

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

In the Matter of Rodolfo Rios,

Complainant,

**ORDER FOR
SUMMARY JUDGMENT**

v.

Minnesota Department of Corrections,
MCF-Moose Lake,

Respondent.

On October 9, 1996, the Respondent filed a Motion for Summary Judgment in this matter. The Complainant filed a Memorandum in Opposition to the Motion on October 17, 1996. The motion was the subject of oral argument on October 18, 1996, at the Office of Administrative Hearings, at which time the Complainant filed and served the attachments to his Memorandum. The record closed on October 24, 1996, upon receipt of an affidavit from the Complainant.

The Respondent is represented by Melissa L. Wright, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101. The Complainant is represented by Reino J. Paaso, Attorney at Law, 310 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415.

Based upon the filings by the parties, the record in this matter, the oral argument, and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED THAT: The Motion for Summary Judgment is GRANTED and this matter is dismissed with prejudice.

Dated this _____ day of November 1996.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

The Department of Corrections has moved for a summary judgment in this matter. Summary judgment is appropriate when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A genuine issue is one which is not sham or frivolous and a material fact is one which will affect the outcome of the case. Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) rev. den., (Minn. Feb. 6, 1985). The party moving for summary judgment, in this case the Department, has the burden of proof. The nonmoving party, the Complainant, has the benefit of that view of the evidence which is most favorable to him. Greaton v. Enich 185 N.W.2d 876, 878 (Minn. 1971). The nonmoving party is responsible for showing that there are specific facts in dispute which have a bearing on the outcome of the case. Highland Chateau, supra, 356 N.W.2d at 808. Under Minn. R. Civ. P. 56.05, the nonmoving party may not rest upon mere averments or denials, but must present specific facts showing that there is a genuine issue for trial. If the nonmoving party fails to rebut specific facts presented in the motion, no question of material fact may exist and summary judgment will be appropriate. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988).

The Minnesota Human Rights Act (MHRA) provides that it is an unfair employment practice for an employer to discharge an employee because of age or national origin. Minn. Stat. § 363.03, subd. 1(2)(b). Discrimination cases brought under the MHRA are analyzed under the three-part test established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). See, Sigurdson v. Isanti County, 386 N.W.2d 715, 719-22 (Minn. 1986). The McDonnell Douglas analysis first requires an employee to demonstrate a prima facie case of discrimination by a preponderance of the evidence. Second, if the employee establishes a prima facie case, the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for

its employment decision. Third, if the employer meets its burden, the employee must prove by a preponderance of the evidence that the legitimate reason offered by the employer was a mere pretext for intentional discrimination. The shifting burden of production set out in McDonnell Douglas also applies to a motion for summary judgment in a discrimination case. Albertson v. FMC Corp., 437 N.W.2d 113, 115 (Minn. Ct. App. 1989). Summary judgment is appropriate either if the employee fails to present a prima facie case or if the employee fails to provide evidence which could establish that the employer's nondiscriminatory reasons for its employment decision were pretextual. Shea v. Hanna Mining Company, 397 N.W.2d 362, 369 (Minn. Ct. App. 1986). In this case, the Respondent has not argued that Complainant has failed to demonstrate a prima facie case, but rather argues that the Respondent has articulated a legitimate nondiscriminatory reason for the Complainant's noncertification and that the Respondent has failed to produce facts which demonstrate that the reason offered was really a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); Rademacher v. FMC Corp., 431 N.W.2d 879, 883 (Minn. Ct. App. 1988).

Taking that view of the evidence most favorable to the Complainant, the record indicates the following facts. The Complainant was hired by the Respondent at its Moose Lake correctional facility in June of 1994 as a probationary correctional officer. At that time, the Complainant, an Hispanic male, was 57 years old. Complainant's class consisted of 11 probationary officers. It was the first class to be trained in Moose Lake for work in a medium (rather than a minimum) correctional facility. The class received its orientation from July 6 through July 8, 1994, and attended the Department of Corrections Academy from July 11 through July 29, 1994. Their on-the-job training period was from August 1 through August 23, 1994. Following the training period, Complainant (and the other trainees) became a probationary Correctional Officer 1.

The Complainant's first evaluation by the training supervisor occurred on August 23, 1994. He was advised that he needed to inform staff when he didn't understand a directive, that he needed to show more self-initiative, and needed to be more assertive in doing rounds or other duties. It was noted that he was an asset with the Spanish-speaking inmates. He was advised that his job concerned security tasks rather than counseling and that the emphasis must be on security. (Ex. 5.)

The Complainant's second evaluation was for the month ending September 24, 1994, and was communicated to him October 3, 1994. His performance was rated as satisfactory in 17 tasks and needing improvement in 10 tasks. It was noted that the staff was unsure if they could depend on him to complete a task, that he spent a lot of time with just Hispanic groups, and that he did not always respond to his radio. It was also noted that he spent a lot of time watching T.V. (Ex. 5, Ex. 6.)

The Complainant's third evaluation by the training supervisor was completed on November 23, 1994, for the period August through November 1994. He was found to fully meet standards in 17 areas and to minimally meet standards in four areas. His overall level of performance was rated as marginal. It was noted that the Complainant had some lapses in attending to security procedures and radio procedures. It was also noted that he is bilingual and able to use that in his job. (Ex. 7.) The Complainant's training supervisor advised him at the time of this performance review that he needed improvement in order to be certified as a permanent employee.

At some point prior to February 6, 1995, a meeting was held to discuss whether or not the correctional probationary officers should be certified as permanent employees. The meeting was conducted by Captain Wilmes and attended by all of the available Lieutenants, including the training supervisor. The group reached a consensus that Complainant and one other probationary employee should not be recommended for certification. The written performance evaluation completed by the training supervisor on February 6, 1995, indicates that the Complainant fully met standards in only about one-half of the evaluation factors. His overall performance was rated as unsatisfactory. It indicates that the two major issues were communications with staff and general attentiveness to security issues. It was noted that the review group did not feel that Complainant was yet able to work independently and they were concerned about his ability to respond in an emergency. (Ex. 9.) Five of the Lieutenants filled out written employment evaluations for the Complainant. Two noted significant problems with his work while three generally indicated that his work was satisfactory. (Ex. 8.)

One of the incidents cited in connection with the Complainant's performance was an occasion where he was supervising inmates who were cleaning the nurses' dorm. The training supervisor discovered that the inmates were unsupervised and found the Complainant on another floor looking up a word in a dictionary in the library. (Ex. 11, p. 28-29.) On another occasion, the Complainant gave a set of keys to an inmate to open a shed door, but did not retrieve the keys from the inmate who then turned the keys in at the end of the day. He also allowed an inmate to return a cellular phone contrary to facility policy. (Fetsch Dep. p. 22, Unger Affidavit p. 2.) An earlier unsigned affidavit by inmate Unger to the contrary, submitted by the Complainant, was later repudiated. No affidavit or deposition of the Complainant was submitted regarding these incidents.

The other probationary correction officer who was not certified was a white male. In his November 1994 performance review, this officer minimally met standards in six areas and fully met standards in the remaining areas. His overall performance level was rated as marginal. His final performance rating, on February 6, 1995, was unsatisfactory. On that review, he fully met standards on only seven items, minimally met standards on ten items, and was below standards on one item. He was criticized for minimal interaction with inmates, late reports, leaving early and minimal attention to matters such as security checks. (Ex. 12.) Like the Complainant, he had favorable evaluations from some supervisors and critical evaluations from others. (Ex. 12.)

Based upon the discovery and affidavits in the record, the employer has advanced a legitimate nondiscriminatory reason for not certifying the Complainant. Substandard performance is a legitimate nondiscriminatory basis for adverse employment action. Feges v. Perkins Restaurant, Inc., 483 N.W.2d 701, 711 (1992). The burden therefore shifts back to the Complainant who must show that the reason given by the Respondent is really a pretext for discrimination. The Complainant retains the overall burden of showing that intentional discrimination was the true reason for the Respondent's actions. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742, 2747 (1993). It is not enough, however, for the Complainant to show disagreement with the employer's assessment of his performance. Davenport v. Riverview Gardens School District, 30 F.3d 940, 945 (8th Cir. 1994).

In his Memorandum in Opposition to the Summary Judgment Motion, the Complainant points to three areas which he believes indicates that the Respondent's reasons are a pretext and that discrimination was a factor in his noncertification. First, he states that his age was discussed at the certification meeting. He suggests that the uncontested fact that his age was discussed at the time the decision to not certify him was made, and that his physical ability to do the job was questioned, is sufficient to deny summary judgment. In his statement taken by the Respondent in his investigation of this matter, Lieutenant Zuk made an ambiguous statement which might be interpreted to mean that age was discussed at the certification meeting. However, in his deposition, Lieutenant Zuk was again asked about this matter and indicated that the reason for his response in the statement was simply because he was told that the claim was one of age and race discrimination. Lieutenant Zuk stated that he does not recall age coming up at the meeting. (Zuk Dep. pp. 20-21.) With the clarification of Lieutenant Zuk's statement, no facts remain in this record which would indicate that age was a factor. At the time that he was hired as a probationary employee, the Complainant was almost 59 years old. This fact suggests an absence of discriminatory intent based on age. The Complainant suggests that Captain Wilmes had questioned his physical ability to respond to an emergency. Captain Wilmes' statement was apparently not included in the materials submitted by the Complainant. However, such a statement is not necessarily age-related. Based upon the record in this matter, the Complainant has failed to demonstrate any genuine issue as to a material fact concerning age discrimination and has failed to produce any facts, concerning age, to demonstrate that the employer's reason for its employment action is a pretext.

Secondly, the Complainant points to facts in the record relating to the Complainant speaking Spanish to Latino inmates. Lieutenant Thorsten indicated that speaking Spanish to inmates was not a detriment to the Complainant's employment and, in fact, was positive. Lieutenant Thorsten did indicate that staff might get a little nervous when they don't know what's being said, but also stated that the Complainant speaking Spanish was an asset to the institution as long as he came back and told the other guards what was being said if there was anything important. (Thorsten's Statement p. 7.) Lieutenant Thorsten also indicated that some inmates had reported that the Complainant spent more time with Hispanic individuals. (Thorsten Dep. p. 28.) In his deposition, the Complainant himself stated that he had no reason to believe that speaking Spanish to inmates led to him not being certified. (Rios Dep. p. 155.) The unsigned affidavit of Evonne Kosloski concerning speaking Spanish was later repudiated by Kosloski. The Complainant also stated that there were no situations where he thought he was treated differently from non-Hispanic officers. (Rios Dep. pp. 142-43.) The record also indicates at a number of points that Respondent's supervisors saw the Complainant's ability to speak Spanish and the fact that he was Hispanic as a positive factor. The facts pointed to by the Complainant as showing pretext in regard to his speaking Spanish at the institution do not amount to a showing of intentional discrimination. Rather, the Respondent appears to have valued the Complainant's ability to speak Spanish.

Finally, the Complainant argues that the record indicates that Respondent held Complainant to a different standard for performance in his performance reviews. He suggests that non-Hispanic probationary correctional officers who were not certified had

substantially poorer performance than he did and argues that the incidents pointed to by the employer were not serious. There is no material disagreement on the facts of the incidents which the employer cites as performance problems. Rather, the Complainant argues that the incidents cited were not carefully enough documented and that they were less serious than the performance problems leading to other noncertifications. The Complainant, however, must come forward with something beyond a perception of his own talents that differs from his employer's perception. Krenik v. County of Le Sueur, 47 F.3d 953, 960 (8th Cir. 1995). Accordingly, his arguments that the incidents in question were not particularly serious, do not constitute a showing of pretext since in the facility's judgment and that of a reasonable person, the incidents would reasonably cause security concerns for the facility. The Complainant also argues that supervisors' reports of incidents were not adequately verified and constitute hearsay. There is no indication, however, that information concerning the Complainant was gathered in any fashion different from the way in which it was gathered for other probationary employees.

The Complainant produced for the record performance reviews of probationary employees who were "not certified" prior to the Complainant's class. The performance reviews produced show some in which probationary employees were rated below standards or minimally met standards to a higher degree than was the Complainant. The fact that some non-certified employees in the past had worse ratings than the Complainant does not establish discrimination. A more apt comparison is the employee in the Complainant's class who was not certified. His rating on levels of performance is quite similar to that of the Complainant in that he fully met a number of standards and minimally met some standards. The record indicates that this white male employee was treated in a fashion similar to the performance evaluation of the Complainant. Complainant's argument that there must be "below standards" ratings rather than "minimally meets" ratings to support non-certification is specious and unsupported. According to the training supervisor, no probationary officers whose evaluations fell below "fully meets standards" has been certified during her tenure. The record fails to demonstrate any material facts in dispute in regard to the Complainant's performance. Additionally, the facts in the record do not indicate that the Complainant's noncertification occurred because of his race or national origin.

This case is factually similar to the Davenport case, supra, in which an African American male employed by a school district as a probationary physical education teacher and coach was not renewed. The school district alleged several violations of school policy which the plaintiff generally admitted. The plaintiff did dispute the reasons for and significance of the incidents and accordingly argued that they were merely pretextual. The 8th Circuit noted that the plaintiff's obligation in a summary judgment motion was to present sufficient evidence to create a genuine dispute on the issue of pretext. 30 F.3d at 943-44. The court determined that the infractions cited by the employer sufficiently set forth legitimate nondiscriminatory reasons for its discharge of the plaintiff. The court also held that it was not enough for plaintiff to argue that the infractions were not serious enough to warrant a discharge since even if true, this contention merely questioned the soundness of the employer's judgment. 30 F.3d at 945. Davenport also claimed that similarly situated white employees committed the same infractions and were not discharged. The court noted that while evidence

supporting the claim would be highly irrelevant to the issue of pretext, the plaintiff had presented no such evidence other than his own unsubstantiated allegations in a deposition. Similarly, in this case, the Complainant has failed to create a record that shows disparate treatment when comparing his situation with other probationary employees. Furthermore, in this case, the Complainant, in his deposition, indicated that he was not treated differently from non-Hispanic officers. Accordingly, it must be concluded in this case, as in Davenport, that there is no genuine issue of fact on the issue of pretext and the ultimate issue of intentional discrimination. The Complainant has failed to show that it is more likely than not that poor performance was not the reason for his discharge. In fact, the record indicates he was not certified due to substandard performance. He has failed to submit enough admissible evidence to raise genuine doubt as to the legitimacy of the Respondent's motive.

The Respondent has also claimed that it is entitled to immunity from these claims based upon the doctrine of official immunity which provides that a public official charged by law with duties which call for the exercise of his or her judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong. The Complainant argues that since almost every government function involves some degree of discretion, the official immunity doctrine should not be allowed to nullify the general rule of liability under the state Tort Claims Act. However, recent Minnesota appellate decisions have recognized some immunity against claims under the MHRA. In State by Beaulieu v. Mounds View, 518 N.W.2d 567 (Minn. 1994), the Supreme Court recognized that official immunity may bar a discrimination claim under Minn. Stat. § 363.03 unless there is a showing of willfulness or malice in regard to the conduct of the official. It appears unlikely that official immunity would very often be a successful defense in a summary judgment motion since generally, whether the action taken was willful or malicious would be a factual question. For example, in Kalia v. St. Cloud State University, 539 N.W.2d 828 (Minn. App. 1995) (involving denial of tenure to a probationary professor) the Court of Appeals affirmed denial of a Motion for Summary Judgment on the official immunity issue because the record indicated that prohibited conduct may have occurred. 539 N.W.2d at 832. The court noted that in determining whether an official committed a malicious act, the fact finder considers whether the official has intentionally committed an act which he or she had reason to believe was prohibited by statute. Generally, therefore, decisions on official immunity in MHRA cases will require some testimony. In this case the record contains very little evidence to support a finding of intentionality. However, the question of immunity need not be decided in this case since summary judgment is granted in favor of the Department based upon the failure of the Respondent to create an issue as to pretext.

G.A.B.