STATE OF MICHIGAN

COURT OF APPEALS

GABRIEL QUIROS, JR.,

Plaintiff-Appellee,

v

KALITTA FLYING SERVICE, INC., a/k/a KITTY HAWK CHARTERS, INC.,

Defendant-Appellant.

UNPUBLISHED
June 3, 2003

No. 229229
Washtenaw Circuit Court
LC No. 96-008024-CL

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Plaintiff, a licensed commercial pilot, brought this employment discrimination lawsuit claiming that defendants unlawfully discriminated against him when, among other things, defendants failed to promote him to the status of Lear Jet captain. Defendant appeals as of right from a judgment for plaintiff following a jury trial. We reverse and remand for entry of judgment in favor of defendant.

I. Factual and Procedural History

A. The FAA Prerequisites to Being a Lear Jet Captain

This failure to promote claim is unusual in that the discretion of the employer to promote its employees is constrained by federal aviation law. At least as it relates to this case, it is normal practice for a pilot to progress to first officer of a Beech aircraft, then to Beech captain, to Lear Jet first officer, and finally, to Lear Jet captain. In order to advance to the positions of first officer, Beech captain, and Lear Jet first officer, the Federal Aviation Administration ("FAA") requires a pilot have a specific amount of training and to pass a proficiency examination demonstrating his familiarity with the aircraft (a "check ride"). In order to become a Lear Jet captain, a pilot must obtain a "type rating" certification from the FAA. In order to obtain the type rating, a pilot must present the FAA with written certification that he has been trained to competently perform specified maneuvers in a Lear Jet. A pilot also must pass a written test and a flying proficiency test (a "type ride"). This type ride is administered by a member of the FAA and the chief pilot or check pilot of the testing pilot's company.

B. Defendant's Pilot Training Procedures

A Lear Jet first officer working for defendant who desires to become qualified to be a Lear Jet captain gradually increases his skills by performing more duties during Lear Jet flights. Typically, a Lear Jet first officer begins training in the "pilot not flying" ("PNF") program where he is permitted to fly the Lear Jet at altitudes above ten thousand feet, but is not permitted to pilot the aircraft during critical phases of the flights, including taking off, landing, and shoot approaches. First officers typically train in the PNF program for between twenty-five and fifty hours. After a first officer completes the PNF program, he is designated as second in command ("SIC"), where he is permitted to control the aircraft during critical phases of flights. Finally, an SIC first officer is designated as left seat authorized ("LSA") where he is permitted to fly the plane from the left seat (pilot's seat).

After a pilot becomes an LSA first officer of a Lear Jet, he can train for his type ride so that he can receive accreditation from the FAA to become a Lear Jet captain. It is defendant's policy to assist capable pilots to obtain an FAA type rating. One of defendant's pilots trains the pilot to do all of the specified maneuvers required to pass the type ride. It is normal practice for defendant to train pilots for their type ride during revenue flights when the plane is carrying freight or flying to pick up freight and is not carrying any passengers. Part of training to be a Lear Jet captain is practicing "armchair flying," where the pilot sits on the ground, discusses the profiles and procedures with a training pilot, and visualizes the maneuvers. Defendant places a pilot with an impending type ride on "Lear Jet priority," which allows the pilot to be paired with a training pilot up to two weeks before his type ride for intense training for the test. One or two days before a pilot's scheduled type ride, defendant's chief pilot usually gives the pilot a pretest flight dedicated solely to practicing for the type ride. Defendant often, but not always, promotes pilots who obtained their type rating to Lear Jet captain. However, the failure to obtain an FAA type rating precludes a pilot from being promoted to Lear Jet captain.

C. Plaintiff's Employment History

In 1989, American International Airways, Inc., ("American") hired plaintiff, who is from Columbia, as a Beech captain.[1] Plaintiff eventually advanced to Lear Jet first officer, where he progressed through the PNF training program.[2] Although pilots typically had to train in the PNF program for between twenty-five and fifty hours, plaintiff claims that he was in the PNF program for approximately seven hundred hours.[3] Plaintiff moved on to the SIC program and eventually

[1] On January 1, 1992, plaintiff became an employee for defendant when the Part 135 department of American was transferred to defendant, which was affiliated with American. After this transfer, the supervisors and the means of operating the company stayed the same for the pilots. The only major difference was that defendant's president was different than American's president. Plaintiff's complaint included American, d/b/a Connie Kalitta Services, Inc., as a defendant, but his claims against American were dismissed by stipulation of the parties.

[2] Despite documentation to the contrary, plaintiff claims that he was never given FAA check rides so that he could lawfully fly as a Lear Jet first officer. Assuming plaintiff's testimony to be true, his act of flying a Lear Jet as first officer without taking the FAA mandated check rides is a breach of FAA regulations and a breach of plaintiff's written employment contract with defendant, which requires plaintiff to obey all FAA regulations.

[3] Kathleen Tweed, a pilot who worked for defendant, testified that plaintiff was only in the PNF program for about fifty hours.

became an LSA first officer for a Lear Jet. As an LSA first officer, plaintiff was given the opportunity to take off, land, and do single-engine approaches from the left seat of Lear Jets. However, plaintiff was not promoted to Lear Jet captain. As of the summer of 1993, plaintiff was the most senior pilot who had not been promoted to Lear Jet captain.

Plaintiff claims that when he asked supervisors why he had not been promoted to Lear Jet captain, they told him that it was because of his "body movement." On one occasion when plaintiff asked Louis Berry Birurakis, defendant's Director of Operations, to fly with him, Birurakis stated that he could not fly with plaintiff because of the rotation of the pilots.[4] Plaintiff also testified that defendant's chief pilot, John Bhim-Rao, who is from India and is also a protected class member under state and federal employment laws, told plaintiff that he had not been promoted because defendant's pilots were racist and Birurakis did not like minorities. Bhim-Rao told plaintiff that, in order to be promoted, he should try to "act white" by eliminating his accent[5] and practicing his body movement in front of a mirror.[6] On one occasion when plaintiff asked Bhim-Rao to fly with him, Bhim-Rao refused and told plaintiff to "visualize the maneuvers."[7] The evidence further shows that pilots and supervisors for defendant, including Bhim-Rao and John Talbot,[8] mimicked plaintiff's fast speech, favorite phrase, distinctive laughter, and body movement in front of him and behind his back.[9] During his employment tenure, defendant never complained about being mimicked and never told anybody that he believed that he was subject to unlawful discrimination based on his national origin.

Plaintiff originally claimed that he never had any training in a Lear Jet while he worked for defendant. However, training logs defendant filed with the FAA indicate that plaintiff was trained to fly a Lear Jet. Additionally, several witnesses testified that various pilots trained plaintiff to fly a Lear Jet. Moreover, on cross-examination, plaintiff admitted that various Lear Jet captains had allowed him to practice critical maneuvers in a Lear Jet, including take offs, landings, and shoot approaches. Bhim-Rao testified that he flew with plaintiff on revenue flights for the sole purpose of training him.

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[4] Birurakis testified that plaintiff's training log indicated that he had trained plaintiff. Plaintiff admitted that he had flown in a Lear Jet with Birurakis, but he was not trained or allowed to touch the controls during the flights. In contrast, Birurakis testified that he trained plaintiff and was the check pilot who took plaintiff for a test flight and certified him as a Lear Jet first officer.

[5] Jovlyn Fraser, a pilot who was friends with plaintiff and shared an apartment with him, testified that plaintiff did not have an accent.

[6] Bhim-Rao denied ever making these statements.

[7] As discussed, it is undisputed that the practice of visualizing maneuvers is a Lear Jet training method utilized by defendant that is known as "armchair flying."

[8] Talbot was the defendant's chief pilot when plaintiff was hired. He was succeeded by Bhim-Rao in February 1993.

[9] Bhim-Rao denied mimicking plaintiff and testified that he heard that other pilots mimicked plaintiff, but never saw it actually happen.

Defendant scheduled a type ride for plaintiff on August 20, 1993. Within one month of plaintiff's scheduled type ride, Bhim-Rao assigned Marco Rotmeijer, a Lear Jet captain,[10] to train and evaluate plaintiff for his type ride. However, plaintiff testified that he was never placed on Lear Jet priority.[11] On August 4, 1993, Rotmeijer took plaintiff on a Lear Jet flight. Rotmeijer testified that he trained plaintiff during this flight. On August 6, 1993, and August 7, 1993, Bhim-Rao took plaintiff on a two-day flight on a Lear Jet. On August 9, 1993, Rotmeijer took plaintiff on a four-day trip in a Lear Jet. Rotmeijer testified that he trained plaintiff to do all of the specified maneuvers that were required to pass the type ride. The flights on which Rotmeijer trained plaintiff for his type ride were not for the sole purpose of training, but also served as revenue flights. On August 13, 1993, Bhim-Rao took plaintiff on another Lear Jet flight. On August 14, 1993, and August 15, 1993, plaintiff flew with Lear Jet captain Jim Eliason. Bhim-Rao testified that he planned to take plaintiff on a dedicated pretest flight solely for the purpose of practicing for his type ride one or two days before the scheduled type ride.

On August 17, 1993, three days before plaintiff's scheduled type ride, plaintiff was landing a Lear Jet from the left seat when the brakes did not respond and the plane hydroplaned off the runway. After an inspection of the airplane, it was concluded that plaintiff was at fault for the accident. Because of this incident, defendant cancelled plaintiff's type ride scheduled for August 20, 1993. Plaintiff scheduled a type ride for himself for December 20, 1993, but cancelled it because he did not feel that he was properly trained.

In January 1994, plaintiff repeatedly asked Birurakis to allow him to take a type ride. Defendant scheduled a type ride for plaintiff on February 11, 1994. In a meeting with the Human Resource Director, Dave Ahles, plaintiff complained about the lack of training for his type ride. Because plaintiff appeared to be nervous and under a lot of stress, Ahles told plaintiff to seek counseling from the Employee Assistance Program ("EAP"). The next day, plaintiff once again called to cancel his type ride because he did not feel that he was ready for it.

On February 1, 1994, plaintiff met with Ahles and Birurakis. At the meeting, plaintiff was told that his duties would be limited to that of a Lear Jet first officer. Plaintiff was told that he was a valued employee and that his employment would continue, but was asked to work with defendant to establish a mutually satisfying work relationship. At that meeting, plaintiff informed Ahles and Birurakis that he wanted to go on vacation. During his vacation, plaintiff began to experience back pain and was directed by his doctor not to return to work. On May 24, 1994, plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging a wrongful failure to promote him based on his national origin. When plaintiff recovered from his back injury, he informed defendant that he would not be returning to work.

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[10] Plaintiff testified that Rotmeijer was not a training pilot, but Rotmeijer and Bhim-Rao testified that Rotmeijer was a training pilot.

[11] In contrast, Rotmeijer testified that plaintiff was placed on Lear Jet priority. This factual dispute is not material to the issue before the Court. What is material is whether plaintiff received substantially the same training provided to non-protected class employees of defendant. On this point, we conclude the evidence establishes that plaintiff was indeed afforded the same training and opportunities afforded non-protected class members.

Plaintiff terminated his employment with defendant on July 1, 1994. Plaintiff claims he was constructively discharged.

D. The Parties' Legal Claims

Plaintiff filed a complaint against American and defendant, alleging that they had violated Title VII, 42 USC 2000e-2, and the Elliot-Larsen Civil Rights Act (the "ELCRA"), MCL 37.2202(1), by discriminating against him based on his national origin by making discriminatory statements and by denying him training, promotions, and preferred job assignments. Following a trial, a jury found that defendant had discriminated against plaintiff based on his national origin and that plaintiff had been constructively discharged from his employment with defendant. The trial court entered a judgment on the verdict awarding plaintiff the following: (1) $1,559,000 for the verdict, (2) $105,172.50 in attorney fees, (3) $1,096.50 in costs, (4) $366,442.06 in interest, and (5) $200,000 in punitive damages.

Defendant filed a motion for judgment notwithstanding the verdict ("JNOV"), for a new trial, or, in the alternative, for remittitur. Defendant argued that the evidence was insufficient for the jury to find that plaintiff was denied training or promotion, that plaintiff's failure to be trained or promoted was due to his national origin, or that plaintiff was constructively discharged. Defendant also argued that plaintiff was not entitled to punitive damages and that the jury's damage award was based on pure speculation. Finally, defendant argued that a new trial was required because it was denied a fair trial by the admission of inflammatory hearsay statements and plaintiff's counsel's improper arguments to the jury. The trial court denied defendant's motion, concluding that there was sufficient evidence for reasonable minds to find that defendant failed to train and promote plaintiff based on his nation origin and that plaintiff was constructively discharged. The trial court also determined that the damages awarded by the jury were not based on speculation and that defendant was not denied a fair trial. On July 26, 2000, the trial court entered a final judgment awarding plaintiff an additional $12,518.07 in attorney fees and an additional $39,653.67 in interest.

II. Analysis

A. Standard of Review

Defendant argues that the trial court erred in denying its motion for JNOV because the evidence did not show that plaintiff was discriminated against or received disparate treatment based on his national origin. A trial court's decision to grant or deny a motion for JNOV is reviewed de novo. *Graves v Warner Bros*, 253 Mich App 486, 491; 656 NW2d 195 (2002), lv pending (Supreme Court Docket No. 123104). In reviewing a decision on a motion for JNOV, this Court must view the evidence and all reasonable inferences that may be drawn from the evidence in a light most favorable to the nonmoving party. *Id.* If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001). A JNOV is appropriate only when the evidence fails to establish a claim as a matter of law. *Id.*

B. Plaintiff's Title VII and the ELCRA Claims

The ELCRA prohibits employers from discriminating against their employees based on national origin:

> (1) An employer shall not do any of the following:
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> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
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> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1).]

Title VII, the federal counterpart to the ERCLA, contains a similar prohibition against discrimination on the basis of national origin:

> (a) Employer practices. It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.
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> * * *
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> (m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices. Except as otherwise provided in this title [42 USC 2000e *et seq.*], an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. [42 USC 2000e-2.]

Under both Title VII and the ELCRA, a plaintiff may set forth a prima facie case of employment discrimination by presenting direct evidence of defendant's discriminatory intent. *Hopson v DaimlerChrysler Corp*, 306 F3d 427, 433 (CA 6, 2002). In interpreting Title VII, the Sixth Circuit 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), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999) (emphasis

added). Even where the plaintiff has introduced evidence of discriminatory animus, the plaintiff bears the burden of demonstrating that the employee suffered an adverse employment consequence that was in some part related to the employer's illegal discriminatory animus. *Graham v Ford*, 237 Mich App 670, 677; 604 NW2d 515 (1999). Stated differently, the plaintiff must establish evidence of his qualification and proof that the discriminatory animus was causally related to the decisionmaker's action. *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997).

In the present case, plaintiff testified at trial that Bhim-Rao told him that he had not been promoted because defendant's pilots were racist and Birurakis did not like minorities.[12] Bhim-Rao also told plaintiff that, in order to be promoted, he should try to "act white" by changing his body movement and eliminating his accent. The evidence further demonstrated that pilots and supervisors for defendant, including Bhim-Rao and Talbot, mimicked plaintiff's fast speech, favorite phrase, distinctive laughter, and body movement in front of him and behind his back.

Viewing this testimony in the light most favorable to plaintiff, we conclude that this evidence demonstrates the existence of animus toward plaintiff in his workplace. Nonetheless, we conclude that it does not amount to "direct evidence" of discrimination as defined by this Court and the Sixth Circuit.[13] The uncontroverted evidence does not show that plaintiff was qualified for the Lear Jet captain position or that defendant's decision not to promote him was causally related to its decisionmakers' discriminatory animus. This case is distinguishable from employment disputes arising in unregulated industries. The airline industry is governed by the highly regulated and objective standards of the FAA. The FAA requires that a pilot receive a type rating as a prerequisite to becoming a Lear Jet captain. It is without dispute that plaintiff lacked the required FAA type rating.[14]

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[12] Plaintiff's wife also testified that Bhim-Rao said that Birurakis was a racist.

[13] The dissent concludes the judgment must be affirmed because plaintiff was denied adequate training from Bhim-Rao and others. We find it compelling that, pursuant to defendant's established training procedures, plaintiff had no legitimate expectation to be trained by the chief pilot, Bhim-Rao. Rather, plaintiff was entitled to progressive training from other Lear Jet pilots. Plaintiff admitted on cross-examination to receiving such training. Plaintiff could also expect to receive a pretest flight with the chief pilot, dedicated solely to practicing for an FAA type ride. Admittedly, plaintiff never received such a dedicated pretest flight. However, in other cases, such dedicated training flights occurred no more than two days prior to the type ride. Here, there is no dispute that every one of plaintiff's type rides was cancelled more than two days prior to the date plaintiff was scheduled to take them. Significantly, plaintiff unilaterally cancelled all but one of his type rides. Defendant admittedly cancelled plaintiff's first type ride, but only because plaintiff had allowed a Lear Jet to slide off a runway during a landing just three days prior to the scheduled type ride. For these reasons, we respectfully disagree with our dissenting colleague's conclusion that plaintiff was wrongfully denied training.

[14] Plaintiff nevertheless argues that his failure to obtain the required FAA type rating was directly related to defendant's refusal to train plaintiff. As will be discussed, *infra*, the evidence showed that defendant provided plaintiff with the same training and opportunity to obtain a type rating that was provided to non-protected class members. In addition, all of the licensed Lear Jet pilots who flew in a Lear Jet with plaintiff and who testified at trial opined that plaintiff did not

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Where no direct evidence of impermissible bias is available, the plaintiff must present a prima facie case by proceeding through the steps set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), which interprets Title VII, but which Michigan has adopted for use in race discrimination cases brought under the ELCRA. *Hazle, supra* at 462-463; *Logan v Denny's, Inc*, 259 F3d 558, 567 (CA 6, 2001). The plaintiff must present a prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. *Hazle, supra* at 462; *Logan, supra* at 567. In order to show a prima facie case of discrimination under the *McDonnell Douglas* test, a plaintiff must present evidence that (1) he belongs to a protected class, (2) he suffered an adverse employment action, (3) he was qualified for the position, and (4) he was treated less favorably than a similarly situated individual outside his protected class. *Hazle, supra* at 463; *Logan, supra* at 567.[15]

Defendant argues that plaintiff failed to establish a prima facie case because he failed to show that he was qualified to be a Lear Jet captain. See *McDonnell Douglas Corp, supra* at 802; *Hazle, supra* at 463. "To be 'qualified' for a position means that the individual 'was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative.' " *Wilkins v The Eaton Corp*, 790 F2d 515, 521 (CA 6, 1986), quoting *Loeb v Textron, Inc*, 600 F2d 1003, 1013 (CA 1, 1979). We agree that there was no evidence presented at trial that plaintiff was qualified for a promotion to Lear Jet captain.

Again, it is undisputed that plaintiff never obtained the requisite FAA type rating for Lear Jet captain. Furthermore, Bhim-Rao, Birurakis, Rotmeijer, and Don Schilling (defendant's president) all agreed that plaintiff lacked the judgment skills and situational awareness to be a Lear Jet captain. Kathleen Tweed, who was a Lear Jet captain for defendant, testified that plaintiff was technically proficient, but that he was extremely nervous and that he did things over and over again without "getting it" rather than thinking for himself. Tweed testified that plaintiff did not handle unfamiliar situations well, such as flying in bad weather. Plaintiff admitted that he was extremely nervous when flying as a pilot in a Lear Jet. Rotmeijer testified that plaintiff

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have the necessary skills to be a Lear Jet captain. Although defendant's decisionmakers and pilots mimicked plaintiff's speech and movement, there is no evidence that this mimickry was based on plaintiff's national origin. Further, there is no indication that defendant's decision not to promote him to Lear Jet captain was motivated by any illegal discrimination on the part of defendant's decisionmakers. Therefore, the alleged statement of Bhim-Rao that evidenced a discriminatory animus toward plaintiff and the evidence that plaintiff was mimicked does not *require* the conclusion that unlawful discrimination was a motivating factor in the decisions regarding plaintiff's training or defendant's decision not to promote plaintiff to Lear Jet captain.

[15] Once a plaintiff establishes a prima facie case of discrimination, a presumption of discrimination arises. *Hazle, supra* at 463; *Logan, supra* at 567. The defendant may rebut this presumption of discrimination by producing evidence that it had a legitimate, nondiscriminatory reason for its employment decision. *Hazle, supra* at 464; *Logan, supra* at 567. The plaintiff must then demonstrate that the defendant's legitimate reason for its employment decision was a pretext for unlawful discrimination. *Hazle, supra* at 465-466; *Logan, supra* at 567.

was frequently not situationally aware of what was going on with the aircraft during the flights and would get overanxious when he tried to solve a problem. Rotmeijer discussed these problems with plaintiff, but got the impression that plaintiff did not learn from his mistakes. Rotmeijer believed that plaintiff was not a good candidate to be a Lear Jet captain because of his lack of decision-making skills and situational awareness. Bhim-Rao testified that plaintiff made mistakes on maneuvers during flights and did not have good enough judgment to be a Lear Jet captain. Birurakis testified that plaintiff was not qualified to be a Lear Jet captain because he allowed situations to degenerate and then made incorrect decisions to get out of difficult situations. Birurakis pointed to several examples of mistakes that plaintiff made while flying a Lear Jet. None of the witnesses testified that, absent defendant's discriminatory animus, plaintiff would have been qualified to be a Lear Jet captain.

Plaintiff points to the testimony of Jovlyn Fraser, a pilot who testified that plaintiff was an "[e]xcellent pilot, a superb pilot." Plaintiff also points to the testimony of Glenn Allen Hanson, a pilot who testified that he had no reason to believe that plaintiff would not have passed a training program in the Part 135 department.[16] Plaintiff argues the evidence demonstrates that Bhim-Rao believed that plaintiff had sufficient training and was capable of passing the type ride and getting his type rating.[17] This testimony does not create a jury submissible question regarding plaintiff's qualification to be a Lear Jet captain. The material issue before the Court is not whether Fraser believed plaintiff was an excellent pilot or Bhim-Rao believed plaintiff was capable of passing a type rating. Rather, the dispositive question is whether plaintiff was qualified to be a Lear Jet captain. To become a Lear Jet captain, plaintiff had to receive the requisite type rating. The evidence presented shows that plaintiff had two opportunities to take a type ride after the hydroplaning incident, but unilaterally cancelled the type ride both times.

Plaintiff argues that it was defendant's failure to properly train him that prevented him from obtaining a type rating and being promoted to Lear Jet captain. Under the ELCRA, "the failure to train an employee to perform a particular job may itself form the basis for a civil rights claim where that failure constitutes disparate treatment." *Brunson v E & L Transport Co*, 177 Mich App 95, 101; 441 NW2d 48 (1989). However, according to the Sixth Circuit, an employer may not be liable for a failure to train "absent a showing that [the] failure constituted either dissimilar treatment from the training [non-protected class members] received or treatment similar on its face but dissimilar in its effects upon racial minorities and unfounded on business necessity." *Long v Ford Motor Co*, 496 F2d 500, 505 (CA 6, 1974).

Plaintiff claims that he was never placed on "Lear Jet priority" status before his type ride and he was not taken on a dedicated practice type ride before his scheduled type rides. However, training logs defendant filed with the FAA indicate that plaintiff received the same training provided to non-protected class members. Although plaintiff testified that he saw these training

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[16] Although Fraser and Hanson were pilots, neither ever became Lear Jet captains or flew in a Lear Jet with plaintiff. Significantly, neither Fraser nor Hanson opined that plaintiff was qualified to be a Lear Jet captain. Rather, they generically opined that plaintiff was "an excellent pilot."

[17] Bhim-Rao also testified that, although plaintiff was capable of passing the type ride, he did not have the necessary skills to be a Lear Jet captain.

reports and that some of them were inaccurate, he never informed the FAA that they were inaccurate and never complained to the FAA that he had not been properly trained.[18] Moreover, testimony from other witnesses reveals that various pilots trained plaintiff on a Lear Jet. Significantly, on cross examination, plaintiff conceded that numerous Lear Jet captains had indeed trained him to perform critical maneuvers in a Lear Jet. Rotmeijer testified that he trained plaintiff to do all of the specified maneuvers that were required to pass the type ride. After Rotmeijer trained plaintiff, Rotmeijer, Schilling, Bhim-Rao, and Birurakis agreed that plaintiff was sufficiently trained to pass the type ride. Although plaintiff may not have been given dedicated flights solely for the purpose of training for his type rides, it was normal practice to train pilots for their type ride during revenue flights when the plane was carrying or flying to pick up freight and was not carrying any passengers. Plaintiff's training for his type ride occurred in this way, which was not any different than the way other pilots were trained before their type rides. Although pilots were usually given a pretest flight dedicated solely to practicing for the type ride one or two days before the scheduled type ride, plaintiff was never given this pretest flight because his type rides were all cancelled more than two days before he was scheduled to take them.[19] This evidence shows that plaintiff was not treated less favorably than similarly situated non-minority pilots.

The evidence shows that, during plaintiff's tenure as a pilot for defendant, seven out of thirty-six pilots working for defendant failed to achieve Lear Jet captain status. It appears from the evidence that plaintiff, like several other pilots for defendant, failed to overcome the deficiencies that prevented him from being promoted to Lear Jet captain. There is no evidence that plaintiff had the qualifications to be promoted to Lear Jet captain but was denied promotion or the training required for promotion because of his national origin. Therefore, we conclude that plaintiff failed to establish a prima facie case and that plaintiff's Title VII and ELCRA claims fail as a matter of law.[20]

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Brian K. Zahra

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[18] The failure to report to the FAA the fact that plaintiff's employee was filing false training documents with the FAA is a breach of FAA duty, which arguably would preclude plaintiff from possessing the requisite FAA licensing to be a Lear Jet captain.

[19] As discussed, defendant cancelled plaintiff's first scheduled type ride because plaintiff, flying a plane from the left seat, skidded off the runway when trying to land. This incident is further evidence that plaintiff was not qualified to be a Lear Jet captain. Plaintiff cancelled the other two type rides himself because he felt that he was not ready to take them.

[20] In light of our disposition above, we need not address defendant's other arguments.