

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

V

NATIONAL HERITAGE ACADEMIES, INC.,

Defendant-Appellant.

SUPREME COURT NO. 150616

Court of Appeals No. 306870

Genesee County Circuit Court
Case No. 10-93161-CL
(Hon. Geoffrey L. Neithercut)

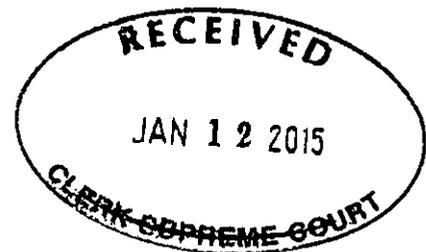
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**PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

This Court may consider Defendant's Application for Leave to Appeal pursuant to MCR

7.301(A)(2).

COUNTER-STATEMENT OF JUDGMENT APPEALED FROM
AND RELIEF SOUGHT

Defendant National Heritage Academies has made Application for Leave to Appeal from the Court of Appeals October 28, 2014 Opinion affirming the Genesee County Circuit Court Judgment in favor of Plaintiff Craig Hecht. The trial court's Judgment is based on the July 15, 2011 jury verdict in favor of Plaintiff, in which the jury found that one motivating factor in Defendant's decision to discharge Plaintiff was his race.

Plaintiff respectfully requests that this Court deny the Defendant's Application for Leave to Appeal.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION, DIRECTED VERDICT, AND JNOV BECAUSE THERE WAS A GENUINE ISSUE OF MATERIAL FACT THAT A REASONABLE JUROR COULD DETERMINE, BASED ON DIRECT EVIDENCE, THAT RACE WAS A MOTIVATING FACTOR IN DEFENDANT'S DECISION TO FIRE PLAINTIFF?

The Trial Court Answered "YES."

The Court of Appeals Answered "YES."

Plaintiff/Appellee Answers "YES."

Defendant/Appellant Answers "NO."

II. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION, DIRECTED VERDICT, AND JNOV BECAUSE THERE WAS A GENUINE ISSUE OF MATERIAL FACT THAT A REASONABLE JUROR COULD DETERMINE, BASED ON INDIRECT EVIDENCE, THAT RACE WAS A MOTIVATING FACTOR IN DEFENDANT'S DECISION TO FIRE PLAINTIFF?

The Trial Court Answered "YES."

The Court of Appeals Answered "YES."

Plaintiff/Appellee Answers "YES."

Defendant/Appellant Answers "NO."

III. IS DEFENDANT ENTITLED TO A NEW TRIAL BECAUSE THE TRIAL COURT ADMITTED EVIDENCE THAT DEFENDANT SENT TO PLAINTIFF'S PROSPECTIVE EMPLOYERS MISCONDUCT DISCLOSURES PURSUANT TO MCLA §380.1230(b)?

The Trial Court Answered "NO."

The Court of Appeals Answered "NO."

Plaintiff/Appellee Answers "NO."

Defendant/Appellant Answers "YES."

IV. HAS DEFENDANT SUFFICIENTLY DEMONSTRATED THAT THERE EXISTS IN THIS CASE LEGAL ISSUES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE, PURSUANT TO MCR 7.302(B)(3), TO JUSTIFY A GRANT OF LEAVE TO APPEAL WHERE THE TRIAL COURT AND THE COURT OF APPEALS UPHELD THE JURY VERDICT BASED ON DIRECT AND INDIRECT EVIDENCE ANALYSES, WHICH ARE LONG-STANDING AND TIME-HONORED PRINCIPLES OF MICHIGAN JURISPRUDENCE?

The Trial Court Answered "NO."

The Court of Appeals Answered "NO."

Plaintiff/Appellee Answers "NO."

Defendant/Appellant Answers "YES."

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The Trial Court Answered "NO."

The Court of Appeals Answered "NO."

Plaintiff/Appellee Answers "NO."

Defendant/Appellant Answers "YES."

VI. HAS DEFENDANT DEMONSTRATED EITHER MAJOR ISSUES AFFECTING THE STATE'S JURISPRUDENCE OR MATERIAL INJUSTICE WHERE THE TRIAL COURT EXERCISED ITS DISCRETION TO ADMIT EVIDENCE CONCERNING MCLA §380.1230(B) DISCLOSURES WHILE ALSO INSTRUCTING THE JURY THAT DEFENDANT WAS REQUIRED TO MAKE SUCH DISCLOSURES UNDER MICHIGAN LAW?

The Trial Court Answered "NO."

The Court of Appeals Answered "NO."

Plaintiff/Appellee Answers "NO."

Defendant/Appellant Answers "YES."

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant has made application for leave to appeal to the Michigan Supreme Court from the October 28, 2014 Court of Appeals opinion denying its appeal from the jury verdict in this case dated July 15, 2011. In its verdict, the racially diverse Genesee County jury determined that one motivating factor in Defendant's decision to discharge Plaintiff, who is white, from his teaching position at Linden Charter Academy was his race.¹

In its Application for Leave to Appeal, Defendant relies upon distortion of the record and hyperbole in an attempt to fool this Court into believing that profound legal principles are at stake in its appeal, and that a grave injustice has occurred. Nothing could be further from the truth. The opinion of the Court of Appeals does not do a thing to change discrimination law. In this case, the Court of Appeals simply recognized that the trial court correctly applied time-honored and time-tested employment law principles concerning disparate treatment in discipline. Defendant has simply never come to terms with the fact that Plaintiff presented at trial a tremendous amount of evidence that Defendant's workplace culture was awash in racial discrimination, Plaintiff was singled out for punishment because of his race, and race clearly was one motivating factor in Defendant's decision to discharge him.

Instead, Defendant extravagantly claims that this case represents "everything wrong with the legal system". Defendant has it exactly backwards; the legal system did its job, and only Defendant still cannot see that. Defendant's race-based double standard for discipline needlessly destroyed Plaintiff's career, despite Plaintiff being one of Defendant's most beloved and proficient teachers. Even his direct supervisor admitted that, "No one is able to teach his students the way he does." Yet when Plaintiff committed one alleged infraction – a lesser infraction, in fact, than his African-American co-workers committed innumerable times in the

¹ See, Exhibit 1, Court of Appeals Opinion dated October 28, 2014.

past without consequence -- he was summarily fired. This is why a racially diverse jury, which included two African-Americans, rendered a verdict for Plaintiff and against Defendant's reverse racial discrimination.

From July 12 through July 15, 2011, the parties tried Plaintiff's case to a Genesee County jury. The central truth trial revealed was that Defendant applied a flagrant double standard to its African-American and white employees, which allowed African-American employees to engage in racial joking and banter, while Plaintiff, who is white, was discharged for one incident of racial joking. The evidence demonstrated that Defendant's decisionmakers fired Plaintiff for remarks not even directly about race, while turning a blind eye to African-American employees who commonly engaged in racial banter, which included the use of the infamous "N" word.

As the Court of Appeals recognized, there is no mystery as to whether Defendant applied a double standard: Linda Caine-Smith, the principal at Linden Charter Academy and the woman who fired Plaintiff, explicitly endorsed a racial double standard. Corrine Weaver, the Dean at Linden Charter Academy², testified that in the midst of the decision to discharge Plaintiff, she told Caine-Smith that the racial comments of which Plaintiff was accused were commonplace at the school. Weaver testified that, in reply, Caine-Smith distinguished the other infractions on the basis of race, declaring: "*It happens among African-Americans and not the other way around.*" In its Application for Leave to Appeal, Defendant attempts to denigrate Weaver's testimony, characterizing it as a mere "interpretation," and denying that it is direct evidence of race discrimination. Defendant's characterization is completely inaccurate. The following is the relevant trial testimony of Dean Corrine Weaver:

Q. Under oath, I ask you this: "Did you tell Ms. Caine-Smith that a lot of people made racial jokes?"

² The Dean was the second highest position at Linden Charter Academy, after the Principal.

- A. I did not say a lot. I said it happened, and that's what's in my deposition.
- Q. You said it happens?
- A. That there were racial comments made, yes.
- Q. Okay. So you told Linda Caine-Smith that when you talked to her on November 3rd; right?
- A. Yes.
- Q. Okay. This is November 3rd, a few days before Craig was fired?
- A. Um hmm. Yes.
- Q. Now isn't it a fact that, when you said that, Caine-Smith responded by saying, "It happens among African-Americans and it's not the other way around"; right?
- A. Yes.³

In short, *Caine-Smith admitted*, while making the decision to discharge Plaintiff, that when it came to racial banter, she discriminated against white employees.

Not surprisingly, given Weaver's direct testimony and the abundant indirect evidence of racial discrimination also presented at trial, the jury, composed of both white and African-American jurors, returned a verdict that race was one motivating factor in Defendant's decision to discharge Plaintiff. The jury awarded Plaintiff \$50,120.00 in past economic damages and \$485,000.00 in future economic damages. Showing significant restraint, the jury also found that Plaintiff had suffered emotional distress, but awarded him no emotional distress damages.

Pre-trial, Defendant brought a Motion for Summary Disposition. During the trial, Defendant brought a Motion for a Directed Verdict. Post-trial, Defendant brought a Motion for Judgment Notwithstanding the Verdict (JNOV), New Trial, or in the Alternative, Remittitur. The trial court denied each motion. After the trial court entered judgment on the jury's verdict, the Defendant appealed the trial court's rulings to the Court of Appeals. On October 28, 2014,

³ Weaver, Tr Vol. 1, pgs. 154, 155.

the Court of Appeals issued its decision affirming the trial court in all respects. It is from this decision Defendant now makes Application for Leave to Appeal.

In its Application, Defendant claims Plaintiff has produced insufficient evidence that discrimination on the basis of race was one motivating factor in its decision to discharge Plaintiff. As this Brief will show, Plaintiff, in fact, produced extraordinary evidence that race was indeed one motivating factor in Defendant's discharge decision.

Under the Elliott-Larsen Civil Rights Act, a plaintiff may establish discrimination by direct or indirect evidence. *DeBrow v Century 21 Great Lakes*, 463 Mich 534, 539; 620 NW2d 836 (2001). In the case-at-bar, Plaintiff presented excellent direct and indirect evidence to support the jury's verdict. The direct evidence in this case is manifest. At trial, witness Corrine Weaver testified that decisionmaker, Linda Caine-Smith, explicitly told her, during the investigation that led to Plaintiff's discharge, that she held white employees and African-American employees to different standards of conduct. According to Weaver's testimony, when she informed Caine-Smith that African-American employees had also made racial statements and engaged in racial joking, Caine-Smith told her the situations were different because, "***It happens among African-Americans and not the other way around.***" As the case law demonstrates, and especially the Michigan Supreme Court decision in *DeBrow, supra*, Weaver's testimony is sufficient direct evidence of discrimination to preclude summary disposition, directed verdict and JNOV. This is time-tested and long-settled law. Nonetheless, Defendant goes beyond asking this Court to ignore precedent: it asks the Court to attack it by reversing the unanimous decision in *DeBrow*. There is nothing in this case to justify such drastic action.

Plaintiff also produced in this case excellent indirect evidence that race was a motivating factor in Plaintiff's discharge. Michigan law broadly outlines, as this Brief will describe, the evidence a plaintiff may present to establish an indirect evidence case of race discrimination.

Suffice to say, the trial record was replete with evidence that white and African-American employees received vastly different treatment for similar conduct. This – in combination with Caine-Smith’s discriminatory statements, Defendant’s biased investigation, and Plaintiff’s excellent work record -- easily established an issue of fact that race was a motivating factor in Defendant’s decision to discharge Plaintiff. The Court of Appeals decision thus correctly upheld the jury verdict based on both direct evidence and indirect evidence.

Defendant also claims in its Application for Leave that the trial court abused its discretion by admitting evidence that Defendant disclosed to Plaintiff’s prospective employers the conduct for which he was fired. Defendant argues that the evidence should not have been admitted because the statute under which Defendant made the disclosures, MCLA §380.1230b, releases a school district from liability “*for the disclosure*”. But Plaintiff did not sue Defendant for slander, or any other theory “*for the disclosure*”. Plaintiff sued Defendant for race discrimination. If the trial court had barred Plaintiff from mentioning that, after his discharge, whenever he applied for a teaching job he was rejected because the MCLA §380.1230b disclosure stated he had engaged in misconduct, he would have been unable to prove the damages that flowed from Defendant’s race discrimination. The trial court wisely steered a middle ground, by allowing the evidence, but clearly instructing the jury that Defendant was required by law to make the MCLA §380.1230b disclosures. Appellate courts assess allegations of evidentiary error under an abuse of discretion standard. *Campbell v Department of Human Services*, 286 Mich App 230, 235; 780 NW2d 586 (2009). Herein, the trial court deftly handled the issue of Defendant’s MCLA §380.1230b disclosures, and certainly did not abuse its discretion.

The Court of Appeals thus was correct in affirming all of the trial court’s rulings, as Defendant’s arguments on appeal have uniformly lacked legal merit. The jury’s verdict should stand, and Defendant’s Application for Leave to Appeal should be denied.

II. STANDARDS OF REVIEW

Defendant brings its Application for Leave to Appeal from the decision of the Court of Appeals to affirm the trial court's decisions to deny its motions for summary disposition pursuant to MCR 2.116(C)(10), for a directed verdict pursuant to MCR 2.516, and for Judgment Notwithstanding the Verdict, pursuant to MCR 2.610. A motion for summary disposition under MCR 2.116(C)(10) tests a claim's factual basis. *Old Kent Bank v Sobczak*, 243 Mich App 57; 620 NW2d 663 (2000). In considering such a motion, the court should evaluate the affidavits, pleadings, depositions, admissions and other evidence in the light most favorable to plaintiff. *Maiden v Rozwood*, 461 Mich 109; 597 NW2d 817 (1999). All inferences from the facts must be drawn in favor of the plaintiff. *Meyer v City of Centerline*, 242 Mich App 560, 574; 619 NW2d 182 (2000). Motions for summary disposition should be denied unless the court is convinced that the evidence presented, taken in the light most favorable to plaintiff, creates no genuine issue of material fact. *Id.* The standards governing motions for a directed verdict and JNOV are similar to those governing motions for summary disposition. In reviewing JNOV and directed verdict motions, the court must examine the evidence and all inferences that may be drawn from the evidence in the light most favorable to plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 681; 385 NW2d 586 (1986). If reasonable jurors could honestly reach different conclusions, the Court has no authority to substitute its judgment for that of the jury. *Id.* at 682-683.

The standards governing motions for summary disposition, directed verdict and JNOV are of particular importance in this case. Defendant, throughout its Application for Leave to Appeal, habitually takes all facts and inferences in the light most favorable to itself, not Plaintiff, and ignores the vast majority of facts most favorable to Plaintiff. Defendant's failure to present the facts consistently with the applicable standards governing this appeal, and the underlying

summary disposition, directed verdict and JNOV motions, fatally compromises the accuracy of Defendant's legal arguments, which flow from its flawed factual recitations.

III. PLAINTIFF'S COUNTER-STATEMENT OF GROUNDS FOR DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

Defendant does not specifically state the grounds on which it believes this Court should grant its Application for Leave to Appeal. From context, however, it appears that Defendant claims it is entitled to leave to appeal because its Application involves legal principles of major significance to the state's jurisprudence, pursuant to MCR 7.302(B)(3), and that failure to grant its Application will cause material injustice, pursuant to MCR 7.302(B)(5).

The legal principles guiding the trial court and Court of Appeals' decisions in this case are well-established. In affirming the trial court's rulings that there is a genuine issue of material fact that race was a motivating factor in Plaintiff's discharge, the Court of Appeals relied on the direct and indirect evidence methods of analysis that have guided Michigan courts for decades. Defendant, in large measure, seeks reversal of this jurisprudence, but provides little justification for such drastic action, other than its own self-interest.

Defendant also claims in its Application that the trial court abused its discretion by admitting evidence that Defendant disclosed to Plaintiff's prospective employers the conduct for which he was fired. Defendant argues that the evidence should not have been admitted because the statute under which Defendant made the disclosures, MCLA §380.1230b, releases a school district from liability "*for the disclosure*". But Plaintiff did not sue Defendant for slander, or any other theory, "*for the disclosure*". Plaintiff sued Defendant for race discrimination. The distinction is simple, and the trial court handled the issue perfectly. It allowed Plaintiff to submit evidence regarding the disclosure to prove damages, but instructed the jury that Defendant made

the disclosure because the law required it, and not for any improper purpose. The trial court's treatment of the issue was adroit and did not at all abuse its discretion.

Defendant also claims that if the Supreme Court does not grant its request for leave, it will suffer material injustice. The opposite is true. Plaintiff was a beloved and inspiring teacher. Nevertheless, the first time he made a joking racial comment similar to what the African-American employees made all the time, he was fired. Defendant's blatant racial double standard deprived Plaintiff of his career, and deprived his students of his love and commitment to them.

A racially diverse jury rendered a verdict in favor of Plaintiff, finding that race was a motivating factor in Defendant's decision to discharge Plaintiff. Defendant's last ditch effort to overturn the jury's verdict through this Application for Leave to Appeal should be denied because Defendant does not raise any issues that deserve this Court's attention.

IV. FACTS

Defendant's Background

Defendant is a charter school corporation with 71 outlets nationwide.⁴ Defendant operates Linden Charter Academy, located in Flint, Michigan. At all relevant times, Linda Caine-Smith was the principal at Linden Charter Academy;⁵ Corrine Weaver was Dean, the second highest position at the school;⁶ and Courtney Unwin was Employee Relations Manager.⁷ Caine-Smith and Unwin made the decision to discharge Plaintiff.⁸

⁴ Caine-Smith, Tr Vol. 2, pg. 194.

⁵ Weaver, Tr Vol. 1, pg. 152.

⁶ Weaver, Tr Vol. 1, pg. 139.

⁷ Unwin, Tr Vol. 3, pg. 5.

⁸ Unwin, Tr Vol. 3, pg. 43.

Defendant's Disciplinary Policy

Defendant distributed an employee handbook containing its disciplinary policy.⁹ According to the policy, discipline for an infraction could range from a verbal reminder to termination, depending upon "certain factors, including but not limited to the seriousness of the violation and whether it is a first violation or a recurrence."¹⁰ The fact that a given offense was not a recurrence was supposed to be a significant mitigating factor in administering discipline.¹¹ Plaintiff's alleged misconduct in this case was a first violation and not a recurrence.¹²

Plaintiff's Background and Excellent Employment Record

Plaintiff was born August 30, 1974¹³ and is Caucasian.¹⁴ He has been married to Karensa Hecht for ten years.¹⁵ The couple has three children, ages 1 through 6 years old.¹⁶ Plaintiff attended Saginaw Valley State University, where he obtained a bachelor's degree in elementary education and a master's degree in educational leadership.¹⁷ Plaintiff began working at Linden Charter Academy in January 2001.¹⁸ He started his career with Defendant as a first grade teacher and ended it as a third grade teacher.¹⁹ In addition, he provided training to other teachers and extra tutoring to students.²⁰

⁹ Weaver, Tr Vol. 1, pg. 157.

¹⁰ Weaver, Tr Vol. 1, pgs. 157-158.

¹¹ Weaver, Tr Vol. 1, pg. 159.

¹² Weaver, Tr Vol. 1, pg. 158.

¹³ Plaintiff, Tr Vol. 1, pg. 218.

¹⁴ Scott, Tr Vol. 1, pg. 191.

¹⁵ Karensa Hecht, Tr Vol. 1, pg. 210.

¹⁶ Karensa Hecht, Tr Vol. 1, pg. 210.

¹⁷ Plaintiff, Tr Vol. 1, pg. 222.

¹⁸ Plaintiff, Tr Vol. 1, pg. 222.

¹⁹ Weaver, Tr Vol. 1, pg. 128; Plaintiff, Tr Vol. 1, pgs. 223, 226.

²⁰ Plaintiff, Tr Vol. 1, pg. 223-224.

Plaintiff loved his students, and his students loved him in return.²¹ He described teaching as his personal calling.²² Plaintiff's performance appraisals as a teacher were all very good.²³ Plaintiff's immediate superior at the time of his discharge was Corinne Weaver. Weaver testified that Plaintiff was a good teacher with a positive outlook. She testified Plaintiff had a "very good attitude"²⁴ and expressed great confidence in Plaintiff's teaching skills, particularly with difficult students.²⁵ Plaintiff was also noteworthy for encouraging the involvement of parents with their children's education.²⁶

Plaintiff's students excelled on standardized tests of math, reading and language skills.²⁷ On Plaintiff's last evaluation prior to his discharge, Weaver exulted, "No one is able to teach his students the way he does."²⁸ Weaver testified that the other teachers looked to Plaintiff for advice and modeling, and he was well-liked by parents and the entire staff.²⁹ The vast majority of Plaintiff's students were African-American.³⁰ Prior to November 2009, Plaintiff had never exhibited any racial insensitivity and had always shown the utmost respect to African-Americans.³¹ Prior to his discharge, Plaintiff had never received any discipline of any kind.³²

²¹ Karensa Hecht, Tr Vol. 1, pg. 211.

²² Plaintiff, Tr Vol. 1, pg. 226.

²³ Trial Exhibit 1; Trial Exhibit 2; Trial Exhibit 3.

²⁴ Weaver, Tr Vol. 1, pg. 127.

²⁵ Weaver, Tr Vol. 1, pg. 128.

²⁶ Weaver, Tr Vol. 1, pg. 129.

²⁷ Weaver, Tr Vol. 1, pg. 130.

²⁸ Weaver, Tr Vol. 1, pg. 132.

²⁹ Weaver, Tr Vol. 1, pgs. 132, 163.

³⁰ Weaver, Tr Vol. 1, pg. 131.

³¹ Weaver, Tr Vol. 1, pg. , 128, 151; Scott, Tr Vol. 1, pg. 195.

³² Plaintiff, Tr Vol. 1, pg. 227.

On-going and Pervasive Racial Jokes and Racial Slurs at Defendant's School

Defendant has a written policy that racial statements must be reported and must be addressed.³³ This policy is supposed to be applied equally, whether the employee is Caucasian or African-American,³⁴ but this is not how it was enforced.

Weaver admitted to Plaintiff that she knew African-American employees at Linden Charter Academy told racial jokes or used racially offensive language "all the time".³⁵ Weaver testified she heard the "N" word used at the school on 2-3 occasions.³⁶ Weaver testified she heard racial banter by African-American employees on 20 other occasions.³⁷ Weaver herself was targeted racially. In the Fall of 2009, just before Plaintiff's discharge, an African-American employee named Tim Jones asked Weaver why she would be making fried pork chops as a white person.³⁸ 10-15 people heard this comment, including Plaintiff.³⁹ Jones received no discipline, even though Weaver reported the incident to Caine-Smith.⁴⁰ On another occasion, an employee named Kevelin Jones told Weaver she could not eat soul food because she is white.⁴¹ Kevelin Jones received no punishment.⁴² Kevelin Jones also told employee Lisa Code, "You can't do that [job] because you're white."⁴³ On yet another occasion, Clarence Scott, who was African-American, looked up at a mural of Dora the Explorer, a cartoon character,⁴⁴ on the wall of the school gym. Noting that her skin was dark, Scott stated that she should be named "Lacretia",

³³ Weaver, Tr Vol. 1, pg. 138.

³⁴ Weaver, Tr Vol. 1, pg. 138.

³⁵ Plaintiff, Tr Vol. 2, pg. 12.

³⁶ Weaver, Tr Vol. 1, pgs. 134, 177; Weaver, Tr Vol. 2, pg. 107.

³⁷ Weaver, Tr Vol. 1, pg. 134.

³⁸ Weaver, Tr Vol. 1, pg. 135-137.

³⁹ Weaver, Tr Vol. 1, pg. 137, 139.

⁴⁰ Weaver, Tr Vol. 1, pg. 137, 139.

⁴¹ Weaver, Tr Vol. 1, pg. 141.

⁴² Weaver, Tr Vol. 1, pg. 142.

⁴³ Code, Tr Vol. 2, pg. 100.

⁴⁴ Scott, Tr Vol. 1, pg. 197.

which Scott took to be an African-American name.⁴⁵ Several employees, including Plaintiff and Floyd Bell, who later complained about Plaintiff's alleged racial joking, witnessed Scott's comment.⁴⁶ After it was said, everyone laughed.⁴⁷ Scott received no punishment.⁴⁸

Defendant has attempted to downplay the amount of racial banter that existed at Linden Charter Academy, but the standard for evaluating evidence at this stage of the proceedings is that all facts and inferences must be taken in the light most favorable to Plaintiff. *Matras, supra. Taking the facts in the light most favorable to Plaintiff, it must be taken as fact that, at the time of Plaintiff's discharge, racial jokes and banter at Linden Charter Academy were pervasive and ongoing.* In this environment, it is easy to understand how an employee such as Plaintiff could come to believe that racial banter was acceptable.

On November 3, 2009, in the midst of the investigation of Plaintiff's alleged racial comments, Weaver informed decisionmaker Caine-Smith that other employees besides Plaintiff had made racial comments at Linden Charter Academy.⁴⁹ Caine-Smith responded that such language was not a concern as long as it happened, "*among African-Americans, and it's not the other way around.*"⁵⁰ Contrary to Defendant's claim, Weaver's testimony was quite explicit on this point. Weaver testified:

Q. Under oath, I ask you this: "Did you tell Ms. Caine-Smith that a lot of people made racial jokes?"

A. I did not say a lot. I said it happened, and that's what's in my deposition.

Q. You said it happens?

A. That there were racial comments made, yes.

⁴⁵ Scott, Tr Vol. 1, pgs. 191-192.

⁴⁶ Scott, Tr Vol. 1, pg. 191.

⁴⁷ Scott, Tr Vol. 1, pg. 198.

⁴⁸ Scott, Tr Vol. 1, pgs. 192-193.

⁴⁹ Weaver, Tr Vol. 1, pg. 154.

⁵⁰ Weaver, Tr Vol. 1, pg. 154-155; Weaver, Tr Vol. 2, pg. 109.

Q. Okay. So you told Linda Caine-Smith that when you talked to her on November 3rd; right?

A. Yes.

Q. Okay. This is November 3rd, a few days before Craig was fired?

A. Um hmm. Yes.

Q. Now isn't it a fact that, when you said that, Caine-Smith responded by saying, "It happens among African-Americans and it's not the other way around"; right?

A. Yes.⁵¹

Contrary to Defendant's depiction, Weaver clearly and explicitly testified that the distinction Caine-Smith made between Plaintiff and the other employees who made racial comments was that Plaintiff was white and the other employees were African-American.⁵² As stated, at this stage of the proceedings all facts must be taken in the light most favorable to Plaintiff. ***Thus, it must be taken as fact that Caine-Smith explicitly told Weaver the reason Plaintiff was being punished for his statements, while other employees were not punished for similar or worse statements, was that Plaintiff was white and the other speakers were African-American.***

Co-decisionmaker Unwin testified that she was also aware that African-American employees at Linden Charter Academy engaged in racial banter.⁵³ Plaintiff specifically told Unwin about the Dora the Explorer incident involving Clarence Scott.⁵⁴ Unwin agreed this statement was inappropriate, but decided not to investigate it.⁵⁵ To the present day, Scott has received no discipline as a result of his racial comments.⁵⁶ In fact, no one at the school has even

⁵¹Weaver, Tr Vol. 1, pgs. 154, 155.

⁵²Weaver, Tr Vol. 1, pg. 155.

⁵³Unwin, Tr Vol. 3, pg. 38.

⁵⁴Plaintiff, Tr Vol. 2, pg. 11; Scott, Tr Vol. 1, pg. 192.

⁵⁵Unwin, Tr Vol. 3, pg. 38.

⁵⁶Scott, Tr Vol. 1, pg. 192-193.

informed Scott that his comment was inappropriate.⁵⁷ Despite the widespread racial banter at the Linden Charter Academy, no employee ever received discipline, except for Plaintiff.⁵⁸

Incident in Question

The incident in question occurred in Plaintiff's classroom on November 3, 2009. In the front of the room were a whiteboard and computer tables. The students were seated at "centers," which were tables at which the students worked.⁵⁹ In addition to Plaintiff and the students, paraprofessional Floyd Bell was in the room.⁶⁰ Bell is African-American.⁶¹ Immediately before the incident, the students were transitioning to new stations during workshop time⁶² and it was "awful noisy".⁶³ At this time, Lisa Code, the Library Technology Assistant, entered the room to return computer tables she had borrowed.⁶⁴ Code asked Plaintiff whether he wanted a white table or a brown table.⁶⁵ Plaintiff believed Code's statement could be taken two ways, one of them being racial.⁶⁶ Plaintiff responded ironically with the intent of alerting Code to the potential double meaning, "Miss Code, you know I want a white table, white tables are better."⁶⁷ Plaintiff turned around to a student and said, "Right", who answered, "Right".⁶⁸ The child was physically in no position to have heard the preceding conversation or anything of a racial nature.⁶⁹ In the written statement Code drafted the day after the incident, she did not mention

⁵⁷ Scott, Tr Vol. 1, pg. 193.

⁵⁸ Caine-Smith, Tr Vol. 2, pg. 198.

⁵⁹ Plaintiff, Tr Vol. 1, pg. 229.

⁶⁰ Plaintiff, Tr Vol. 1, pg. 228.

⁶¹ Scott, Tr Vol. 1, pg. 191.

⁶² Plaintiff, Tr Vol. 1, pg. 229.

⁶³ Plaintiff, Tr Vol. 1, pg. 230.

⁶⁴ Plaintiff, Tr Vol. 1, pg. 228.

⁶⁵ Plaintiff, Tr Vol. 1, pg. 228.

⁶⁶ Plaintiff, Tr Vol. 2, pg. 36.

⁶⁷ Plaintiff, Tr Vol. 1, pg. 229.

⁶⁸ Plaintiff, Tr Vol. 1, pg. 229.

⁶⁹ Plaintiff, Tr Vol. 1, pg. 230.

anything about Plaintiff involving students in the banter.⁷⁰ Unwin later acknowledged there was never any evidence that any student heard Plaintiff's remarks.⁷¹ In its Application, Defendant distorts the Record in an attempt to depict Plaintiff as hurling racial slurs in front of school children. This is completely untrue. *At this stage of the proceedings the facts must be taken in the light most favorable to Plaintiff, and it thus must be taken as fact that no student heard or could have heard Plaintiff's statements to Code. Matras, supra.*

After about 30 seconds passed, Plaintiff made the additional comment that, "We can take all these brown tables and burn the brown tables."⁷² When Plaintiff made the statement, he was talking about the tables.⁷³ He denied adamantly this was a reference to race; he was merely referring to the fact that the brown tables were old and "just ugly".⁷⁴ *At this stage of the proceedings, it must be taken as fact that when Plaintiff was talking about burning the brown tables, he was literally talking about tables, and not race. Matras, supra.*

Initially, Bell did not seem to be offended by any of Plaintiff's remarks.⁷⁵ At trial, however, Bell and Code each claim they called a "foul" at the time of the incident. Plaintiff has consistently stated he did not hear any foul called.⁷⁶ Plaintiff then turned around and resumed teaching his class.⁷⁷ Code told Weaver she thought that Plaintiff was "kidding around" and she

⁷⁰ Code, Tr Vol II, pg. 78.

⁷¹ Unwin, Tr Vol III, pg. 53.

⁷² Plaintiff, Tr Vol. 1, pg. 229.

⁷³ Plaintiff, Tr Vol. 1, pg. 231.

⁷⁴ Plaintiff, Tr Vol. 2, pg. 38.

⁷⁵ Code, Tr Vol. 2, pg. 84.

⁷⁶ Plaintiff, Tr Vol. 1, pgs. 230, 233. Under the Defendant's informal "social code", if an employee is offended, he or she may call a "foul", after which the allegedly offending employee is supposed to give the offended employee two "ups", meaning two compliments.

⁷⁷ Plaintiff, Tr Vol. 2, pg. 7.

did not think he meant to make a racist statement, and Weaver agreed.⁷⁸ Plaintiff testified that, indeed, he was only kidding.⁷⁹

After the incident, Code had no intention of reporting it, because she thought Plaintiff and Bell were just engaging in banter.⁸⁰ But later that morning she encountered five teacher's aides, all of whom were African-American, who had hearsay knowledge of what Plaintiff said, and were upset.⁸¹ Later that day, Bell also reported Plaintiff's comments to Weaver.

After speaking with Code and Bell, Weaver called Plaintiff to her office.⁸² Plaintiff explained everything that happened during the incident and that his remark was only a joke.⁸³ Weaver did not think Plaintiff meant to make a racist statement.⁸⁴ Weaver admitted to Plaintiff statements like his "were made all the time" at the school.⁸⁵ She then related to him the incident in which Tim Jones said white people should not eat pork chops.⁸⁶ Weaver told Plaintiff she planned to address the issue of racial banter at the next staff meeting.⁸⁷ Plaintiff was nonetheless upset that Bell was offended⁸⁸ and asked to speak with him.⁸⁹

Weaver called Bell to her office.⁹⁰ Plaintiff and Bell talked about the incident. Bell said he had been offended,⁹¹ Plaintiff apologized,⁹² and the two men shook hands.⁹³ Weaver testified

⁷⁸ Weaver, Tr Vol. 1, pgs. 145, 147.

⁷⁹ Plaintiff, Tr Vol. 1, pg. 230

⁸⁰ Code, Tr Vol. 2, pg. 82.

⁸¹ Code, Tr Vol. 2, pg. 81-83.

⁸² Plaintiff, Tr Vol. 1, pg. 232.

⁸³ Plaintiff, Tr Vol. 1, pg. 232.

⁸⁴ Weaver, Tr Vol. 1, pg. 145.

⁸⁵ Plaintiff, Tr Vol. 2, pgs. 11-12.

⁸⁶ Plaintiff, Tr Vol. 2, pg. 12.

⁸⁷ Plaintiff, Tr Vol. 2, pg. 12.

⁸⁸ Scott, Tr Vol. 1, pg. 193.

⁸⁹ Weaver, Tr Vol. 1, pg. 149; Plaintiff, Tr Vol. 1, pg. 232.

⁹⁰ Weaver, Tr Vol. 1, pg. 149.

⁹¹ Plaintiff, Tr Vol. 1, pg. 232.

⁹² Weaver, Tr Vol. 1, pgs. 149, 151; Plaintiff, Tr Vol. 1, pg. 233.

⁹³ Weaver, Tr Vol. 1, pg. 150; Plaintiff, Tr Vol. 1, pg. 234.

Plaintiff was genuinely apologetic.⁹⁴ There seemed to be good will between the two men as they parted.⁹⁵ The situation was apparently resolved.⁹⁶

But when Caine-Smith became involved, everything changed. The following morning, November 4, 2009, Caine-Smith directed Plaintiff to draft a written statement about the incident.⁹⁷ Plaintiff essentially recounted the same version of events stated above. He also added that he said, "All brown tables should burn". Plaintiff did not remember making this remark, but Code told him he had, so he put it in his written statement so it did not look like he was trying to hide anything.⁹⁸ The same day, Plaintiff spoke with Courtney Unwin. Plaintiff informed Unwin that when he made the remark that brown tables should burn, he was talking about the tables, and was *not* using the colors of tables as a proxy for skin color. He told her that he made the statement because the white tables were brighter and more attractive than the brown tables.⁹⁹ Unwin told Plaintiff that Defendant was considering termination.¹⁰⁰

Later during November 4, 2009, Plaintiff approached Bell. Concerning their conversation, Plaintiff testified:

Q. What did you speak with Mr. Bell about?

A. I ah – I talked to him about how I was concerned about my job. And that, ya know, that we shook hands that, you know, I thought everything was okay.

Q. All right. Did you ask him to relay that information to the people who were investigating this?

A. Yes, I did. I just wanted him to be able to tell the whole truth.

Q. Now Craig, you understand you're under oath?

⁹⁴ Weaver, Tr Vol. 1, pg. 150.

⁹⁵ Weaver, Tr Vol. 1, pg. 151; Bell, Tr Vol. 2, pg. 159.

⁹⁶ Plaintiff, Tr Vol. 2, pg. 7.

⁹⁷ Plaintiff, Tr Vol. 2, pg. 9.

⁹⁸ Plaintiff, Tr Vol. 2, pg. 15.

⁹⁹ Defendant's Trial Exhibit 19.

¹⁰⁰ Plaintiff, Tr Vol. 2, pg. 19.

A. Yes I do.

Q. You raised your right hand yesterday but it still pertains today. Did you ever ask Mr. Bell to lie for you?

A. No, no I did not.

Q. Did you ever intend for Mr. Bell to lie for you?

A. No, I did not.¹⁰¹

Defendant alleges that Plaintiff violated the Defendant's employee handbook by speaking with Bell, and thereby interfering with Defendant's investigation.¹⁰² This is not true. First, Defendant's handbook says nothing about "interfering" with an investigation.¹⁰³ Defendant's employee handbook states only that the employee is "expected to fully cooperate with the investigation."¹⁰⁴ More fundamentally, the allegation Plaintiff interfered with the investigation is contrary to the testimony presented at trial. Plaintiff did not ask Bell to alter his statement dishonestly, but only to supplement it with truthful information. Unwin testified there was nothing wrong with Plaintiff wanting to make sure that all the facts came out during the investigation.¹⁰⁵ What Plaintiff wanted Bell to do was to add to his written statement to Caine-Smith and Unwin that the two men had resolved their differences during their meeting with Weaver.¹⁰⁶ In fact, Unwin admitted Plaintiff never asked anyone to lie.¹⁰⁷

Caine-Smith and Unwin could have learned firsthand that Plaintiff never interfered with their investigation had they bothered to ask him, *but they admit they never even spoke with*

¹⁰¹ Plaintiff, Tr Vol. 2, pg. 14.

¹⁰² See Plaintiff's Trial Exhibit 7, Defendant's Employee Handbook.

¹⁰³ See Plaintiff's Trial Exhibit 7, Defendant's Employee Handbook.

¹⁰⁴ See Plaintiff's Trial Exhibit 7, Defendant's Employee Handbook.

¹⁰⁵ Unwin, Tr Vol. 3, pg. 56.

¹⁰⁶ Plaintiff, Tr Vol. 2, pg. 14.

¹⁰⁷ Unwin, Tr Vol. 3, pgs. 55, 61.

*Plaintiff about this issue.*¹⁰⁸ The obvious inference is that Caine-Smith and Unwin simply did not care about Plaintiff's version of events because they had already made up their minds to fire him, whether he interfered with the investigation or not. *At this stage of the proceedings, all facts must be taken in the light most favorable to Plaintiff, and it must therefore be taken as fact that Plaintiff never asked Bell to lie, either explicitly or implicitly, and never interfered with Defendant's investigation.*¹⁰⁹ *Matras, supra.*

Discharge

Plaintiff was terminated on November 5, 2009.¹¹⁰ Caine-Smith and Unwin telephoned Plaintiff and told him that he was being fired because he impeded Defendant's investigation.¹¹¹ Plaintiff had never heard this allegation before and had no idea what they were talking about.¹¹² After Plaintiff's discharge, Weaver wrote Plaintiff a glowing letter of recommendation,¹¹³ but two days later she had to ask for it back, on orders from Defendant.¹¹⁴ At the time of his discharge from Defendant's employment, Plaintiff was earning \$51,000.00 annually.¹¹⁵

Plaintiff's Vigorous Efforts to Mitigate His Damages

Plaintiff began his efforts to mitigate his damages immediately. In December 2009, Plaintiff obtained work for 2-3 weeks as a substitute teacher at the Saginaw Preparatory Academy, earning \$100 per day.¹¹⁶ Shortly after he began his job with Saginaw Preparatory Academy, Plaintiff was involved in an accident.¹¹⁷ The accident required stitches, but Plaintiff

¹⁰⁸ Plaintiff, Tr Vol. 2, pg. 20; Unwin, Tr Vol. 3, pg. 58.

¹⁰⁹ Plaintiff, Tr Vol. 2, pg. 14; Bell, Tr Vol. 2, pg. 164.

¹¹⁰ Plaintiff, Tr Vol. 2, pg. 19.

¹¹¹ Plaintiff, Tr Vol. 2, pg. 20.

¹¹² Plaintiff, Tr Vol. 2, pg. 20.

¹¹³ Plaintiff's Trial Exhibit 11.

¹¹⁴ Weaver, Tr Vol. 1, pgs. 164-165.

¹¹⁵ Plaintiff, Tr Vol. 1, pg. 226.

¹¹⁶ Plaintiff, Tr Vol. 2, pgs. 22, 59.

¹¹⁷ Plaintiff, Tr Vol. 2, pg. 22.

refused medication.¹¹⁸ The following day Plaintiff developed a painful headache.¹¹⁹ Plaintiff asked his mother-in-law for a pain reliever and she offered him Vicodin.¹²⁰ Plaintiff took the medicine, not knowing that it required a prescription.¹²¹ Plaintiff has never taken illegal street drugs and has never had a drug problem.¹²² As a result of taking the Vicodin, Plaintiff failed a drug test.¹²³ Prior to this time, Plaintiff's supervisor at Saginaw Preparatory Academy told him she was interested in making him a permanent employee, but she had not interviewed him and no job offer had been extended.¹²⁴ Saginaw Preparatory Academy had also not received Defendant's disclosure pursuant to §380.1230b concerning Plaintiff's alleged misconduct.¹²⁵ Had Plaintiff received the full-time teaching position at Saginaw Preparatory Academy, he would have earned \$30,000.00 per year.¹²⁶

After Saginaw Preparatory Academy, Plaintiff worked a number of stints as a substitute teacher at other schools.¹²⁷ Plaintiff was a substitute teacher in the Lake Fenton School District for one month, working 2-4 days per week, and earning \$75 per day.¹²⁸ Plaintiff next worked for one month in the Flushing School District, where he earned \$75 per day. Plaintiff even took to selling items on eBay, through which he earned \$3,000-\$4,000.¹²⁹

¹¹⁸ Plaintiff, Tr Vol. 2, pg. 22.

¹¹⁹ Plaintiff, Tr Vol. 2, pg. 22.

¹²⁰ Plaintiff, Tr Vol. 2, pg. 22.

¹²¹ Plaintiff, Tr Vol. 2, pg. 23.

¹²² Frances Hecht, Tr Vol. 1, pg. 208; Plaintiff, Tr Vol. 2, pg. 23.

¹²³ Plaintiff, Tr Vol. 2, pg. 23.

¹²⁴ Plaintiff, Tr Vol. 2, pg. 23.

¹²⁵ Plaintiff, Tr Vol. 2, pg. 23.

¹²⁶ Plaintiff, Tr Vol. 2, pg. 24.

¹²⁷ Plaintiff, Tr Vol. 2, pg. 24.

¹²⁸ Plaintiff, Tr Vol. 2, pgs. 21-22.

¹²⁹ Plaintiff, Tr Vol. 2, pg. 27.

To obtain his substitute teaching positions, Plaintiff worked through a firm named PESG, a contractual firm for substitute teachers.¹³⁰ He was, however, unable to maintain any of the positions long-term. This was because of the MCLA §380.1230b disclosures. MCLA §380.1230b requires a teacher's former employers to communicate to prospective employers any misconduct in which the teacher was involved during his or her employment. Plaintiff testified that whenever a new district at which he was substitute teaching received the disclosure, he was told his "services were no longer needed".¹³¹ Eventually, PESG informed Plaintiff all of the districts in the Genesee County Consortium had turned down his teaching services because of the MCLA §380.1230b disclosure.¹³²

On May 16, 2011, Plaintiff began working full-time at Dow Corning Health Industries Material Site in Hemlock, Michigan, a non-teaching position, where he earned at the time of trial \$14 dollars per hour, which when converted to an annual wage is \$29,120.00 per year.¹³³ This is approximately the same wage he would have earned if he had obtained the teaching position at Saginaw Preparatory Academy.¹³⁴

V. LEGAL ARGUMENT

This is a one-count lawsuit, in which Plaintiff alleged race discrimination against Defendant in violation of the Elliott-Larsen Civil Rights Act (ELCRA). At trial, the jury rendered a verdict that one motivating factor in Defendant's decision to discharge Plaintiff was his race and awarded Plaintiff damages of \$535,120.00. The Court of Appeals affirmed the verdict, and Defendant has now made application for leave to appeal to the Michigan Supreme Court. In its Application, Defendant alleges the trial court erred in two respects: (1) by denying

¹³⁰ Plaintiff, Tr Vol. 2, pg. 24.

¹³¹ Plaintiff, Tr Vol. 2, pgs. 24, 67.

¹³² Plaintiff, Tr Vol. 2, pg. 25.

¹³³ \$14 per hour x 40 hours x 52 weeks = \$29,120.00 annually.

¹³⁴ Plaintiff, Tr Vol. 2, pgs. 26-27; Plaintiff's Closing Argument, Tr Vol. 3, pg. 123.

its motions for summary disposition, directed verdict and JNOV in each of which Defendant argued there existed no genuine issue of material fact that race was a motivating factor in its decision to discharge Plaintiff; and (2) by admitting evidence concerning the disclosures Defendant made pursuant to MCLA §380.1230b. This brief will address these issues *seriatim*.

A. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTIONS FOR SUMMARY DISPOSITION, DIRECTED VERDICT AND JNOV BECAUSE THERE IS A GENUINE ISSUE OF MATERIAL FACT, AND A REASONABLE JUROR COULD DETERMINE, THAT RACE WAS A MOTIVATING FACTOR IN DEFENDANT'S DECISION TO FIRE PLAINTIFF.

This case involves a reverse race discrimination claim under Michigan's Elliott-Larsen Civil Rights Act (hereinafter "ELCRA"). To prevail in an ELCRA race discrimination claim, a plaintiff need only show that race was "one of the reasons for plaintiff's discharge." Race does not have to be "the only reason or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to discharge the plaintiff." *Matras, supra*, at 682.

Under ELCRA, discrimination may be established either by direct or indirect evidence. *DeBrow, supra*, at 539. A court should deny a motion for summary disposition, directed verdict or JNOV if either direct or indirect evidence would allow a fact-finder to conclude the employer's stated reason for the discharge is pretext for discrimination. *Town v Michigan Bell*, 455 Mich 688, 698; 568 NW2d 64 (1997). In this case, the Court of Appeals correctly affirmed the trial court's denial of Defendant's motions for summary disposition, directed verdict and JNOV based upon both direct and indirect evidence of race discrimination.

1. Plaintiff Presented Sufficient Direct Evidence of Race Discrimination to Preclude Summary Disposition, Directed Verdict and JNOV.

Defendant asserts that Plaintiff failed to produce evidence showing race was a motivating factor in his discharge. On the contrary, the evidence at trial revealed that Defendant maintained

a workplace suffused with racial double standards and that Plaintiff's race was a key factor in Defendant's decision to discharge him.

First, Plaintiff presented direct evidence that Defendant's decisionmakers considered Plaintiff's race in their decision to discharge Plaintiff. Direct evidence is evidence that, if believed, requires, without resort to additional inferences, the conclusion that unlawful discrimination was at least a motivating factor in the challenged employment decision. *Matras*, *supra*, 683; *Lyle v Malady*, 209 Mich App 179, 185 *rev'd on other grounds* 458 Mich 153, 579 NW2d 906 (1998), 530 NW2d 135 (1995);¹³⁵ *Weburg v Franks*, 229 F3d 514, 522 (6th Cir 2000).¹³⁶ Where there is direct evidence of discrimination, the shifting burden analysis the U.S. Supreme Court established in *McDonnell Douglas Corp v Green*, 411 US 792, 802-805; 93 S Ct 1817; 36 L Ed2d 668 (1973) is inapplicable. *DeBrow*, 539. One discriminatory statement by a decisionmaker constitutes direct evidence of discrimination sufficient to preclude summary judgment. See *DeBrow*, *supra*; *Downey v Charlevoix County Bd of Road Comrs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).

The Michigan Supreme Court decision in *DeBrow* is controlling authority in this case. In *DeBrow*, an age discrimination case, this Court faced a fact situation very similar to the case-at-bar, in which the decisionmaker stated, during the meeting at which he discharged the plaintiff, that the plaintiff was "too old for this shit". The Court held that the decisionmaker's one

¹³⁵ In its Application for Leave to Appeal, Defendant implies that Michigan adopted the aforesaid standard for evaluating direct evidence as recently as *Hazle v Motor Co*, 464 Mich 456; 628 NW2d 515 (2001). The reason Defendant conveys this impression is to mislead this Court into thinking that the direct evidence standard existing in Michigan law today was adopted after *DeBrow*, and that *DeBrow* was decided according to some other standard. As the 1986 *Matras* and the 1995 *Lyle* decisions demonstrate, Defendant's insinuation is false. The standard for direct evidence that *DeBrow* followed, and that the Court of Appeals in the case-at-bar followed, is the same standard the *Matras* court followed twenty-nine years ago.

¹³⁶ Michigan Courts view Federal Title VII cases as persuasive authority in interpreting the Elliott-Larson Civil Rights Act. *Harrison v Olde Financial*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

statement was sufficient to establish a genuine issue of fact through direct evidence that age was a factor in the decision to discharge the plaintiff. Similarly, the Michigan Court of Appeals ruled in *Downey, supra*, another ELCRA age discrimination case, that even comments made outside the context of the discharge decision could constitute direct evidence. Thus, the Court of Appeals held that the decisionmaker's comments about "getting rid of older employees" because they "weren't doing the job" and "If I have to, I will get rid of the older guys - you older guys and replace you with younger ones" were sufficient direct evidence of discrimination to preclude summary disposition. See also *Lamoria v Health Care & Retirement Corp*, 230 Mich App 801, 810-811; 584 NW2d 589 (1998), adopted 233 Mich App 560; 593 NW2d 699 (1999). (A decisionmaker's racial slurs establish sufficient direct evidence of discrimination to preclude summary disposition.)

Defendant argues that the federal law with regard to direct evidence is different than Michigan law. This is false; federal courts are in complete accord with Michigan law. *DiCarlo v Potter*, 358 F3d 408 (6th Cir 2004) is a leading Sixth Circuit case as to when statements made by an employer constitute direct evidence. The *DiCarlo* Court began its analysis by defining direct evidence in exactly the same way Michigan law does. The Court held, "Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Consistent with this definition, direct evidence of discrimination does not require a factfinder to draw any inferences in order to conclude that the challenged employment action was motivated at least in part by prejudice against members of the protected group." *DiCarlo*, 416. In *DiCarlo*, the decisionmaker called the plaintiff a "dirty wop" and stated, "There are 'too many dirty wops' at the workplace." No other references to the plaintiff's nationality appeared on the record. The decisionmaker expressed no direct intention to terminate the plaintiff because of his nationality. The Sixth Circuit ruled the statements were

sufficient to establish an issue of fact that nationality motivated the discharge.

The 6th Circuit also addressed the direct evidence issue in *Wexler v White*, 317 F3d 564 (6th Cir 2003). In *Wexler*, the decisionmaker made age-discriminatory remarks such as, “You’re 60-years-old, aren’t you, Don? . . . [W]ell, we both have in the business 117 years. You don’t need the aggravation, stress of management problems”, and referred to the plaintiff as “a bearded, grumpy old man”. The 6th Circuit ruled that the plaintiff had presented enough direct evidence that his age was a motivating factor in his discharge to preclude summary judgment. Finally, the Sixth Circuit in *Talley v Bravo Pitino Restaurant, Ltd.*, 61 F3d 1241 (6th Cir 1995) addressed a fact situation in which a restaurant’s general manager “occasionally made disparaging comments about blacks.” The Court held that such racial statements made by a manager were direct evidence of discrimination sufficient to preclude summary judgment. *Id.*, 1249.

In the case-at-bar, Plaintiff presented sufficient direct evidence of discrimination to preclude summary disposition, a directed verdict, or JNOV. Corrine Weaver testified decisionmaker Caine-Smith explicitly stated, during the investigation of Plaintiff’s alleged misconduct, that she held white and African-American employees to different standards regarding racial comments and banter. Caine-Smith told Weaver such language was not a disciplinary concern as long as it was “amongst African-Americans, and it’s not the other way around.” The comment – which explicitly endorsed discrimination against white employees as compared to African-American employees – was made by a decisionmaker during the time, and in the context of the decision to discharge Plaintiff. See, *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289; 624 NW2d 212 (2001). The statement was not ambiguous, but clearly articulated a discriminatory intent. Therefore, applying the precedent set in *DeBrow*, *Downey*, *Lamoria*, *DiCarlo*, *Talley*, *Wexler* and *Krohn*, Plaintiff successfully established, based on direct

evidence alone, a genuine issue of material fact that race was a motivating factor in his discharge.

Defendant argues that Caine-Smith's statement that racial banter was not a disciplinary concern if it was "amongst African-Americans, and it's not the other way around" is not direct evidence. Defendant argues Weaver's testimony required a factfinder to infer what Caine-Smith actually said from what Weaver believed "Caine-Smith's unremembered statement meant." This is nonsense. There is no testimony that Weaver did not remember Caine-Smith's statement. She testified she did remember it. In addition, she testified that Caine-Smith specifically stated in the context of Plaintiff's discharge that she had a double-standard for white and African-American employees. No inferences were required: if Weaver's testimony was true, then race was a motivating factor in the Defendant's decision to discharge Plaintiff.

But even if it is assumed, *arguendo*, that Weaver's testimony was subject to more than one interpretation, the factual issue concerning which interpretation was correct was for the jury to decide. The Michigan Supreme Court's holding in *DeBrow, supra*, is directly on point and dispositive:

The present case falls outside that common pattern, however. Here, the plaintiff has direct evidence of unlawful age discrimination. The plaintiff testified during his deposition that, in the conversation in which he was fired, his superior told him that he was "getting too old for this shit." We recognize that this remark may be subject to varying interpretations. It might reasonably be taken as merely an expression of sympathy that does not encompass a statement that the plaintiff's age was a motivating factor in removing him from his position as an executive. However, it is well established that, in reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we must consider the documentary evidence presented to the trial court "in the light most favorable to the nonmoving party." According to the plaintiff's deposition testimony, the remark was made during the conversation in which the plaintiff's superior informed him that he was being fired. Considered in the light most favorable to the plaintiff, this remark could be taken as a literal statement that the plaintiff was "getting too old" for his job and this was a factor in the decision to remove him from his position. While a factfinder might be convinced by other evidence regarding the circumstances of the plaintiff's removal that it was not motivated in any part by the plaintiff's age and that the facially

incriminating remark was no more than an expression of sympathy, such weighing of evidence is for the factfinder . . . *DeBrow*, 538 (citations omitted).

Thus, under Michigan law, if one reasonable interpretation of a statement is sufficient to constitute direct evidence, then summary disposition, directed verdict or JNOV is precluded, even if the statement may be subject to varying interpretations.

Defendant asserts, however, that the long chain of state and federal authority cited in this brief, which includes *DeBrow*, *Downey*, *Lamoria*, *DiCarlo* and *Wexler*, conflicts with the definition of direct evidence as evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the challenged employment decision. This is simply wrong. Defendant's mistake is in confusing a jury's determination of a fact with the drawing of an additional logical inference. First, it is important to realize what is meant by an "inference". According to the Meriam-Webster Dictionary, an inference is: "The act of passing from one proposition, statement, or judgment considered as true to another whose truth is believed to follow from that of the former." So, if Sally hears the mailbox close and her dog bark at the same time, she can infer the mail carrier just delivered the mail. She did not see anything directly, but she reached a conclusion anyway. This is an inference. The direct evidence in this case requires no inference. Weaver testified that Caine-Smith stated directly to her that racial statements made by African-Americans were not a disciplinary concern because they occurred "amongst African-Americans, and it's not the other way around." This is an explicit statement by Caine-Smith, which Weaver personally observed, that she (Caine-Smith) held employees to different standards based on the employee's race. Furthermore, the comment – which endorsed discrimination against white employees as compared to African-American employees – was made while the two women were discussing the decision to discipline Plaintiff.

As with all testimony, the jury still had to determine whether Weaver's recollection was credible and accurate. It is possible it was not, although it is difficult to imagine what Weaver's motive would have been to make up a lie that worked to the detriment of her own employer. In any event, the jury's determination that Weaver's testimony was true is a straight-forward determination of fact. It was not an inference from the evidence because the jury was not required to deduce anything from its factual determination. Weaver's testimony spoke for itself; if her testimony was true, then Caine-Smith discriminated against Plaintiff on the basis of race. Based on Caine-Smith's statement, a reasonable juror could conclude that Caine-Smith told Weaver the truth: when it came to disciplining employees for making racial comments, she discriminated on the basis of race.

If, as Defendant suggests, this Court were to change the law and adopt an even higher standard for direct evidence than already exists, the only evidence that could pass muster would be sworn testimony of a decision-maker herself that race was a factor in the contested adverse action. Needless to say, this is not now the law, and there is no good argument that it should become the law. The trial court thus was correct in denying Defendant's motions for summary disposition, directed verdict and JNOV based on direct evidence of race discrimination.

2. Plaintiff Presented Sufficient Indirect Evidence of Race Discrimination to Preclude Summary Disposition, a Directed Verdict and JNOV.

In addition to the direct evidence Plaintiff presented at trial, there was also abundant indirect evidence that Defendant singled out Plaintiff for discharge, in part, because of his race.

In the absence of direct evidence, a plaintiff is entitled to prove his case using indirect evidence. Classically, courts use the *McDonnell Douglas* burden-shifting analysis.¹³⁷ To establish a prima facie indirect evidence case under *McDonnell Douglas*, the plaintiff must

¹³⁷ See, *McDonnell Douglas Corp v Green*, 411 US 792, 802-805; 93 S Ct 1817; 36 L Ed2d 668 (1973).

present admissible evidence that he (1) is a member of a protected class; (2) suffered an adverse employment action; (3) was qualified for the position; and (4) was discharged under circumstances that give rise to an inference of unlawful discrimination. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). Plaintiff's burden in establishing a prima facie case is not intended to be onerous. *Majewski v Automatic Data Processing*, 274 F3d 1106, 1113 (6th Cir 2001).

Defendant argues in its Application that Plaintiff did not establish the fourth element of the prima facie case because Plaintiff was not treated less favorably than similarly situated co-workers. Defendant primarily argued that Plaintiff was not similarly situated to his African-American co-workers because their conduct was not of "comparable seriousness".¹³⁸ In fact, Plaintiff produced at trial extensive evidence that the numerous African-American employees who commonly used racial or racist language engaged in conduct of comparable seriousness, and were thus similarly-situated to Plaintiff.

In *Ercegovich v Goodyear Tire Company*, 154 F3d 344 (6th Cir 1998), the Sixth Circuit stated that to be similarly-situated:

The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, as this court has held in *Pierce*, the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." (Emphasis in the original).

In *Jackson v Fedex Corporate Services, Inc*, 518 F3d 388, 396-397 (6th Cir 2008), the Sixth Circuit stated that an overly narrow application of the similarly situated standard does not serve the purposes of the civil rights statutes. Thus, it held that for two instances of conduct to be the same without such differentiating or mitigating circumstances to distinguish them, the conduct must only be of *similar*, not identical, kind and severity. *Clayton v Meijer, Inc*, 281 F3d 606,

¹³⁸ See, Defendant's Brief on Appeal, pg. 28.

611 (6th Cir 2002). The Sixth Circuit has held that in comparing employment discipline decisions, “precise equivalence in culpability between employees” is not required. Rather, the plaintiff must simply show that the employees were engaged in misconduct of “comparable seriousness.” *Hollins v Atlantic Co*, 188 F3d 652, 659 (6th Cir 1999).

In accord with the federal courts, Michigan courts have held that, to establish he is similarly situated to another employee outside the protected classification, the plaintiff must show that the comparator engaged in conduct of “comparable seriousness”:

[T]he individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct *without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it . . .*

Of course, precise equivalence in culpability between employees is not the ultimate question: as we indicated in *McDonnell Douglas*, an allegation that other employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained . . . is adequate to plead an inferential case that the employer's reliance on his discharged employees misconduct as grounds for terminating him was merely a pretext. *Venable v General Motors*, 2001 WL 682483, pgs. 2-3 (Mich App).

The 7th Circuit Court of Appeals further elaborated on the “comparable seriousness” standard:

Similarly situated employees must be directly comparable to the plaintiff in all material respects, but they need not be identical in every conceivable way. We are looking for comparators, not clones. So long as the distinctions between the plaintiff and the proposed comparators are not so significant that they render the comparison effectively useless, the similarly-situated requirement is satisfied. The question is whether members of the comparison group are sufficiently comparable to the plaintiff to suggest that the plaintiff was singled out for worse treatment.

This flexible standard reflects the Supreme Court's approach to Title VII in *McDonnell Douglas* and its progeny. To offer a prima facie case of discrimination under the indirect method, the plaintiff's burden is not onerous. The Supreme Court never intended the requirements to be rigid, mechanized, or ritualistic . . . but merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. The Court has cautioned that precise equivalence . . . between employees is not the ultimate question. The touchstone of the similarly-situated inquiry is simply whether the employees are “comparable.”

Whether a comparator is similarly situated is usually a question for the fact-finder, and summary judgment is appropriate only when no reasonable fact-finder could find that

plaintiffs have met their burden on the issue. There must be enough common factors... to allow for a meaningful comparison in order to divine whether intentional discrimination was at play. The number of relevant factors depends on the context of the case. In the usual case a plaintiff must at least show that the comparators (1) dealt with the same supervisor, (2) were subject to the same standards, and (3) engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them. This is not a magic formula, however, and the similarly-situated inquiry should not devolve into a mechanical, one-to-one mapping between employees. *Coleman v Donahoe*, 667 F3d 835, 846-847 (7th Cir 2012). (Citations and internal quotations omitted).

Taking the facts in the light most favorable to Plaintiff, there is more than enough evidence that the racial statements and slurs Plaintiff's co-workers made were of equal – or greater – seriousness than Plaintiff's. In this case, Plaintiff admitted that he stated, "Miss Code, you know I want a white table, white tables are better."¹³⁹ Plaintiff also testified that 30 seconds later he said brown should burn, but that this statement had nothing to do with race, and only pertained to the fact that the brown tables at the school were old and ugly. During the investigation, Plaintiff told Unwin that only the first statement had anything do with race. On appeal, all facts and inferences must be taken in the light most favorable to Plaintiff, and therefore Plaintiff's testimony must be taken as true.

So the question is, were any of the statements Plaintiff's African-American co-workers made of comparable seriousness to Plaintiff's remark? There is a genuine issue of material fact they were. Weaver testified she heard Plaintiff's African-American co-workers make racial comments on at least twenty occasions. Critically, three of these occasions involved the use of the word "nigger". The "N" word is perhaps the most reviled word in the English language. It is a racial slur "irrespective of its common usage and without regard for the race of those who use it." *NLRB v Foundry Div. of Alcon Indus.*, 260 F3d 631, 635 (6th Cir 2001). Because Plaintiff never used the "n" word, his conduct may not have been exactly the same as his comparators.

¹³⁹ Plaintiff, Tr Vol. 1, pg. 229.

But the inquiry is whether there are comparators, not “clones”. *Coleman, supra*. So long as the distinctions between the plaintiff and his comparators are not “so significant that they render the comparison effectively useless” they do not prevent a plaintiff from making out a prima facie case. The standard is *comparable* seriousness. It is difficult to imagine how Plaintiff’s joking about white tables being better than brown tables is more serious than the use of the word “nigger”, in addition to the widespread racial statements and jokes made by many other employees at Linden Charter Academy.

Defendant’s counter-arguments are uniformly flawed. Defendant first argues that the comparators were not in a classroom when they made their racist comments and, so, evidently, were not overheard by children. But no child overheard Plaintiff’s comment, either. As decision-maker Unwin admitted, there is literally no evidence in this case that any child overheard Plaintiff’s comments. Plaintiff testified that it was not physically possible that the children could have heard the comments and Defendant received no complaints from parents or children.

Defendant also argues that Plaintiff’s remark generated a complaint to the administration, triggering Defendant’s obligation to investigate, while the many racial comments African-American employees made did not generate a complaint. The truth is that Defendant’s argument supports Plaintiff’s, not Defendant’s, case. One construction of the evidence is that racial banter and joking by African-American employees was so rampant and accepted that no one even bothered to complain. In any event, *the evidence is clear that the administration was well aware that racial comments and joking were widespread at the school*, and this should have triggered administrative action in the same way Plaintiff’s conduct did. As the Court of Appeals noted:

It is true that plaintiff’s remarks appear to be the only ones that generated a complaint that was forwarded to the principal. However, Unwin, defendant’s employee relations manager (and the second party involved in the decision to terminate plaintiff) testified

that Weaver had an obligation to report all serious racial remarks, including the use of the “n” word, even if it was spoken by an African-American individual and it was incorrect for her to have failed to do so.¹⁴⁰

Weaver testified that she herself was on the receiving end of at least two negative racial comments, and she even called a foul on the commenters. Defendant, however, issued those offenders no discipline.

Defendant also argues that Plaintiff’s comment, “brown should burn” is different from all the other comments because it had violent overtones. But in making this argument, Defendant takes the facts in the light most favorable to itself, rather than Plaintiff. Plaintiff testified that his comment that “brown should burn” was a comment directed at the tables, not at African-Americans, and that he informed decisionmaker Unwin of this fact. This is certainly in keeping with Plaintiff’s employment record, which was completely devoid of any hint of racism. But even if it is accepted that Plaintiff’s comment referred to brown people, rather than brown tables, it is still difficult to see how this is worse than calling someone a “nigger”, which is synonymous with violence and dehumanization.

Defendant also argues that Plaintiff was a teacher, while the numerous other offenders were non-teachers. But, in evaluating whether there exists an issue of fact that two or more individuals are comparators, the trial court should look at all *relevant* aspects of the comparison, not just any distinction that can be made. *Ercegovich, supra*. While some work rules may apply to some employees but not others, there is no evidence in this case that Defendant’s work rules against the use of racially-charged language applied only to teachers, or that the work rule was less of a concern for other positions. While in practice the work rule applied only to Plaintiff, according to Defendant’s employee handbook the work rule was plenary and not position-specific. Since the work rule applied to everyone, regardless of staff position, the employment

¹⁴⁰ Exhibit 1, Court of Appeals decision dated October 28, 2014.

position of the alleged offender was not a relevant difference between Plaintiff and his comparators.

Finally, Defendant argues that Plaintiff interfered with Defendant's investigation, while his comparators did not. Defendant's argument is easily dismissed, because Defendant completely fails to acknowledge that there is an issue of fact that Plaintiff *did not* interfere with Defendant's investigation, and that this rationalization for discharge was instead pretext for discrimination. At trial, the decisionmakers testified they believed Plaintiff interfered with the investigation by pressuring Bell to lie on Plaintiff's behalf. But Plaintiff did not ask Bell to lie, only to supplement his statement to inform Caine-Smith and Unwin that Plaintiff had apologized to Bell and the two men had parted ways on good terms. At no time did Plaintiff ask Bell to lie, and Unwin and Caine-Smith admitted they knew this. Unwin also testified there was absolutely nothing wrong with Plaintiff trying to bring out all the facts. At this stage of the proceedings, the facts must be taken in the light most favorable to Plaintiff, not Defendant. Consequently, it must be taken as fact that Plaintiff *did not* interfere with Defendant's investigation. Obviously, then, Plaintiff's alleged interference is not a distinction between Plaintiff and his comparators.

Having answered each of Defendant's objections, Plaintiff has satisfied the fourth element of his prima facie case by establishing an issue of fact that Defendant treated him less favorably than similarly situated co-workers. This approach to establishing a prima facie case is not exclusive, however. In *Blair v Henry Filters*, 505 F3d 517 (6th Cir 2008), the Sixth Circuit considered whether the plaintiff had sufficient evidence to establish a prima facie case without evidence of more favorable treatment of similarly situated co-workers. In *Blair*, the plaintiff instead offered age discriminatory statements as a basis for his prima facie case. Specifically, the plaintiff offered evidence that one of the decisionmakers stated, outside the context of the discharge decision, that the plaintiff was too old to handle an account and was the "old man on

the sales force". The Sixth Circuit began its analysis by noting, "Generally, at the summary judgment stage, a plaintiff's burden is merely to present evidence from which a reasonable jury could conclude that the plaintiff suffered an adverse employment action under circumstances which give rise to an inference of unlawful discrimination." *Id.* The Court then held:

We must keep in mind, however, that there are various context-dependent ways by which plaintiffs may establish a *prima facie* case, and not rigid requirements that all plaintiffs with similar claims must meet regardless of context Each of [the plaintiff's supervisor's] three statements discussed above is sufficient circumstantial evidence to create a genuine issue of material fact that Henry Filters dismissed Blair because of his age. *Blair*, 529-530.

In the case-at-bar, Plaintiff argued that Caine-Smith's statements, made *within the context of the discharge decision*, that she viewed racial remarks made by white employees differently than the same statements made by African-American employees, is direct evidence of race discrimination. But even if it does not rise to the level of direct evidence, it certainly rises to the level of circumstantial evidence, and is therefore, under the authority of *Blair*, sufficient to satisfy the fourth element of Plaintiff's *prima facie* case.

Once Plaintiff establishes a *prima facie* indirect evidence case, the burden shifts to Defendant to articulate a legitimate non-discriminatory reason for Defendant's decision to discharge him. Defendant claims it discharged Plaintiff for making racially inappropriate statements and interfering with the subsequent investigation. The burden thus shifts back to Plaintiff to establish a genuine issue of material fact that Defendant's proffered non-discriminatory reason for firing Plaintiff is pretext.

Pretext may be shown by establishing an issue of fact that Defendant's proffered reason for the discharge has: (1) no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct. *Dubey v Stroh Brewery Co.*, 185 Mich App 561, 565-566; 462 NW2d 758 (1990); *Wexler*, 576. While a court

may not substitute its judgment for the employer's, the lack of reasonableness of a Defendant's business judgment is relevant to whether the employer discriminated against an employee. M Civ JI 105.03; *Wexler*, 577. A plaintiff may demonstrate pretext by showing that similarly situated employees who were not within the protected class were treated more favorably than the plaintiff. *Dixon v WW Granger*, 168 Mich App 107, 116-117; 423 NW2d 580 (1987); *Talley*, *supra*. Discriminatory statements, even if they do not rise to the level of direct evidence, can create a genuine issue of material fact that the defendant's proffered reason for the discharge decision is pretext. *Blair*, *supra*. Evidence that Defendant failed to follow its own employment policies is evidence of pretext. *Harrison v Metropolitan Govt of Nashville*, 80 F3d 1107, 1117 (6th Cir 1996). Plaintiff's favorable performance reviews should be considered in determining pretext. *Logan v Denny's, Inc.*, 259 F3d 559, 575 (6th Cir 2001). The proofs offered to support a prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason for the adverse action is pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis. *Town*, *supra*, at 697. Evidence of pretext should not be viewed in isolation, but with an awareness that each item of evidence of discriminatory animus buttresses the others. *Ercegovich*, *supra*, at 356. In the case-at-bar, the evidence demonstrates pretext in a myriad of ways.

a. Defendant's Proffered Reason For Plaintiff's Discharge Was Pretext; it Was False and, in Any Event, Did Not Justify His Discharge.

It is well established that the falsity of a defendant's explanation for an adverse employment action is evidence of discrimination. In *Reeves v Sanderson Plumbing, Inc.*, 530 US 133, 147; 120 S Ct 2097; 147 L Ed2d 105 (2000), the U.S. Supreme Court wrote:

Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. ([P]roving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional

discrimination.) In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.

Herein, when Caine-Smith and Unwin telephoned Plaintiff to announce the discharge decision, they told him that the reason for the discharge was that he interfered with their investigation. At trial, the decisionmakers testified that they believed Plaintiff interfered with the investigation by pressuring Bell to lie on Plaintiff's behalf. In fact, Plaintiff did not ask Bell to lie, as Defendant alleges, but only to supplement his statement to inform Caine-Smith and Unwin that Plaintiff had apologized to Bell and the two men had shaken hands. At no time did Plaintiff ask Bell or anyone else to lie, and Unwin and Caine-Smith admitted they knew this. Furthermore, Unwin testified that there was absolutely nothing wrong with Plaintiff trying to bring out all the facts. In any event, if Defendant's decisionmakers had really thought or cared that Plaintiff wanted Bell to lie, they would have asked Plaintiff about it, and taken a statement. Instead, they summarily fired him without ever asking him about the charge that he "interfered" with the investigation. In fact, the first Plaintiff ever heard of the charge was when Unwin and Caine-Smith told him he was fired. Thus, Plaintiff's alleged "interference" with the investigation actually had nothing to do with the discharge decision and was pretext for discrimination.

Defendant has nevertheless relied upon the so-called "honest belief" rule to support the proposition that Plaintiff cannot establish pretext in this case. In other words, Defendant contends that regardless of what Plaintiff testified happened with respect to his comments and the bogus charge that he interfered with Defendant's investigation, Defendant honestly believed that Plaintiff had violated its workplace policies.

But the "honest belief" rule should not be overdrawn; it is more a jury argument than a basis for summary disposition or directed verdict. See, *SSC Associates Ltd. Partnership v Gen.*

Retirement Sys. of Detroit, 192 Mich App 360, 365; 480 NW2d 275 (1991)(“[T]he jury should decide issues of credibility.”) First, it must be emphatically stated that the “honest belief” rule does not excuse treating similarly situated employees disparately. It is not possible to “honestly believe” that one employee deserved discharge for an offense, while allowing similarly-situated employees who engaged in similar conduct to escape without punishment.

Furthermore, the “honest belief” rule is narrow and does not apply to the case-at-bar. In *Smith v Chrysler Corp*, 155 F3d 799 (6th Cir 1998) the Sixth Circuit stated:

[W]hen the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process “unworthy of credence,” then any reliance placed by the employer in such a process cannot be said to be honestly held. *Id* at 807-808.

In *White v Baxter Healthcare Corporation*, 533 F3d 381, 393 (6th Cir 2008) the Sixth Circuit stated that a plaintiff may demonstrate pretext by offering evidence which challenges the reasonableness of the employer’s decision to the extent that such an inquiry sheds light on whether the employer’s proffered reason for the employment action was its actual motivation. Similarly, in *Wexler, supra*, 578, the 6th Circuit stated that the reasonableness of the employer’s justification for discharge is probative of whether it is pretext. The more idiosyncratic or questionable the employer’s reasoning, the easier it will be to expose as pretext. *Id*.

The Michigan Supreme Court is in accord. In *Town, supra*, at 698, this Court held:

We note that in accordance with nine other federal circuits, evidence sufficient to discredit a defendant’s proffered non-discriminatory reasons for its actions, taken together with Plaintiff’s prima facie case [may be] sufficient to support (but not require) a finding of discrimination. Where ... either direct or circumstantial evidence from which a fact-finder could rationally conclude that the employer’s stated reason is a pretext for discrimination, summary judgment normally should be denied. (Citations omitted)

(See also, Mich Civ JI 105.03: “. . . you may consider the reasonableness or lack of reasonableness of defendant’s stated business judgment along with all the other evidence in determining whether defendant discriminated or did not discriminate against the plaintiff.)

In this case, there is certainly a genuine issue of fact that Defendant’s claim that it discharged Plaintiff because he interfered with its investigation is unworthy of credence. Plaintiff did not interfere with Defendant’s investigation, but sought only to place before the decisionmakers all the facts. Defendant would have known this had its decisionmakers bothered to ask him, but they fired him before he had a chance to tell them. Therefore, because there is a genuine issue of material fact that Defendant’s proffered reason for discharging Plaintiff was contrary to the facts – which Defendant would have found out had it only bothered to ask – there is also an issue of fact that Defendant’s proffered reason for Plaintiff’s discharge is pretext.

b. Caine-Smith’s Direct Statement That She Held White Employees and African-American Employees to Different Standards Concerning Racial Comments and Jokes is Evidence of Pretext.

As stated, biased statements of a decisionmaker are evidence of pretext, even assuming *arguendo* they do not rise to the level of direct evidence. *Blair, supra*. In this case, Weaver quoted Caine-Smith as stating that she held white employees and African-American employees to different standards regarding racial statements and jokes. Obviously, such a biased statement is evidence that race was a factor in the decision to discharge Plaintiff, and that Defendant’s protestations to the contrary are pretext for discrimination.

c. Plaintiff’s Excellent Employment Record is Evidence of Pretext.

Plaintiff’s favorable job performance should be taken into account when evaluating the issue of pretext. *Logan, supra*, at 575. The evidence is overwhelming that, prior to the incident in question, Plaintiff was an excellent employee. Even after his discharge, Plaintiff’s immediate supervisor wrote him a letter of recommendation, in which she stated that Plaintiff was well-

liked by students, parents and staff, and that other teachers viewed him as a role model. She stated: "I considered Craig to be an asset to our school and our team; he would do whatever was necessary to ensure that the job was done." Plaintiff's teaching skill bore fruit in his students, who excelled on standardized reading and math tests. Critically, Plaintiff had no history of racial misconduct during his almost nine years in Defendant's employ. Plaintiff's excellent job performance is further evidence that Defendant's proffered reasons for his discharge are pretext.

d. The Fact That Defendant Did Not Follow Its Own Disciplinary Policies in Abruptly Firing Plaintiff is Further Evidence That Its Proffered Reasons For Plaintiff's Discharge Are Pretext For Discrimination.

Evidence that Defendant failed to follow its own employment policies is evidence of pretext. *Harrison v Metropolitan Govt of Nashville, supra*, at 1117. In this case, Defendant failed to follow its own disciplinary procedures. In Defendant's employee manual, it states that when evaluating whether to discipline an employee, and determining the appropriate level of discipline, the decisionmaker should consider whether the conduct was "a recurrence". Defendant's management testified that the fact that an incident of misconduct is a first time event is supposed to be a significant mitigating factor in assessing discipline. Yet, in this case, Unwin and Caine-Smith fired Plaintiff for his first racial joke, even though racial joking and comments were pervasive throughout the school.

The Michigan courts have repeatedly emphasized that a jury is free to disbelieve an employer's testimony offering non-discriminatory reasons for an adverse employment action. See, e.g., *Nabozny v Pioneer State Mutual Insurance Ins. Co*, 233 Mich App 206, 209 (1998). The following facts, taken individually and together, raise a genuine issue of material fact that Defendant's proffered reason for firing Plaintiff is not worthy of belief:

- Defendant's proffered reason for Plaintiff's discharge has no basis in fact;
- Defendant's proffered reason for Plaintiff's discharge did not motivate the discharge;

- Defendant treated similarly situated African-American employees more favorably than Plaintiff;
- Defendant's decisionmaker made explicit statements that showed she held white and African-American employees to different standards based on race;
- Plaintiff was an excellent employee with no history of racial animosity; and
- Defendant failed to follow its own disciplinary procedures in deciding to fire Plaintiff.

The evidence thus establishes an issue of fact that Defendant's proffered reason for Plaintiff's discharge is pretext, and the Court of Appeals therefore correctly affirmed the trial court's decisions to deny Defendant's motions for summary disposition, directed verdict and JNOV.

B. THE COURT OF APPEALS WAS CORRECT WHEN IT REJECTED DEFENDANT'S ARGUMENT THAT IT IS ENTITLED TO A NEW TRIAL, BECAUSE THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE THAT DEFENDANT SENT TO PLAINTIFF'S PROSPECTIVE EMPLOYERS MISCONDUCT DISCLOSURES PURSUANT TO MCLA §380.1230b.

Defendant argues that it is entitled to a new trial because the trial court admitted evidence concerning Defendant's disclosures made pursuant to MCLA §380.1230b. The trial court's decision was correct, and it certainly does not justify reversal.

A trial court's decision to exclude or admit evidence is reviewed for an "abuse of discretion". *Campbell, supra*, at 235. An abuse of discretion occurs only when the decision results in an outcome falling outside the principled range of outcomes. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). "Establishing an abuse of discretion is . . . quite difficult for an abuse will only be found when the decision is so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias." *Pena v Ingham County Road Commission*, 255 Mich App 299, 303; 660 NW2d 351 (2003). Evidentiary rulings are reviewed "for an abuse of discretion and in making that determination, we consider the facts

on which the trial court acted to determine whether an unprejudiced person would say that there is no justification or excuse for the ruling made.” *Krohn. supra*, at 295. Defendant nevertheless argues that because Michigan law requires the disclosures pursuant to MCLA §380.1230b, the trial court should have barred Plaintiff from admitting evidence relating to them.

First, in its Application for Leave to Appeal, Defendant essentially ignores the fact that the trial court specifically instructed the jury about this issue. At trial, Defendant argued that admitting into evidence that Defendant disclosed the reason for Plaintiff’s discharge to prospective employers was barred pursuant to MCLA §380.1230b. Plaintiff argued that MCLA §380.1230b does not bar disclosure, and that Plaintiff would have been severely prejudiced if he were prevented from explaining the facts behind the difficulty he had in mitigating his damages. As a result of the arguments, the trial court sensibly gave the following special instruction, to inform the jury that the law required Defendant’s disclosures:

Now I’m gonna tell you about the laws that apply in this case. First of all, before hiring an applicant for employment, a Michigan school is required to request that the applicant’s current employer or, if the applicant’s not currently employed, the applicant’s immediate previous employer, to disclose any unprofessional conduct by the applicant; and then, upon receiving that kind of request, the employer is required by law to provide the information to the party requesting it. It must also make available to the requesting party copies of all documents in the employee’s record relating to the unprofessional conduct.¹⁴¹

In this lawsuit, Plaintiff claimed damages, including economic damages, as a result of his discharge. Before his discharge, Plaintiff earned \$51,000 per year. After his discharge, whenever Plaintiff applied for a teaching position, the prospective employer contacted his previous employer, Defendant. Defendant thereupon sent a letter to the employer, pursuant to MCLA §380.1230b, stating Plaintiff was fired for making allegedly racist statements and attempting to induce co-workers to change their statements. Not surprisingly, after his

¹⁴¹Jury Instructions, Tr Vol. 3, pg. 158.

discharge, Plaintiff was unable to retain any teaching position. Eventually, the firm with which Plaintiff contracted to obtain substitute teaching positions informed him that no local school districts were interested in his services because of the misconduct disclosures.

Defendant contends that the trial court should have barred Plaintiff from testifying truthfully about why he has been unable to find a job, or why he eventually sought work outside the teaching profession. Michigan law does not support Defendant's arguments. After his discharge, Plaintiff sued Defendant pursuant to ELCRA. An employee who proves an employer violated ELCRA is entitled to economic damages. MCLA §37.2801 et seq. At trial, Plaintiff had the burden of proving damages. In other words, Plaintiff was required to submit admissible evidence that, as a result of his discharge, he suffered the economic damages he claimed.

Defendant nonetheless argues that MCLA §380.1230b precluded Plaintiff from introducing evidence that he has not been able to find a teaching job, at least in part, because of the MCLA §380.1230b disclosures, even in light of the Court's cautionary instruction. The statute itself does not support Defendant's position. MCLA §380.1230b(3) states, in pertinent part: "An employer, or an employee acting on behalf of the employer, that discloses information under this section in good faith is immune from civil liability *for the disclosure.*" (Emphasis added). Pursuant to the MCLA §380.1230b, Plaintiff signed a release, which states, in pertinent part: "I release and hold harmless all prior and current employees, and the below stated organization, their agents and employees from civil or criminal liability *for providing such information.*" (Emphasis added).

The following cannot be emphasized enough: Plaintiff did not sue Defendant for damages "for the disclosure". Plaintiff did not seek "civil or criminal liability" against Defendant "for providing such information". On the contrary, this is a one-count lawsuit in which Plaintiff sought damages resulting from Defendant's racial discrimination.

Defendant's disclosures are, however, relevant to the issues of damages and mitigation of damages. Concerning these issues, there is utterly nothing in MCLA §380.1230b that even hints that it is intended to render the disclosures inadmissible in a discrimination lawsuit. It would have been easy enough to include such language in the statute or in the release, but no such language exists. Defendant has cited no case law for the position that MCLA §380.1230b disclosures are inadmissible in this lawsuit, because there is none. After exhaustive research of Michigan law, Plaintiff has been unable to find a single case that supports Defendant's position that MCLA §380.1230b prevents a party from introducing into evidence the fact that a school has sent a disclosure pursuant to the statute.

In *Brunson v E & L Transport*, 177 Mich App 95; 441 NW2d 48 (1989) the Michigan Court of Appeals did, however, address an analogous situation. In *Brunson*, the plaintiff brought an ELCRA sex discrimination claim arising from her unsuccessful efforts to become a truck driver for defendant E & L Transport. While an employee for the defendant, the plaintiff inquired about transferring to the position of truck driver. During testing for the position, the tester told her, "It was no job for a woman". The same tester gave the plaintiff an unsatisfactory rating on her test. Without a satisfactory rating on the test, the plaintiff did not meet the qualifications for truck drivers established in the Federal Motor Carrier Safety Regulations. The defendant argued that it therefore could not have offered her the position of truck driver to the plaintiff because she was not a qualified driver. The Court rejected the defendant's claim:

Plaintiff alleged and proved to the jury's satisfaction that the manner in which the driving tests were conducted and judged by Defendant exhibited disparate and discriminatory treatment based on Plaintiff's gender, Defendant could have complied with both the DOT regulations and the Civil Rights Act simply by testing Plaintiff in a fair and nondiscriminatory fashion. Accordingly, we find that Plaintiff's claim is not preempted by the DOT regulations. *Brunson*, 104.

In other words, the Court of Appeals held that, had the defendant not discriminated against the plaintiff, the plaintiff would not have been unqualified under the Federal Motor Carrier Safety regulations.

The argument Defendant has made is similar to the one the *Brunson* defendant made, and should likewise be rejected. Plaintiff was forced to deal with Defendant's disclosures pursuant to MCLA §380.1230b because Defendant discriminated against him. If Defendant had not discriminated against Plaintiff, it would not be confronted with the fact that Plaintiff has had difficulty finding a teaching job. If Defendant had not discriminated against Plaintiff, Defendant would still employ Plaintiff and MCLA §380.1230b would not be an issue.

Defendant also claims that the evidence concerning the MCLA §380.1230b disclosures was substantially more prejudicial than probative, and therefore inadmissible pursuant to MRE 403. Defendant has it exactly backward: if the evidence had not been admitted, it would have severely prejudiced Plaintiff. At trial, Defendant claimed Plaintiff failed to mitigate his damages. Defendant specifically requested, and the trial court read, M Civ JI 53.05, the jury instruction concerning mitigation of damages:

Here, the Plaintiff must make every reasonable effort to minimize or reduce his damages for loss of compensation by seeking employment. Now I want to talk about something called mitigation of damages. The Defendant has the burden of proving that this Plaintiff failed to mitigate his damages for loss of compensation. If you find the Plaintiff is entitled to damages, then you must reduce those damages by what the Plaintiff earned and what the Plaintiff could have earned with reasonable effort during the period which you determine he is entitled to damages; and even if you find that he's entitled to future damages, you must reduce those damages by the amount the Plaintiff could reasonably earn or reasonably be expected to earn in the future.¹⁴²

One factor that has made it difficult for Plaintiff to mitigate his damages is that any time he applied for a teaching position, the prospective employer received Defendant's MCLA §380.1230b disclosure, and declined to hire Plaintiff. It would have been have been grossly

¹⁴² Jury Instructions, Tr Vol. 3, pg. 160.

unfair to have allowed Defendant to claim that Plaintiff failed to mitigate his damages, but at the same time prevent Plaintiff from explaining why mitigation was so difficult. Thus, the Court of Appeals correctly ruled that the trial court did not abuse its discretion in determining that MRE 403 did not require that it bar from evidence the MCLA §380.1230b disclosures.

Defendant has cited *Awkerman v Tri-County Orthopedic Group*, 143 Mich App 722; 373 NW2d 204 (1985) in support of its argument that the trial court should have excluded any evidence concerning its MCLA §380.1230b disclosures. *Awkerman* has absolutely no relevance to the case-at-bar. In *Awkerman*, the plaintiff sued the defendant for medical malpractice and for filing an erroneous child abuse report, which the plaintiff claimed was the result of the malpractice. Subsequently, the defendant moved for dismissal of the plaintiff's damages claims for the "shame and humiliation" plaintiff allegedly suffered as a direct result of the erroneous child abuse report. The defendant based its argument on MCLA §722.625, Michigan's child abuse reporting statute, which grants immunity to persons who report child abuse in good faith. The trial court granted the defendant's motion and the Court of Appeals affirmed.

Awkerman is completely different from the case-at-bar. First, *Awkerman* and the case-at-bar involve completely different statutes intended to address completely different issues. But even if the two statutes, MCLA §380.1230b and MCLA §722.625, the child abuse reporting statute, were viewed as analogous, the ways they were applied in the case-at-bar and *Awkerman* were totally dissimilar. In *Awkerman*, the plaintiff sought damages related directly to the physician's report of child abuse. In the case-at-bar, Plaintiff does not seek damages related directly to the MCLA §380.1230b disclosures, but for race discrimination. Furthermore, the trial court, in its jury instructions made it crystal clear, if there was any doubt, that Plaintiff was not entitled to damages for the MCLA §380.1230b disclosures. *Awkerman* is therefore completely irrelevant to the case-at-bar.

In summary, the evidence concerning the MCLA §380.1230b disclosure was relevant and admissible pursuant to Mich.R.Evid. 401, 402 and 403. There is nothing in MCLA §380.1230b or the associated release that suggests that Defendant's disclosure is inadmissible in a race discrimination lawsuit. The standards for evaluating the Court's evidentiary rulings require reversal for abuse of discretion only. Thus, reversal in this case should occur only if, "the decision is so palpably and grossly violative of fact and logic that evidence not the exercise of will but perversity of will." *Pena, supra*. In this case, the exercise of the trial court's discretion also included its decision to the jury a cautionary instruction that fully advised the jury that Defendant was legally obligated to circulate the §380.1230b disclosure. Given these facts, the trial court properly admitted the evidence of §380.1230b disclosures and the court's deft handling of the issue was certainly not an abuse of discretion.

But even assuming, *arguendo*, that the trial court abused its discretion, any error was harmless. "In civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008). To avoid a finding that an evidentiary error is harmless, the appellant must show that the error affected the outcome of the case. *Taylor v TECO Barge Line, Inc.*, 517 F3d 372, 378 (6th Cir 2008).

In the case-at-bar, the Defendant speculates that, in awarding Plaintiff future damages, the jury was improperly influenced by the fact of the §380.1230b disclosures. Defendant implies that the jury became angry with Defendant because it made the disclosures, and in response awarded Plaintiff excessive future damages. This is very unlikely to be true in light of trial court's cautionary instruction, and the fact that the jury determined Plaintiff suffered emotional distress, but awarded him no emotional distress damages. Both the trial court and the jury were

actually quite measured and restrained concerning the issue of damages. There is no evidence passion influenced the decisions of either one.

In any event, the economic damages the jury awarded were not affected by the MCLA §380.1230b disclosures because Plaintiff found employment with a comparable wage to the teaching positions for which he applied. At trial, Plaintiff presented to the jury detailed evidence concerning his past earnings with Defendant, his efforts to mitigate, and his current employment status. Specifically, Plaintiff presented evidence that if Plaintiff had obtained a full time teaching position, *it would have made virtually no difference to Plaintiff's future economic damages.* The salary at Saginaw Preparatory Academy, for instance, would have been \$30,000.00 had Plaintiff obtained the position. At the time of trial, Plaintiff worked at Dow Corning Health Industries Material Site, where he likewise made approximately \$30,000.00 per year. Thus, even if the trial court abused its discretion in admitting evidence of the §380.1230b disclosures, the error resulted in no prejudice to Defendant, and was therefore harmless.

VI. CONCLUSION

The simple truth of this case is that Defendant, as evidenced by Caine-Smith's own statement, held white and black employees to different standards. While black employees could make racist comments – such as using the “N” word or teasing co-employees because they were white – a white employee like Plaintiff was subject to discharge for much milder conduct. The trial record is replete with evidence that African-American employees engaged in racial banter and racial joking. In fact, the joking, banter and even the use of the “N” word happened “all the time”. But no one other than Plaintiff was ever disciplined, not to mention discharged.

So why was Plaintiff treated so differently? The reason for the differential treatment is found in Corrine Weaver's testimony: Weaver testified that Caine-Smith told her, in the context of the decision to discharge Plaintiff, that white employees and African-American employees

who engage in racial banter *should* be treated differently. This is direct evidence of discrimination sufficient to preclude Defendant's motions for summary disposition, directed verdict and JNOV.

Plaintiff also presented at trial abundant indirect evidence of discrimination. Without repeating all the evidence, suffice to say that Plaintiff created a genuine issue of fact that Defendant's proffered reasons for Plaintiff's discharge – that he made an inappropriate racial comment and interfered with Defendant's investigation of the matter – were pretext for discrimination. Plaintiff offered ample proof that Plaintiff was fired for making a single racial joke, while all the African-American employees who made similar comments escaped punishment completely. Nor did Plaintiff have a negative history to set him apart from the other employees who engaged in racial banter. On the contrary, he had a stellar work record, devoid of any hint of racial animosity. This evidence clearly established a genuine issue of fact that race was a motivating factor in Defendant's discharge decision.

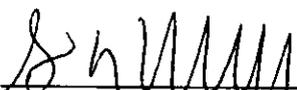
The Court should similarly reject Defendant's argument that it is entitled to a new trial based on the Court's decision to admit evidence that Defendant sent out MCLA §380.1230b disclosures to Plaintiff's prospective employers. There is simply nothing in MCLA §380.1230b that suggests that the disclosures are inadmissible in a discrimination lawsuit. In fact, if the Court had barred the evidence from trial, it would have severely prejudiced Plaintiff's efforts to prove his damages. Furthermore, the trial court read to the jury an instruction that stated just what the Defendant wanted the jury to understand: that Defendant did not choose to send out the MCLA §380.1230b disclosures, but was required by law to do so. Thus, the trial court's decision to admit evidence concerning the §380.1230b disclosures Defendant made was certainly not an abuse of discretion.

In the case-at-bar, the lower court conducted the trial in excellent fashion. It correctly denied Defendant's Motion for Directed Verdict, on the basis of the direct and indirect evidence presented, as it had done previously to Defendant's Motion for Summary Disposition. Its rulings on the evidentiary issues presented were uniformly well-considered and accurate. Its denial of Defendant's post-trial motions hewed closely to the evidence presented at trial and the applicable law. Thus, Defendant's Application for Leave to Appeal should be denied.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court deny Defendant's Application for Leave to Appeal and let stand the jury's verdict in the case-at-bar.

Dated: 1/8/15


GLEN N. LENHOFF (P32610)
Law Office of Glen N. Lenhoff
Attorney for Plaintiff

Dated: 1/8/15


ROBERT D. KENT-BRYANT (P40806)
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Dated: 1/8/15

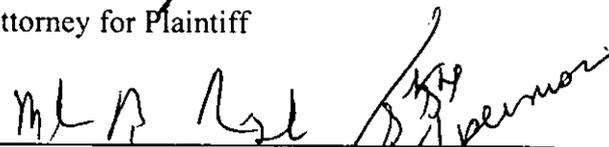

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RIZIK & RIZIK, PC
Co-Counsel for Plaintiff

EXHIBIT LIST

EXHIBIT 1

Court of Appeals Opinion dated October 28, 2014

EXHIBIT LIST

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Court of Appeals Opinion dated October 28, 2014

EXHIBIT 1

STATE OF MICHIGAN
COURT OF APPEALS

CRAIG HECHT,

Plaintiff-Appellee,

v

NATIONAL HERITAGE ACADEMIES, INC.,

Defendant-Appellant.

UNPUBLISHED
October 28, 2014

No. 306870
Genesee Circuit Court
LC No. 10-093161-CL

Before: SERVITTO, P.J., and CAVANAGH and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered following a jury verdict in favor of plaintiff in this employment discrimination action. We affirm.

Defendant is a for-profit company that runs charter schools throughout the country. Plaintiff, a 35-year-old white male at the time of his firing, had been employed at a teacher in an at-will capacity with defendant since 2001. At the time of the incident giving rise to this litigation, plaintiff taught third grade at Linden Charter Academy ("LCA"), whose student body was approximately 93% African American.

On November 3, 2009, plaintiff was in his classroom with his students along with Floyd Bell, an African American special education paraprofessional assigned to plaintiff's classroom. At some point, Lisa Code, a white woman, who worked in the school library, entered the classroom to return a table she had borrowed. Realizing she had borrowed a brown table and was bringing a white table into the classroom, Code asked plaintiff if he cared whether he was getting a white table rather than the brown one she had actually borrowed. According to Code, plaintiff said he definitely liked the white table better than the brown and that all of the brown needed to go. Code thought that plaintiff was trying to be funny but was shocked because she knew how it sounded and thus asked plaintiff, "What?" Plaintiff indicated that he was joking with Bell at which point Code called "a big foul" on plaintiff.¹ Bell then called a foul "to the

¹ LCA employees created a "social contract" with each other, such that if an individual stated something that someone else found offensive or inappropriate, the person offended was to "call a foul" on the speaker. In response, the speaker was to give two "ups" to the person who called

highest power." Code immediately reported to Corinne Weaver, the dean of LCA,² a white woman, that plaintiff had said "[W]hite is better than brown anyway. Brown should burn." Code also reported to Weaver that plaintiff looked over his shoulder at a group of students and asked them, "White is better than brown, right?"

Bell also reported the incident to Weaver. As a result, Weaver asked plaintiff to come to her office to discuss the incident. Plaintiff explained that he had not meant any racist intent but merely meant his comments as a joke, like he had heard many times before at the school. Plaintiff asked to speak to Bell, who arrived at the office and the two shook hands.

Following her meeting with plaintiff, Weaver contacted the principal of LCA, Linda Caine-Smith, to advise her about the incident. As principal, Caine-Smith, a white woman, was the highest ranking position at LCA. The next morning, Caine-Smith spoke with plaintiff, Bell and Code and asked them all to prepare written statements about the incident. Caine-Smith also reported the incident to Courtney Unwin, the employee relation manager at defendant's office in Grand Rapids. Unwin reviewed the written statements and spoke to plaintiff by telephone. Noting that plaintiff's statement to her contradicted his written statement in some respects, Unwin informed plaintiff that an investigation of the incident would proceed and that his dismissal was an option. Plaintiff was thereafter placed on administrative leave. According to Bell, plaintiff approached him and pleaded with him to change his statement indicating that he had a wife and child. Bell advised plaintiff that he would not lie. Plaintiff also left two phone messages for Code, but she did not return his calls.

Bell reported his encounter with plaintiff to Caine-Smith and prepared a written statement concerning the same. Caine-Smith also learned that plaintiff had attempted to contact Code and believed he was attempting to interfere with their investigation. She thus called Unwin to discuss this concern. Following their discussion, Caine-Smith and Unwin decided to terminate plaintiff's employment for the stated reasons that: (1) plaintiff made an inappropriate racial statement in front of students; and, (2) plaintiff interfered with their investigation of the incident.

Plaintiff filed a complaint against defendant, alleging racial discrimination in violation of the Elliott-Larsen Civil Rights Act, MCL 37.2201 *et seq.* Plaintiff alleged that race was a substantial factor in defendant's decision to terminate plaintiff's employment and that he was treated less favorably than similarly situated African-American employees. The jury agreed, rendering a verdict in his favor in the amount of \$535,120.00.

On appeal, defendant first contends that there was insufficient evidence to support the jury's verdict that racial discrimination was a factor in plaintiff's termination such that the trial court erred in denying its motion for JNOV. We disagree.

This Court reviews a trial court's decision on a motion for JNOV de novo. *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review

the foul, which are positive statements about the person. In this instance, Plaintiff testified that he did not give any "ups" to either Bell or Code because he did not hear any foul called.

² The dean is the second highest position at LCA.

the evidence and all legitimate inferences in the light most favorable to the nonmoving party, recognizing that a motion for JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. *Id.*

MCL 37.2202 provides, in pertinent part, as follows:

(1) An employer shall not do any of the following:

(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.

“The ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination.” *Reeves v Sanderson Plumbing Products, Inc.*, 530 US 133, 153; 120 S Ct 2097; 147 L Ed 2d 105 (2000). Proof of discriminatory treatment may be established by direct evidence or by indirect or circumstantial evidence. *Sniecinski*, 469 Mich at 132. In *Hazle v Ford Motor Co.*, 464 Mich 456, 462; 628 NW2d 515 (2001), our Supreme Court cited with approval the United States Court of Appeals for the Sixth Circuit’s definition of “direct evidence” as “evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Id.*, quoting *Jacklyn v Schering Plough Healthcare Products Sales Corp.*, 176 F3d 921, 926 (CA 6, 1999).

In this matter, the crux of plaintiff’s assertion that he was subject to disparate treatment was that “racial bantering” occurred in the school on many occasions but that the others who engaged in racial bantering were not punished because they were African-American. Plaintiff asserted that the incident that he was involved in also constituted racial bantering, but that he was discharged because he was white.

The only direct evidence of discrimination was a statement attributed to Caine-Smith, one of the decision-makers who ultimately decided to discharge plaintiff. When relating the incident in plaintiff’s classroom to Caine-Smith, Weaver testified that Caine-Smith also indicated to her that she had heard racial bantering at the school before:

[Plaintiff’s Counsel]: Did you bring that information to her attention?

Weaver: I think I told her that, you know, those things do happen around here, but they were under different circumstances.

[Plaintiff’s Counsel]: How did she respond when you said, “those things do happen around here?”?

Weaver: I—I think her point was that it happens amongst African Americans. And it’s not the other way around. And this wh—and that this one was reported, someone was offended, and we had an obligation to follow up on it.

There need be no inference drawn to understand that Caine-Smith's response was an acknowledgement that while racial bantering among African Americans occurred, it did not occur between a white person such as plaintiff and an African American, and in firing plaintiff for such bantering one could conclude that Caine-Smith was motivated at least in part by plaintiff's race. In other words, if Weaver's interpretation is believed by the trier of fact, it would demonstrate that plaintiff's race was at least a motivating factor in the employer's actions because if he were a black person saying that same comment to another black person, then he would not have been punished. Caine-Smith stating to Weaver that the situation was distinguishable because the incident was reported and someone was offended certainly is important, but it does not negate her previous statement.

It is true that Weaver's testimony constitutes a summation of what Caine-Smith may have meant rather than a statement of what Caine-Smith actually said. As such, it could reasonably be subject to differing interpretations. For example, the statement or point attributed to Caine-Smith could be interpreted to mean that because plaintiff was white, his racially based comments could not be tolerated in the same way that comments made by African Americans could be, or that she felt pressure to impose a stricter punishment on plaintiff for his comments because he was white. An equally plausible interpretation could be that Caine-Smith was searching for an explanation or rationalization as to why no one had previously complained to the administration about racial bantering at the school and found one in the fact that prior bantering had occurred only between African Americans and not between a white person such as plaintiff and an African American such as Bell or between only white persons such as plaintiff and Code. In either event, however, plaintiff's race was clearly part of the equation. And, that the statements could be subject to differing interpretations supports upholding the jury's verdict.

In *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 540; 620 NW2d 836 (2001), our Supreme Court held that a single remark in the context of a discussion regarding an employee's termination, and the remark's weight and believability are matters for the fact-finder to determine. In that case, after the plaintiff was fired from his job, he sued his former employer, alleging age discrimination. The trial court granted summary disposition in favor of the employer and a panel of this Court twice affirmed. Our Supreme Court reversed, holding that the singular statement to the plaintiff by his supervisor that he was "getting too old for this shit" constituted direct evidence of age discrimination. *Id.* at 538. Relevant to the instant matter, the *DeBrow* Court stated:

We recognize that this remark may be subject to varying interpretations. It might reasonably be taken as merely an expression of sympathy that does not encompass a statement that the plaintiff's age was a motivating factor in removing him from his position as an executive. However, it is well established that, in reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), we must consider the documentary evidence presented to the trial court in the light most favorable to the nonmoving party. *Id.* at 538-539.

The Supreme Court concluded, "While a factfinder might be convinced by other evidence regarding the circumstances of the plaintiff's removal that it was not motivated in any part by the plaintiff's age and that the facially incriminating remark was no more than an expression of sympathy, such weighing of evidence is for the factfinder . . ." *Id.* at 539.

While this matter involves a motion for JNOV rather than a motion for summary disposition, the standard of review for both motions is the same and it is the standard of review that we must apply that is the crucial factor in resolving this matter. Again, reversal is permitted when reviewing the denial of a motion for JNOV only if the evidence, while viewed in a light most favorable to the plaintiff, fails to establish a claim as a matter of law. *Sniecinski*, 469 Mich at 131. When reasonable jurors could honestly reach different conclusions regarding the evidence, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

Consistent with *DeBrow*, even if Weaver's recollection of Caine-Smith's alleged statement was subject to differing interpretations, it was properly up to the jury to determine which interpretation fit Caine-Smith's intention. We must view the evidence in the light most favorable to the non-moving party upon review and it is not irrational to conclude that the jury made a determination of Caine-Smith's statement that was unfavorable to defendant's position. Such a determination was within the jury's realm just as it was within the jury's realm to weigh and consider *all* of Caine-Smith's remarks and ultimately decide if plaintiff's race was a factor in defendant's decision to terminate plaintiff's employment.

While defendant additionally argues that plaintiff presented insufficient circumstantial evidence to survive the burden-shifting approach set forth in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 888 (1973), the burden-shifting approach is inapplicable not only where direct evidence is offered, as it was here, but simply in general once the matter has proceeded to trial and is passed to the jury. "Where direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* framework, and the case should proceed as an ordinary civil matter." *DeBrow*, 463 Mich at 539-540 (quotations omitted). More importantly, as our Supreme Court explained in *Hazle*, 464 Mich at 466-467, quoting *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 256 n 8; 101 S Ct 1089; 67 L Ed 2d 207 (1981):

[t]he *McDonnell Douglas* burden-shifting framework is merely intended 'to progressively sharpen the inquiry into the elusive factual question of intentional discrimination.' It is important to keep in mind, therefore, that for purposes of claims brought under the Michigan Civil Rights Act, the *McDonnell Douglas* approach merely provides a mechanism for assessing motions for summary disposition and directed verdict in cases involving circumstantial evidence of discrimination. It is useful only for purposes of assisting trial courts in determining whether there is a jury-submissible issue on the ultimate fact question of unlawful discrimination. The *McDonnell Douglas* model is *not* relevant to a jury's evaluation of evidence at trial See *Gehring v Case Corp*, 43 F 3d 340, 343 (CA 7, 1995) (explaining that, in federal discrimination cases, "[o]nce the judge finds that the plaintiff has made the minimum necessary demonstration [the 'prima facie case'] and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question-the *only* question the jury need answer-is whether the plaintiff is a victim of intentional discrimination").

The *McDonnell Douglas* framework approach “was adopted because many plaintiffs in employment-discrimination cases can cite no direct evidence of unlawful discrimination. The courts therefore allow a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.” *DeBrow*, 463 Mich at 537-538 (emphasis in original).

As the Sixth Circuit Court of Appeals explained, there was no jury in *McDonnell Douglas* and “ ‘The critical issue,’ as the Supreme Court explained, ‘concerns *the order and allocation of proof* in a private, non-class-action challenging employment discrimination.’ [*McDonnell Douglas*, 411 US at 800]. The ‘order and allocation of proof’ are not matters for which juries are responsible.” *Brown v Packaging Corp of America*, 338 F3d 586, 591 (CA 6 (2003) (emphasis in original). Thus, the *McDonnell Douglas* analysis is used only when plaintiff’s establishment of a prima facie case is at issue. Once a jury submissible issue on the ultimate fact of whether there has been unlawful discrimination has been found-i.e., once summary disposition and directed verdict motions have been resolved, the need for the analysis has passed. In the instant matter, no summary disposition decision is at issue, nor is the defendant’s directed verdict motion being appealed.

Plaintiff’s claim was for disparate treatment. Thus, had he not provided direct evidence of discrimination, in order to defeat defendant’s motion for JNOV, he must have provided sufficient circumstantial evidence that: (1) he was a member of a protected class; (2) that an adverse employment action was taken against him; (3) that he was qualified for the position; and, (4) that others, similarly situated and outside the protected class were unaffected by the employer’s adverse conduct. See, e.g., *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). So long as the jury found some type of evidence of intentional discrimination-direct *or* circumstantial-its verdict must be upheld.

There is no dispute that plaintiff, a white male, was a qualified teacher who suffered an adverse employment action. At trial, evidence was provided concerning several instances of racial “banter” (which plaintiff claims his comments constituted) wherein those engaging in the same were not punished. On a professional development day, plaintiff was with several other people, when one of them, an African American man, made a statement about a Dora the Explorer mural on the wall. The employee stated that because the paint on Dora’s skin was so dark, she should be called “Laquisha” instead. Bell was present during this incident. On another professional development day, some staff members were on a bus when Weaver was asked in casual conversation what she was doing for dinner that night. When she responded that she was making pork chops, an African American staff member replied, “Why would you be making pork chops; you’re white?” Plaintiff was one of approximately 25 staff members on the bus when this incident occurred. According to Weaver, on another occasion, an African American staff member told her she should not eat soul food because she was white. Plaintiff testified to an incident where he saw the school secretary, who is African American, call to one of the students, saying “[H]ey, come here light skinned.” When Code was working as a secretary at the school, an African American staff member had told her she could not do something because she was white. Though she felt the comment was inappropriate, Code testified that she did not report the incident. Weaver also testified to hearing the “n” word used several times at LCA by African American staff members and that she had heard African American staff members engage in racial bantering up to 20 times.

It is undisputed that no African American staff member was ever disciplined in any manner for racial bantering, even though the dean was the target of such bantering on several occasions. It is true that plaintiff's remarks appear to be the only ones that generated a complaint that was forwarded to the principal. However, Unwin, defendant's employee relations manager (and the second party involved in the decision to terminate plaintiff) testified that Weaver had an obligation to report all serious racial remarks, including the use of the "n" word, even if it was spoken by an African American individual and it was incorrect for her to have failed to do so. Plaintiff was the only person at LCA to ever be disciplined for making a racial remark.

The above constitutes sufficient circumstantial evidence that plaintiff was similarly situated to African American employees who had made racial remarks at school and to other employees who were not punished. The trial court thus properly denied defendant's motion for JNOV.

Defendant next contends that disclosures concerning plaintiff's unprofessional conduct that it made in response to requests by prospective employers of plaintiff should not have been admitted into evidence. According to defendant, the disclosures were mandatory pursuant to MCL 380.1230b and the trial court erred in admitting them into evidence because the evidence was irrelevant. We disagree.

We review preserved evidentiary issues for an abuse of discretion. *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008). An abuse of discretion occurs when the trial court chooses an outcome that falls "outside the range of principled outcomes." *Id.*

In general, relevant evidence is admissible and irrelevant evidence is not admissible. MRE 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. *County of Wayne v Michigan State Tax Com'n*, 261 Mich App 174, 196; 682 NW2d 100 (2004).

The disclosures at issue were required under MCL 380.1230b, which provides in relevant part:

(1) Before hiring an applicant for employment, a school district, local act school district, public school academy, intermediate school district, or nonpublic school shall request the applicant for employment to sign a statement that does both of the following:

(a) Authorizes the applicant's current or former employer or employers to disclose to the school district, local act school district, public school academy, intermediate school district, or nonpublic school any unprofessional conduct by the applicant and to make available to the school district, local act school district, public school academy, intermediate school district, or nonpublic school copies of all documents in the employee's personnel record maintained by the current or former employer relating to that unprofessional conduct.

(b) Releases the current or former employer, and employees acting on behalf of the current or former employer, from any liability for providing information

described in subdivision (a), as provided in subsection (3), and waives any written notice required under section 6 of the Bullard-Plawecki employee right to know act, Act No. 397 of the Public Acts of 1978, being section 423.506 of the Michigan Compiled Laws.

(2) Before hiring an applicant for employment, a school district, local act school district, public school academy, intermediate school district, or nonpublic school shall request at least the applicant's current employer or, if the applicant is not currently employed, the applicant's immediately previous employer to provide the information described in subsection (1)(a), if any. The request shall include a copy of the statement signed by the applicant under subsection (1).

(3) Not later than 20 business days after receiving a request under subsection (2), an employer shall provide the information requested and make available to the requesting school district, local act school district, public school academy, intermediate school district, or nonpublic school copies of all documents in the employee's personnel record relating to the unprofessional conduct. An employer, or an employee acting on behalf of the employer, that discloses information under this section in good faith is immune from civil liability for the disclosure

Though defendant maintains that the disclosures should not have been admitted into evidence because subsection (3) provides for immunity from civil liability, such immunity applies only "for the disclosure" itself. In other words, a defendant cannot be sued for making a good-faith disclosure under the statute. The statute does not, however, create a privilege whereby evidence of the disclosure is inadmissible under all circumstances. Plaintiff in this case did not sue defendant for the disclosure but instead sued defendant for racial discrimination on the basis of his termination. The fact that the disclosures may be relevant in the discrimination lawsuit does not implicate the immunity granted by statute.

A plaintiff bringing a civil rights action may bring such an action for "damages," which is defined as "damages for injury or loss caused by each violation" of the Elliott-Larsen Civil Rights Act, MCL 37.2810 *et seq.* MCL 37.2801(3). A plaintiff bears the initial burden of proving his or her damages, but once that burden has been met, the respondent bears the burden of demonstrating that the claimant failed to mitigate his or her damages. *Department of Civil Rights v Horizon Tube Fabricating, Inc.*, 148 Mich App 633, 638; 385 NW2d 685 (1986). The respondent must do so by establishing "(1) that the damage suffered by plaintiff could have been avoided, *i.e.*, that there were suitable positions available which plaintiff could have discovered and for which he was qualified; and (2) that plaintiff failed to use reasonable care and diligence in seeking such a position." *Id.*, quoting *Sias v City Demonstration Agency*, 588 F2d 692, 696 (CA 9, 1978). In this matter, plaintiff had the burden of proving his damages and, anticipating that defendant would claim that he failed to mitigate his damages, could reasonably address any such argument by showing that he attempted to obtain other teaching jobs but was unable to do so due to the disclosures and instead took a job outside of the area of teaching that paid considerably less than his teaching position with defendant. The evidence was thus relevant and the trial court did not abuse its discretion in admitting the evidence.

Defendant also argues that even if relevant, the evidence should have been excluded under MRE 403 because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. Defendant did not raise this argument before the trial court. We thus review this unpreserved evidentiary issue to determine whether there was plain error affecting defendant's substantial rights. See, e.g., *Hilgendorf v St. John Hosp and Medical Center Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

"Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785, 796 (1998). The probative value of the disclosures was not merely marginally probative, given that it helped explain why plaintiff failed to obtain another teaching job after he was fired. Additionally, it was not clear that the jury would have given this evidence undue weight because the jury was instructed that defendant was required by law to provide the disclosures. Defendant has thus failed to establish any plain error affecting its substantial rights in the admission of the challenged evidence.

Defendant's final argument on appeal is that the jury's award of future economic damages or "front pay" was excessive and unsupported by the evidence such that it was entitled to a new trial or remittitur premised upon this award. We disagree.

We review a trial court's decision on a motion for new trial or remittitur for an abuse of discretion. *Shaw v Ecorse*, 283 Mich App 1, 17-18; 770 NW2d 31(2009). In conducting our review, we view all of the evidence in the light most favorable to the nonmoving party. *Id.* at 18.

"In determining whether remittitur is appropriate, a trial court must decide whether the jury award was supported by the evidence. This determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008) (citation omitted). Our Supreme Court has indicated that the objective factors that should be considered by this Court are:

(1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in similar cases both within the state and in other jurisdictions. [*Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009) (citation omitted).]

If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989).

While defendant first contends that the existence of *any* front pay is too speculative, that does not preclude an award of damages. Rather, "[i]n deciding whether to award such damages the courts should look to (1) whether reinstatement would be a feasible remedy, (2) the employee's prospects for other employment, and (3) the number of years remaining before the

employee would be faced with mandatory retirement.” *Riethmiller v Blue Cross and Blue Shield of Michigan*, 151 Mich App 188, 200-201; 390 NW2d 227 (1986). Moreover, “[t]he fact that such damages may be speculative should not exonerate a wrongdoer from liability. *Id.* at 201-202.

In this matter, it was clear that reinstatement was not a feasible remedy. The evidence also made clear that it was highly unlikely that plaintiff would ever be able to obtain another teaching position. As previously indicated, for every such potential employment opportunity, defendant was obligated to provide the disclosures to plaintiff’s potential employers. MCL 380.1230b. Considering that plaintiff had been consistently told that his services were no longer needed once his employer had received the disclosures, the jury could reasonably infer that the pattern would continue. And, the evidence indicated that plaintiff, a relatively young man, had a bachelor’s degree in elementary education and a master’s degree in educational leadership, indicating that his education and qualifications appear to be primarily (if not solely) in the field of education.

Defendant maintains that the fact that plaintiff cannot obtain employment as a teacher due to the statutorily required disclosures means that his “injury” is not compensable. However, the salient point is that the jury found that defendant had wrongfully discriminated against plaintiff when it fired him. Thus, plaintiff was entitled to recover for any loss caused by the violation in order to make him “whole.” See MCL 37.2801(3). Plaintiff was making \$51,000 per year in defendant’s employ and, as a result of defendant’s wrongful conduct, was unable to continue making this income. As a result of the disclosures, brought about by defendant’s discriminatory conduct, he was unable to obtain another teaching position that may have paid a similar amount. Instead, he was only able to secure employment outside of his field making approximately \$29,000 per year. The jury could reasonably award plaintiff the shortfall he was expected to encounter going forward.

Further, it was not too speculative to presume that plaintiff would have continued to teach as an employee of defendant for many years. The record reveals that plaintiff was passionate about teaching and had favorable reviews as a teacher with defendant. Plaintiff was 35 years old and had worked for defendant for eight years when he was fired. Consequently, the verdict awarding plaintiff future damages in the amount of \$485,000 (\$22,000 shortfall multiplied by 22 years) was supported by the evidence. Viewing the evidence in a light most favorable to plaintiff, the award fell within the range of the evidence and within the limits of what reasonable minds would deem just compensation. *Frohman*, 181 Mich App at 415. The particular circumstances in this case show that the trial court did not abuse its discretion in denying defendant’s motion for a new trial or remittitur.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

V

NATIONAL HERITAGE ACADEMIES, INC.,

Defendant-Appellant.

SUPREME COURT NO. 150616

Court of Appeals No. 306870

Genesee County Circuit Court

Case No. 10-93161-CL

(Hon. Geoffrey L. Neithercut)

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PROOF OF SERVICE

The undersigned hereby certifies that she served a copy of **PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL** and this **PROOF OF SERVICE** on the attorneys of record for Defendant-Appellant, being:

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Said service was made by way of first class mail, postage pre-paid, on this 12th day of
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