

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

Glen N. Lenhoff (P32610)  
Robert D. Kent-Bryant (P40806)  
LAW OFFICE OF GLEN N. LENHOFF  
328 South Saginaw Street  
8th Floor, North Building  
Flint, Michigan 48502  
810.235.5660

Michael B. Rizik, Jr. (P33431)  
RIZIK & RIZIK PC  
9400 South Saginaw Street, Suite E  
Grand Blanc, Michigan 48439  
810.953.6000

Attorneys for Plaintiff-Appellee

John J. Bursch (P57679)  
Dean F. Pacific (P57086)  
Matthew T. Nelson (P64768)  
WARNER NORCROSS & JUDD LLP  
900 Fifth Third Center  
111 Lyon Street, N.W.  
Grand Rapids, Michigan 49503-2487  
616.752.2000

Attorneys for Defendant-Appellant

---

---

**APPELLANT NATIONAL HERITAGE ACADEMIES, INC.'S  
REPLY BRIEF**

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
REPLY ARGUMENT .....	2
I.    Hecht does not even cite, much less defend, the Court of Appeals’ direct-evidence reasoning because it is wrong .....	2
II.   Hecht failed to prove that NHA intentionally discriminated against him because he is white.....	5
A.   Hecht has not identified African-Americans who engaged in nearly identical conduct and were not fired .....	5
B.   Hecht did not prove that NHA’s stated reason for ending his employment—his racist joke and interference with its investigation—was a pretext so it could actually fire him because he is white .....	8
III.  MCL 380.1230b immunizes NHA for any damages flowing from making statutorily required disclosures .....	9
CONCLUSION AND REQUESTED RELIEF .....	10

**TABLE OF AUTHORITIES**

Page(s)

**Federal Cases**

*Jacklyn v Schering-Plough Healthcare Products Sales Corp*,  
176 F3d 921 (CA 6, 1999)..... 4

*Smith v Leggett Wire Co*,  
220 F3d 752 (CA 6, 2000)..... 6

*Vaughn v Epworth Villa*,  
537 F3d 1147 (CA 10, 2008)..... 4

*Webber v International Paper Co*,  
417 F3d 229 (CA 1, 2005)..... 4

**State Cases**

*Adair v State*,  
486 Mich 468; 785 NW2d 119 (2010)..... 8

*DeBrow v Century 21 Great Lakes, Inc*,  
463 Mich 534; 620 NW2d 836 (2001)..... 4

*Hannay v Department of Transportation*,  
497 Mich 45; 860 NW2d 67 (2014)..... 10

*Hazle v Ford Motor Co*,  
464 Mich 456; 628 NW2d 515 (2001)..... 4, 7

*In re Bradley Estate*,  
494 Mich 367; 835 NW2d 545 (2013)..... 10

*Town v Michigan Bell Telephone Co*,  
455 Mich 688; 568 NW2d 64 (1997)..... 5

*Travis v Dreis & Krump Manufacturing Co*,  
453 Mich 149; 551 NW2d 132 (1996)..... 6

**State Statutes**

MCL 380.1230b..... 9

## INTRODUCTION

Hecht does not deny that he: (1) made racist comments in his third-grade classroom to the effect that white people are better than brown people (NHA Br 5); (2) involved one of his students in the “joke” (*id.*); (3) initially told the principal he had not intended his comments to be racist (*id.* at 6); (4) later denied he made the comments at all (*id.*); (5) later still, admitted his misconduct in writing (*id.*); (6) then contradicted that same writing by telling an NHA manager there were no children by him when he made the racist comments and, later, that he could not remember his racist comments (*id.* at 7); (7) disobeyed a direct order to leave the school and instead confronted one of the witnesses who complained about his racist comments, a witness who testified that Hecht asked him to lie about the incident (*id.* at 7-8); and (8) acknowledged that whereas racial bantering by other employees did *not* warrant discipline, his own racist joke did warrant punishment (*id.* at 35). Based on these undisputed facts, NHA was entitled to judgment as a matter of law. The lower courts erred in deciding what constitutes direct evidence of discrimination, determining when employees are “similarly situated,” and applying MCL 380.1230b, the disclosure-of-employee-misconduct immunity provision for schools.

Hecht largely avoids addressing the questions presented and studiously avoids defending the Court of Appeals’ reasoning. Instead, Hecht draws a factual picture that contradicts the record and defies reality. Because the Court has posed legal questions of great importance, NHA will rebut Hecht’s story in the context of further addressing those questions. Notably, however, many of Hecht’s inferences involve conclusions about *what happened*, as opposed to what NHA, exercising its business judgment, *believed to have occurred* based on the reports it received. Only the latter matters, because Hecht must prove that NHA fired him because he is white. As in the criminal law, any NHA mistakes of fact would negate NHA’s discriminatory intent.

## REPLY ARGUMENT

### I. Hecht does not even cite, much less defend, the Court of Appeals' direct-evidence reasoning because it is wrong.

Hecht avoids any mention of the Court of Appeals' actual analysis of the direct-evidence issue. (Hecht Br 18-25.) Hecht even rejects the Court of Appeals' determination of which testimony is the purported direct evidence. As a result, Hecht avoids the question this Court directed the parties to address regarding "direct evidence." (9/16/2015 Order.) Hecht does not actually argue that Weaver's understanding of what Caine-Smith may have meant is or can be direct evidence; so Hecht's response to the first question is presumably "yes."

To be clear, the Court of Appeals analyzed the direct-evidence issue by examining Weaver's deposition testimony that Hecht's counsel read into the record to ensure that the jury was not confused about what Weaver meant. (Compare COA Op 3-4, App 351a-352a with Weaver Tr 106, 109, App 140a, 143a.) In that testimony, Weaver testified regarding what she *thought* Caine-Smith's response was after learning about past racial banter at NHA: "I *think* [Caine-Smith's] point was that it happens amongst African Americans. And it's not the other way around. And that this . . . one was reported, someone was offended, and we had an obligation to take action." (Weaver Tr 109, App 143a (emphasis added).) Weaver's speculation about what she believed Caine-Smith meant is not "direct evidence" of anything.

In his appeal brief, Hecht ignores the testimony the Court of Appeals relied on and instead selectively cites to only one colloquy during his counsel's cross examination of Weaver. (Hecht Br 2-3, 10-11, 22.) In that cross-exam, Hecht's counsel misstated Weaver's earlier testimony, rephrasing it as something Caine-Smith *actually said*, rather than something Weaver *believed* Caine-Smith said: "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 round'; right?"

(Weaver Tr 154, App 10b.) As just noted, that was not what Weaver testified at her deposition; rather, Weaver testified about what she *thought* Caine-Smith meant. (Contra Hecht Br 22.)

Hecht then takes his counsel's characterization of Weaver's actual testimony and argues that this Court "must" believe that Caine-Smith "explicitly" told Weaver—during the decision to discharge Hecht—that she was punishing Hecht because he was white and other speakers were African-American. (Hecht Br 3; 11.) Caine-Smith never said that, and neither did Weaver (when all of her testimony is considered in context). In fact, Hecht's timing is not even correct, because Caine-Smith's purported comments to Weaver took place two days *before* the termination decision, before the investigation uncovered Hecht's attempts to change his co-workers' testimony.<sup>1</sup> (Weaver Tr 109, 151-152, 154-155, App 143a, 10b-11b, 40a-41a; Unwin Tr 17-23, App 245a-251a.)

More important, Weaver cleared up this point in additional trial testimony that Hecht also omits from his brief. In response to the very next question after Hecht's cited testimony, Weaver clarified that she thought Caine-Smith believed Hecht's racist joke was different than the reports of racial bantering she had recently received because "someone was offended" by Hecht's joke. (Weaver Tr 154-155, App 10b-11b.) In other words, said Weaver, Caine-Smith "was more focused on the *offensiveness*" of Hecht's joke to other employees. (*Id.* at 155, App 10b (emphasis added).) This is hardly direct evidence that Caine-Smith decided to fire Hecht because he is white. It *is* evidence that Caine-Smith considered Hecht's situation substantially different than the reports of racial bantering, even before Caine-Smith learned of Hecht's misconduct with respect to the investigation.

---

<sup>1</sup> Hecht also says the Court "must" believe that "racial jokes and banter . . . were pervasive and ongoing." (Hecht Br 10.) As NHA has acknowledged, there were racial jokes and banter—albeit not racist jokes—but the record shows that incidents occurred 10-20 times *over the course of a decade*. (Weaver Tr 177-178, App 49a; *Id.* at 107-108, App 147a-148a.)

In sum, Weaver’s testimony, whether as recited by Hecht or the Court of Appeals, cannot be direct evidence because it is subject to multiple reasonable interpretations, some of which are benign. (See COA Op 4, App 352a; COA Dissent 3, App 361a.) Indeed, even the Court of Appeals panel majority—which ruled in Hecht’s favor—believed that Weaver’s testimony could demonstrate that Caine-Smith was merely searching for an explanation for why no one had previously complained about racial bantering at the school. (COA Op 4, App 352a; COA Dissent 3, App 361a.) The majority’s conclusion is consistent with Weaver’s testimony emphasizing that Caine-Smith referenced that Hecht’s statement was different because another employee was offended and reported it. (Weaver Tr 155, App 11b; Weaver Tr 109, App 143a.)

Hecht ignores all the cases demonstrating that the federal direct-evidence standard—quoted favorably in *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999))—is inconsistent with this Court’s decision in *DeBrow v Century 21 Great Lakes, Inc*, 463 Mich 534; 620 NW2d 836 (2001). The federal courts hold that statements by decision makers that are subject to multiple reasonable interpretations, some of which are benign, do *not* constitute “direct evidence” of employment discrimination. *E.g.*, *Vaughn v Epworth Villa*, 537 F3d 1147, 1154 (CA 10, 2008); *Webber v Int’l Paper Co*, 417 F3d 229, 239 (CA 1, 2005). Conversely, in *DeBrow*, this Court said that a statement that was reasonably susceptible to multiple interpretations, some of which were benign, *could* be direct evidence of discrimination. 463 Mich at 538. Judge Wilder highlights this conflict in his dissent. (COA Dissent 3, App 361a.)

This Court should clarify that the Michigan and federal standards are indeed the same, and that statements susceptible to multiple reasonable interpretations, some of which are benign, can never be “direct evidence” of employment discrimination. (NHA Br 21–31.)

**II. Hecht failed to prove that NHA intentionally discriminated against him because he is white.**

With respect to the issue of similarly-situated employees, Hecht again chooses not to defend the Court of Appeals' analysis. Although Hecht does believe he was similarly situated to other employees, he instead seeks to address additional issues not accepted by this Court, including a pretext analysis that is irrelevant if Hecht cannot make out a prima facie case. Ultimately, Hecht agrees that the Court of Appeals erred by rejecting the *McDonnell-Douglas* analysis as a tool for considering whether he met his burden of proof. (Hecht Br 26 n8.)

**A. Hecht has not identified African-Americans who engaged in nearly identical conduct and were not fired.**

Hecht was not similarly situated to any of the African-Americans who engaged in racial banter for several reasons: Hecht made a racist joke in a classroom with students present, Hecht's coworkers were offended and complained to management, and Hecht compounded his misconduct by interfering with NHA's investigation. Hecht cannot identify a single NHA employee who was nearly identical in all relevant respects to Hecht.

Hecht acknowledges that this Court has held that a comparator is "similarly situated" only if the comparator is "nearly identical" to the plaintiff in all relevant aspects. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997). There are no such comparators here; Hecht has admitted that while he should have been disciplined, the other employees should not have been. (Hecht Closing 110, 116-117, App 304a, 308a-309a.) Hecht also contends that no students heard "or could have heard" his racist joke.<sup>2</sup> (Hecht Br 12.) The record does not require such a suspension of reality—Hecht called upon a student to affirm that

---

<sup>2</sup> Hecht said that "from his perspective," the child he involved in his repartee could not have heard anything. (Hecht Tr 229-230, App 70a-71a.) But Hecht made the joke in a classroom full of students. (*Id.*) And there is no evidence that it was impossible for students to hear his comments.

white “tables” are better than brown “tables.” (Def’s Ex 11, Hecht Statement, App 328a.) No matter. Hecht admits that he made a racist joke in his classroom with students present. (Hecht Tr 229, App 70a.) And he admits that there were students coming up next to him and going to a table ahead of him. (*Id.* at 44, App 102a.) It is not reasonable to infer that it was impossible for any third grader to have heard Hecht’s racist joke. This is a significant difference from Hecht’s alleged comparators. None of the purportedly comparable situations occurred in a classroom with students present. None had the attendant risk of harm to students, the school’s educational relationship with the students and their families, and the school’s reputation. Hecht was right to admit that he deserved to be disciplined for his misconduct even if the African-American employees were not—his misconduct was far worse. What Hecht fails to realize is that these differences make him *unsimilarly* situated to other employees.

Hecht also seems to believe that at least one incident of racial banter was reported to Caine-Smith. (Hecht Br 9 (citing Weaver Tr 137, 139, App 26a, 28a).) But the record is devoid of any evidence that Caine-Smith was aware of *any* racial banter by other employees. Indeed, Caine-Smith was not present at the time one incident occurred. (Weaver Tr 139, App 28a.) Caine-Smith and Unwin did not know of other earlier incidents in which African-Americans had engaged in racial banter when they decided to end NHA’s employment of Hecht.

Hecht alternatively contends that even if Caine-Smith and Unwin did not know of the other incidents, he was similarly situated to those employees because *Weaver* knew of some of them. (Hecht Br 32-33 (citing COA Op 7, App 355a).) But the law does not impute Weaver’s knowledge to Caine-Smith and Unwin. See *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 171-172; 551 NW2d 132 (1996). *Cf. Smith v Leggett Wire Co*, 220 F3d 752, 762 (CA 6, 2000) (employees are not similarly situated where they were disciplined by different decision makers).

Hecht next tries to downplay the scope of his racist joke. Specifically, Hecht says that the Court “must” believe that he was not referring to people when joking about burning brown tables, even though he admits that in his joke he used “tables” to refer to people. (Hecht Tr 37, 43, App 94a, 101a.) Regardless, the reasonable conclusion of his listeners and NHA was that Hecht *was* referring to burning brown people. (See Ex 9, Code’s Statement, App 326a; Ex 10, Bell’s Statement, App 327a. See also Ex 11, Hecht’s Statement, App 328a (admitting that he said both “white tables are better than brown tables” and “all brown tables should burn”).) Not one of Hecht’s purported comparators said anything of comparable reprehensibility.<sup>3</sup>

Hecht also downplays his interference with NHA’s investigation. He says that the standard of review requires the Court to (again) suspend reality and assume that when Hecht spoke with Bell and tried to speak with Code, he was not trying to get them to change their statements. (See Hecht Br 34.) The issue is not what Hecht actually did, but what Caine-Smith and Unwin *reasonably believed* Hecht did. See *Hazle*, 464 Mich at 465 n7. Further, the record is clear that Hecht was directed to leave the school immediately after meeting with Caine-Smith. (Caine-Smith Tr, 184, App 190a.) Hecht disobeyed—he stayed, tracked down Bell, and then dismissed the students Bell was tutoring so that Hecht could talk to Bell about Hecht’s predicament. (Bell Tr 132-133, 136-137, App 161a-162a, 165a-166a; Hecht Tr 46, App 104a.) After that conversation, Bell reported that Hecht tried to convince him to change his statement and coerce Bell’s help by offering to “go to bat for [Bell] because [Bell] was in trouble for breaking the social contract.” (Ex 15, Bell Statement, App 330a.) As Judge Wilder noted, none of the

---

<sup>3</sup> Hecht also tries to compare himself to unknown individuals who in unknown situations reportedly used the n-word. (Hecht Br 31-32.) There is no evidence that Caine-Smith and Unwin knew about those incidents. Accordingly, Hecht is not similarly situated.

other purported comparators engaged in similar misconduct. (COA Dissent 6, App 364a.) These additional facts also support the conclusion that Hecht was *unsimilarly* situated.

In sum, this Court should correct the confusion the Court of Appeals' decision has sown regarding what it means to be similarly situated. (NHA Br 31–36.)

**B. Hecht did not prove that NHA's stated reason for ending his employment—his racist joke and interference with its investigation—was a pretext so it could actually fire him because he is white.**

Hecht seeks to add an issue for this Court's review—whether he proved that NHA's stated justification for its decision is a pretext for unlawful discrimination. This Court does not typically address issues on which it has not granted leave. *Adair v State*, 486 Mich 468, 491 n42; 785 NW2d 119 (2010). And NHA's stated reason for ending Hecht's employment—the racist joke he admitted making and NHA's business judgment that Hecht tried to interfere with its investigation—was not a pretext for intentionally firing Hecht because he is white. Hecht cites three reasons to argue to the contrary. Each is without merit:

1. Weaver's belief that Caine-Smith believed African-American and Caucasian employees were treated differently with respect to racial banter. As explained above, Weaver's testimony is that Caine-Smith believed Hecht's classroom joke offended other employees, while previous racial bantering among adults had not offended anyone, thus no one reported it. And Weaver's conversation with Caine-Smith occurred when Weaver reported Hecht's comments and before Caine-Smith learned that Hecht had tried to interfere with NHA's investigation.
2. Hecht was an excellent teacher. Hecht does not explain why past performance gives him a pass for making a racist joke in a classroom full of third graders, or for disobeying a direct order and interfering with a school investigation.
3. Hecht was fired after his first offense, contrary to NHA's employment policies. NHA fired Hecht for two offenses: making a racist joke *and* interfering with NHA's investigation. Moreover, NHA's policies warn that racial harassment may result in termination for the first offense, and that the level of discipline is based on a number of factors, including recurrence and “the seriousness of the violation.” (Ex 7, NHA Handbook 24-25, 28, 29, App 78b-79b, 82b-83b.)

### III. MCL 380.1230b immunizes NHA for any damages flowing from making statutorily required disclosures.

The Legislature could not have more clearly stated its intent to immunize an employer from any liability when, in good faith, it discloses a current or former employee's unprofessional conduct to a school to which the person has applied for a position. And this case demonstrates why this immunity "from any liability for providing information," MCL 380.1230b(1)(b), extends to enhancing damages in an employment case. Here, Hecht admits making a racist joke in a classroom full of third graders. When NHA provided its statutory disclosure, it provided all of the supporting documentation—including Hecht's own statements—to allow the requesting schools to evaluate Hecht's conduct. (Unwin Tr 25-29, App 253a-257a.) Those schools' independent evaluation of what Hecht did led them not to hire Hecht based on NHA's disclosure. Hecht's enhanced damages against NHA are "liability for providing information."

Hecht accuses NHA of question begging, but only by twisting two separate inquiries. (Hecht Br 47.) NHA has repeatedly observed that Hecht's inability to find another teaching job is the result of schools learning that Hecht made a racist, in-classroom "joke." Hecht *needs to find* another teaching job because of what NHA did—fired him for making the racist comment in a classroom full of third graders and then interfering with its investigation. Hecht *cannot find* another teaching job because of what Hecht did. In other words, NHA's decision did not cause Hecht's inability to obtain another teaching job, but providing information about Hecht's unprofessional conduct did. (Accord *Amicus* Br of MI Atty Gen 10-11.)

Hecht defends the Court of Appeals' decision on the grounds that Hecht "did not sue" NHA for making the disclosure. (Hecht Br 43-44.) As the Michigan Attorney General explains, the Legislature's use of the word "liability" demonstrates its intent to extend immunity to all legal responsibility for any damages flowing from the disclosure without regard of action

pleaded. (*Amicus Br of MI Atty Gen 5* (citing *Hannay v Dep't of Transp*, 497 Mich 45; 860 NW2d 67 (2014); *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013)).) NHA's immunity is not dependent on the nature of Hecht's claim.

The remainder of Hecht's contentions are lifted verbatim from Hecht's opposition to NHA's Application for Leave, and are addressed in NHA's initial brief. (NHA Br 41-42.) Only Hecht's contention that any error was harmless deserves additional comment. In 2009-10, when Hecht was seeking another teaching job, the average annual salary for a Michigan teacher was \$61,867,<sup>4</sup> more than double the pay of the factory job he settled for. In the event that there is a second trial in this matter, the trier of fact should not be allowed to award damages based on NHA's statutorily-mandated disclosure of Hecht's racist comments. (NHA Br 36-42.)

## CONCLUSION AND REQUESTED RELIEF

Michigan law regarding claims of employment discrimination is muddled, and Hecht's re-characterization of the trial record should not distract the Court from clarifying this important area of the law. First, an employee's testimony about what she believed or thought another person meant in a statement that is subject to multiple interpretations, some of them benign, can never be "direct evidence" of discrimination. Second, an employee who makes a racist joke in a classroom and then interferes with the school's investigation is not "nearly identical" to employees who sometimes banter in employee-only contexts. And third, an employer cannot be punished for making mandatory disclosures to a school about a prospective employee's prior bad acts. For all these reasons, the Court of Appeals should be reversed, and the Court should grant the relief identified in NHA's opening brief.

---

<sup>4</sup> U.S. Department of Education, Institute of Education Sciences, National Center for Education Statistics, Table 211.60 available at <http://tinyurl.com/teachersalarystats>.

Dated: January 19, 2016

Respectfully submitted,

WARNER NORCROSS & JUDD LLP

By /s/ Matthew T. Nelson

John J. Bursch (P57679)

Dean F. Pacific (P57086)

Matthew T. Nelson (P64768)

WARNER NORCROSS & JUDD LLP

900 Fifth Third Center

111 Lyon Street, N.W.

Grand Rapids, Michigan 49503-2487

616.752.2000

Attorneys for Defendant-Appellant

13892068

RECEIVED by MSC 1/19/2016 5:25:15 PM