or "no" as to whether they supported appellant as a partner. Eight partners responded that they supported appellant as a partner; three did not support him. That was the lowest partner-support score of any physician at EPPA.

After Dr. Belk became medical director at Unity Hospital, he asked for feedback about EPPA physicians from Unity Hospital hospitalists (physicians working at Unity Hospital who were not EPPA physicians). As a result, Dr. Belk learned of ten issues regarding appellant's cases that occurred between 2003 and 2005. The first case involved appellant diagnosing a patient with a communicable disease without corroborating evidence and then prescribing an antibiotic that did not treat the diagnosed disease. The second case involved a young infant who appellant diagnosed with a urinary-tract infection without supporting documentation. Appellant discharged the infant, who was subsequently admitted to Children's Hospital with bilateral tubal ovarian abscesses, bilateral kidney abscesses, and a perinephric abscess. In the third case, appellant prescribed Tylenol with codeine for an infant under the age of six months. The child's pediatrician opined that the prescription was inappropriate. In the fourth case, appellant discharged an elderly patient with diarrhea who died four hours later. Another Unity Hospital physician criticized appellant's decision to discharge a patient in light of the patient's history and lab results. In the fifth case, Dr. Belk received an internal grievance

report regarding appellant's decision concerning the appropriate lab work for a particular patient. In the sixth case, appellant prescribed an antibiotic for a dental issue when it was unclear whether the patient had an infection. In the seventh case, appellant failed to admit to the hospital an infant with a urinary-tract infection. In the eighth case, concerns were expressed about appellant's treatment of a patient who had injuries from a car accident. The reporting physician noted that appellant performed a substandard workup for a multitrauma patient, had excessive delay in patient care and comfort, ordered placement of a catheter without a diagnosis of a urethral injury, and provided poor documentation of the patient's presentation and physical exam. In the ninth case, appellant removed a cervical collar from an intoxicated patient, which subjected the patient to possible ligamentous injury. In the tenth case, a patient was dissatisfied with appellant's demeanor. Appellant allegedly "shushed" the patient's representative and did not listen to their concerns.

On February 10, 2005, Gary Gosewisch, M.D., the president of EPPA, and Dr. Belk met with appellant, at which time they told him that EPPA would not be renewing his contract when it expired in June. Appellant's 2004 evaluation was discussed, and appellant claimed that there were errors in the evaluation. Dr. Gosewisch responded, "It doesn't matter what the accuracy of these statements are, whether they're right or wrong, it didn't make any difference." Dr. Gosewisch also stated that he wanted to have every physician be interchangeable at all of EPPA's hospitals and that appellant was not interchangeable. Dr. Gosewisch then stated that "he had many fresh, new residents to pick from. . . . [T]here was not one but there were three residency programs

now in the state of Minnesota turning out residents, and that all had happened or would have been effective as of 2005." Prior to the meeting, Dr. Belk told appellant that Dr. Gosewisch wanted to "clean house." Appellant's final contract ended on June 30, 2005. At the time, appellant was 53 years old.

Dr. Gosewisch wrote appellant a letter after the February 10, 2005 meeting that indicated that appellant's partner rating and clinical skills were the reasons for the nonrenewal. Dr. Belk testified that the decision was based on

> a constellation of issues; his clinical performance, of which part and parcel is those cases listed and several others, his critical decision making in other cases, the physician performance review, that you go through an annual review basis, and the nonsupport of several of his partners, the hospital staff, medical staff and EMS perception of his clinical abilities and concerns.

In July 2005, EPPA hired two new physicians, ages 31 and 34, who were recent graduates from residency programs, and assigned them to work at Unity Hospital. Between July 1, 2003, and July 1, 2005, EPPA hired eight physicians, who ranged in age from 28 to 42. Between June 30, 2003, and December 31, 2006, EPPA opted not to renew the contracts of six other physicians between the ages of 42 and 61.

Some of the younger physicians EPPA hired had performance-related issues. These issues included an inability to communicate with patients, being too demanding of staff, and posting inappropriate information on a website. A few of the physicians were put on performance-improvement plans; all were retained. In addition, there was evidence that the numerical peer reviews of some of the younger physicians fell below

the averages for EPPA and for Unity Hospital in some of the same categories as appellant's 2004 review.

Appellant filed a complaint alleging age discrimination under Minn. Stat. § 181.81 (2008) and Minn. Stat. § 363A.01–.41 (2008), the Minnesota Human Rights Act (MHRA), violation of the Minnesota Whistleblowers Act, and defamation. Appellant voluntarily dismissed the whistleblower claim. Following a motion for summary judgment by EPPA, the district court granted summary judgment. This appeal on the age-discrimination claim follows.

D E C I S I O N

"On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993).

> [T]here is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the nonmoving party's case to permit reasonable persons to draw different conclusions.

DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997).

Under the MHRA, an employer may not "refuse to hire," "discharge an employee," or "discriminate against a person with respect to hiring, tenure,

compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of age. Minn. Stat. § 363A.08, subd. 2. Under section 181.81, an employer may not "refuse to hire or employ," or "discharge [or] dismiss . . . any individual on the grounds that the individual has reached an age of less than 70." Minn. Stat. § 181.81, subd. 1. To make a case for age discrimination, a plaintiff may put forth direct evidence of discrimination or circumstantial evidence through the *McDonnell Douglas* burden-shifting test. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 1824–25 (1973)). In construing the MHRA, this court applies both Minnesota state cases and "law developed in federal cases arising under Title VII of the 1964 Civil Rights Act." *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

As a preliminary argument, appellant contends that the district court applied an incorrect summary-judgment standard that required him to "prove" his case instead of just requiring the presentation of sufficient evidence to create a genuine issue of material fact on each element of the prima facie case. While the district court used the term "prove" in its order, it did not use the word when it described the summary-judgment standard. A fair reading of the order in its totality persuades us that the district court was using the word to describe the requirement that appellant present competent evidence to defeat summary judgment. *See Morgan v. McLaughlin*, 290 Minn. 389, 393, 188 N.W.2d 829, 832 (1971) ("[U]pon a motion for summary judgment the party opposing the motion cannot rely upon the naked allegations of his pleadings and must present specific facts

showing genuine issues for trial."). Further, this court has used the word "prove" as a way of describing the parties' shifting burdens under the *McDonnell Douglas* test. *See Meads v. Best Oil Co.*, 725 N.W.2d 538, 542 (Minn. App. 2006), *review denied* (Minn. Feb. 20, 2007). Therefore, we conclude that the district court's use of the term "prove" does not support the conclusion that the district court utilized an incorrect standard for summary judgment.

I.

Appellant contends that the district court erred in granting summary judgment to EPPA because he provided sufficient direct evidence of age discrimination to create a genuine issue of material fact. "[D]irect evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004) (quotation omitted). When using direct evidence to prove age discrimination, "[s]tray remarks made in the workplace cannot serve as direct evidence of discrimination." *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. App. 1997), *review denied* (Minn. Aug. 21, 1997).

Here, appellant asserts that evidence regarding Dr. Gosewisch's comment about the "fresh, new" residency graduates, the hiring and nonrenewal patterns of EPPA, appellant's retirement inquiry and subsequent monitoring by Dr. Belk, and the more favorable treatment of younger physicians is sufficient direct evidence of discrimination. This evidence, even when considered in a light most favorable to appellant, is not

sufficient to create a genuine issue of material fact regarding age discrimination. The "fresh, new" comment is not direct evidence because it does not provide a specific link between the alleged discriminatory intent and the nonrenewal of appellant's contract. This comment is merely a factual assertion. It contains no explicit reference to appellant or any animus toward older physicians. Similarly, the evidence relating to hiring and nonrenewal patterns and the treatment of younger physicians is not direct evidence because it does not provide a specific link between the discriminatory intent and the nonrenewal. Either standing alone or together, this evidence does not create a genuine issue of material fact that the reason for the nonrenewal of appellant's contract was appellant's age.

II.

Appellant argues that the district court erred in finding that he did not meet his burden to survive summary judgment under the *McDonnell Douglas* test. The *McDonnell Douglas* burden-shifting test is a three-part test. *Hoover*, 632 N.W.2d at 542. The first part requires a plaintiff to make a showing of a prima facie case of discrimination. *Feges v. Perkins Rests., Inc.*, 483 N.W.2d 701, 711 (Minn. 1992). If plaintiff makes this showing, defendant "may avoid summary judgment by proffering a reason which would allow a trier of fact rationally to conclude that the employment decision has not been motivated by discriminatory animus." *Id.* Finally, "[i]f the defendant provides a legitimate, nondiscriminatory reason for its actions, the presumption of discrimination disappears and the plaintiff has the burden of establishing that the employer's proffered reason is a pretext for discrimination." *Hoover*, 632 N.W.2d at 542.

Appellant contends that, while the analysis for both an MHRA claim and section 181.81 is similar, he is not required to satisfy the *McDonnell Douglas* test for his section 181.81 claim. Instead, appellant asserts that "[s]ince the evidence meets the elements of this test . . . the issue is moot." Appellant does not suggest an alternative framework for analyzing circumstantial evidence in a section 181.81 claim. Because claims asserted under both the MHRA and section 181.81 are similar—in that they allege that an adverse employment action was taken for a prohibited reason—we analyze both the MHRA and section 181.81 claims under the *McDonnell Douglas* framework. *See Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 321, 323 (Minn. 1995) (analyzing an appeal from a grant of summary judgment on MHRA and section 181.81 claims under the *McDonnell Douglas* framework).

A. The prima facie case

To establish a prima facie case of age discrimination, a plaintiff must show that: "(1) [he] was a member of a protected class; (2) [he] was qualified for the position [he] held; (3) despite [his] qualifications, [his] employment was terminated; (4) a younger person was assigned to do [his] work." *Ward v. Employee Dev. Corp.*, 516 N.W.2d 198, 201 (Minn. App. 1994), *review denied* (Minn. July 8, 1994). "The first step—establishing a prima facie case—is not onerous." *Dietrich*, 536 N.W.2d at 323. The district court found that appellant had not established a prima facie case because he had not provided sufficient evidence to establish that a particular younger person was assigned to his position.

Appellant argues that the district court erred by requiring a prima facie showing as to the fourth element. Appellant contends that the elements of a prima facie case vary from case to case, and the element requiring evidence that a younger person replaced him is not required to make a prima facie case for age discrimination under the *McDonnell Douglas* test. Instead, appellant asserts that he only needs to show unequal treatment based on age. While the *McDonnell Douglas* test is not rigid and has been modified to fit different types of discrimination, this court has explicitly held that a plaintiff in an age-discrimination claim must produce evidence that he was replaced by a younger person. *Ward*, 516 N.W.2d at 201. Therefore, the district court did not err in requiring appellant to produce evidence sufficient to create a genuine issue of material fact that he was replaced by a younger person. But we disagree with the district court's determination that appellant did not establish a prima facie case of age discrimination.

Regarding the first factor, neither appellant nor EPPA contests that appellant, age 53 at the time of the nonrenewal, was in a protected class. *See* Minn. Stat. §§ 363A.03, subd. 2 (stating that the protected class is anyone over the age of majority), 181.81, subd. 1 (stating that the protected class extends until age 70). Therefore, as the district court determined, this element of the prima facie case was met.

Second, the district court found that appellant was qualified for the position that he held. To be qualified, an employee "need only show that he met the minimum objective qualifications for the job." *State by Khalifa v. Hennepin County*, 420 N.W.2d 634, 640 (Minn. App. 1988), *review denied* (Minn. May 4, 1988); *see also Ward*, 516 N.W.2d at 201 ("The qualifications prong generally relates to vocational skills and ability to perform

the job's functions.")). Here, appellant was a board-certified emergency physician, who held the same position for many years. While appellant did not do a residency in emergency medicine, Dr. Gosewisch testified that a physician would not be terminated for that reason alone. In addition, although appellant's 2004 evaluation addressed areas where appellant could improve, it was not grounds to immediately terminate appellant's contract. In fact, appellant worked at EPPA for an additional seven months after his 2004 evaluation. Therefore, appellant was qualified for the position.

The third factor is also met, because despite appellant's qualifications, his employment was terminated. EPPA asserts that appellant cannot show that he was terminated from the job because appellant was employed through a series of one-year contracts, and appellant's last contract was fully performed. It is a violation of the MHRA to "(1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or (2) discharge an employee; or (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08, subd. 2(1)–(3). In addition, Minn. Stat. § 181.81, subd. 1, states that it is unlawful "to refuse to hire or employ, or to discharge, dismiss, reduce in grade or position, or demote any individual." Here, the nonrenewal of the contract is the equivalent of a refusal to hire, which is listed under both statutes. Therefore, appellant has established the third element of the prima facie case.

The fourth prima facie element concerns whether appellant was replaced by a younger person. The district court found that appellant had "failed to prove that any particular person was assigned to the slot that he held." But there was evidence that on the day following the termination of appellant's contract, two physicians, who were 34 and 31 years old, started working at Unity Hospital. While those new physicians might not have taken appellant's exact shifts, it is arguable that they would have been scheduled to cover some of the void left by appellant's departure. This creates a genuine issue of material fact as to whether a younger person replaced appellant.

Accordingly, we conclude that the district court erred in its determination that appellant did not establish a prima facie case. But the error was harmless, as the district court also analyzed the other two aspects of the *McDonnell Douglas* test and correctly determined that EPPA was entitled to summary judgment based on its additional analysis.

B. EPPA's nondiscriminatory reasons

Once a plaintiff establishes a prima facie case of discriminatory discharge, the burden shifts to the employer to establish a legitimate, nondiscriminatory reason for the discharge. *Hoover*, 632 N.W.2d at 542. Here, EPPA provided sufficient nondiscriminatory reasons for not renewing appellant's contract: inadequate overall job performance. First, at the time appellant's contract was not renewed, EPPA was faced with the need to reduce the number of physicians due to its expectation that it would lose one of its hospital contracts. Second, appellant's partner rating showed that only 73% of the other EPPA partners supported appellant—the lowest confidence rating of any EPPA partner. Third, as medical director of Unity Hospital, Dr. Belk in 2004 was aware of

various complaints and concerns made against appellant. These complaints and concerns involved prescribing the wrong medication, improperly discharging patients, completing substandard workups, and failing to perform proper treatment procedures that resulted in the death of one patient. Fourth, from 2000 through 2004, appellant's evaluations consistently contained poor reviews. For example, the evaluations stated that appellant "get[s] going a little to[o] fast," there was a "concern that [appellant] will miss something," his documentation "seems a little thin compared to his peers," and his dictations were so brief that there was a feeling that EPPA might not be able to properly bill for appellant's work. Further, in the 2004 evaluation, appellant's numerical peer reviews showed that he had the lowest averages of any EPPA doctor. These are sufficient nondiscriminatory reasons for the nonrenewal of appellant's contract.

C. Pretext

Because EPPA provided sufficient nondiscriminatory reasons for the nonrenewal of appellant's contract, the burden shifted to appellant to establish that the nondiscriminatory reasons were a pretext for age discrimination or were untrue. The district court found that appellant had not presented enough evidence to establish pretext.

Under this third prong, appellant

> must put forth sufficient evidence for the trier of fact to infer that the employer's proffered legitimate nondiscriminatory reason is not only pretext but that it is pretext for discrimination. In some cases, sufficient evidence may consist of only the plaintiff's prima facie case plus evidence that the employer's proffered reason for its action is untrue. In other cases, more may be required. However, at all times the employment discrimination plaintiff retains the burden of

> establishing that the defendant's conduct was based on unlawful discrimination.

Hoover, 632 N.W.2d at 546. Evidence probative of pretext may include

> that the employer's proffered reason has no basis in fact, that the employee received a favorable review shortly before he was terminated, that similarly situated employees who did not engage in the protected activity were treated more leniently, that the employer changed its explanation for why it fired the employee, or that the employer deviated from its policies.

Stallings v. Hussmann Corp., 447 F.3d 1041, 1052 (8th Cir. 2006). In addition, appellant "may concede that the proffered reason for the termination[] would have been a sufficient basis for the adverse action while arguing that the employer's proffered reason was not the true reason for the action." *Id.* (quotation omitted). Regarding evidence of a similarly situated younger employee who is treated more favorably, "the test for determining whether employees are similarly situated to a plaintiff is a rigorous one." *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005). Appellant must show "that [he] and the employees outside of [his] protected group were similarly situated in all relevant respects." *Id.* "To be probative evidence of pretext, the misconduct of more leniently disciplined employees must be of comparable seriousness." *Id.* (quotation omitted).

Appellant argues that he established pretext based on his strong employment history. But while appellant's annual reviews show that he had many positive qualities, he was consistently instructed to improve on chart dictation and to slow down in order to improve patient care. In addition, as previously noted, appellant's 2004 numerical peer evaluation showed that he was below both the EPPA and Unity Hospital averages in the

categories of patient care, responsibility, organization, and administration. Appellant tries to downplay his poor 2004 evaluation by asserting that it was subjective and a poor way to judge performance. While the scores given by appellant's peers could be characterized as subjective, from Dr. Gosewisch's perspective, they were objective. Dr. Gosewisch played no part in providing the scores, and appellant does not contest the legitimacy of the numbers. The ratings were anonymously provided by appellant's peers. Thus, when Dr. Gosewisch compared the scores of appellant to the other EPPA partners, it was an objective comparison.

Appellant asserts that the complaints detailed by Dr. Belk should be questioned, given their lack of formality. While the lack of formality might affect the weight of the complaints, appellant has not contested the validity of the complaints. In addition, appellant argues that the fact that appellant had no formal complaints in 2004 establishes pretext. Although appellant did not have any formal patient complaints in 2004, this does not preclude a finding that appellant received criticism from other sources.

Appellant maintains that there is evidence that younger, similarly situated physicians were treated more favorably. Under the "rigorous" test for similarly situated individuals, we cannot conclude that any similarly situated individuals were treated more favorably. Appellant has not provided any evidence of complaints or concerns of other younger doctors as serious as those alleged of appellant. The only specific incidents described by appellant relate to one physician posting inappropriate patient material on a website and another being unable to communicate with patients. In contrast, EPPA provided evidence of specific incidents where appellant prescribed the wrong medication,

improperly discharged patients, ordered the wrong lab work, and performed incorrect treatments. Further, it is undisputed that appellant's 2004 partner-support rating was the lowest of any EPPA partner, including, presumably, the younger, newer physicians. This evidence sufficiently distinguishes appellant from the younger physicians and prevents comparisons for purposes of a similarly situated analysis.

Appellant claims that there was a pattern of not renewing the contracts of older physicians and only hiring younger physicians. But appellant admits that between 2003 and 2005 only two physicians over the age of 50, other than himself, were not renewed at Unity Hospital. In addition, appellant has not contested the district court's finding that at Unity Hospital alone there were two EPPA physicians who were 57 and four others who were 55, 54, 50, and 42 whose contracts were renewed.

Finally, appellant contends that EPPA deviated from its own policy of regularly renewing contracts unless there is some egregious performance or behavioral deficiency. But this argument ignores the significant issues that Dr. Belk learned of as medical director at Unity Hospital and the fact that appellant had the lowest partner-support rating at EPPA. These reasons would have been sufficient to cause EPPA not to renew appellant's contract.

Under the *McDonnell Douglas* test, appellant has the burden of providing sufficient evidence to show that a genuine issue of material fact exists on the issue of pretext. Appellant has not provided sufficient evidence to establish pretext. Therefore, although we conclude that the district court erred in finding that appellant did not establish a prima facie case, this error was harmless. Accordingly, the grant of summary

judgment was appropriate given the lack of direct or circumstantial evidence to establish age discrimination.

Affirmed.