

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

Plaintiff-Appellee,

v.

NATIONAL HERITAGE ACADEMIES,
INC.,

Defendant-Appellant.

Supreme Court Case No.: 150616

Court of Appeals Case No.: 306870

Genesee CC Case No. 10-093161-CL

**AMICUS CURIAE BRIEF
OF THE MICHIGAN MANUFACTURERS ASSOCIATION**

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Statement of Question Presented

Should a Michigan employer have to pay a half-million-dollar jury verdict when it terminates an employee for making inflammatory racist statements on the job and then lying about them and impeding the employer's investigation?

Introduction

The appellant is right that a “non-lawyer might say that this case represents everything that is wrong about our legal system.” Companies looking to do business in Michigan might say the same thing. This case, if the Court of Appeals' decision stands, puts all Michigan employers in an impossible spot: Fail to fire an employee who makes racist statements on the job and face hostile-work-environment claims from other employees; or take appropriate action and get hit with a half-million-dollar jury verdict. Our employment laws cannot possibly compel that quandary, and amicus curiae the Michigan Manufacturers Association (MMA) urges the Court to reverse.

The employer here, National Heritage Academies (NHA), acted appropriately and in compliance with federal and state law when it terminated its employee, Craig Hecht, for making racist statements on the job and in front of a classroom full of nine-year-olds. This was, to understate things, an easy call. The comments were reprehensible: Hecht told his third-graders that “white is better than brown” and that “brown should burn.” He then sought to engage the students in the exchange, asking them, “White is better than brown, right?” The other adults in the room appropriately called foul and reported Hecht to his superiors. Hecht first lied about making the statements, then admitted he did make them, and then tried to get other teachers to lie to cover his tracks. The school, sensibly enough, concluded that making racist statements in front of a classroom full of nine-year-olds, lying about it, and then pressuring colleagues to impede the subsequent investigation were sufficiently severe offenses to warrant termination.

The school, in short, determined in its considered judgment that it did not want a lying racist to teach its third-graders.

Under no rational application of our employment laws is the end result of Hecht's actions a \$535,000 jury verdict in his favor. Yet that was the result here, and the result the Court of Appeals majority affirmed.

This case highlights the importance of proper and faithful application of the employment-discrimination standards under Michigan's Elliott-Larsen Civil Rights Act (ELCRA). This case had no business reaching a jury. Mr. Hecht's theory was that he suffered "reverse discrimination" because he is white and was terminated after making racist statements, while black employees supposedly engaged in racial "banter" at the school but were not fired. His primary evidence in support of this theory was a twice-removed account by another employee that she *understood* a statement by NHA's principal to mean that the principal knew about this racial banter (which was not in front of students and not reported to supervisors) yet did not terminate the other teachers. Proper application of the employment-discrimination standards would have weeded this case out at the pleadings stage or at summary disposition, or at the very latest, in a motion for directed verdict at trial. An employer does not violate employment laws when it fires a teacher for making racist statements in a third-grade classroom, lying about it, and obstructing the investigation.

The Court of Appeals majority, however, held that Michigan law does indeed permit this absurd result. The majority held, among other things, that the second-hand comment above was "direct" evidence of discrimination, and that Hecht was "similarly situated" to the other teachers, even though their alleged statements were not in front of students and not reported. In so holding, the Court of Appeals lowered the bar for proceeding with viable discrimination claims,

and eroded the critical procedural safeguards that protect Michigan employers from frivolous discrimination suits. The end product is a loss for everyone: Michigan employers cannot act to remedy potentially hostile work or educational environments without fear of lawsuits; employees with real discrimination claims get lost in a sea of flotsam like this case; and the courts are left to sort through a legal morass where “direct” evidence really means “indirect,” “similarly situated” means “much differently situated,” and “race discrimination in employment” really means “terminating a racist employee.” The MMA, on behalf of all Michigan employers, urges this Court to reverse the Court of Appeals’ decision and restore a sensible employment climate in Michigan.

Statement of Interest of Amicus Curiae

Amicus curiae Michigan Manufacturers Association (MMA) is an association of Michigan businesses. The MMA was organized and exists to promote the interests of Michigan businesses and of the public in the proper administration of laws, to study matters of general interest to its members, and otherwise to promote the general business and economic climate of the State of Michigan. A significant aspect of the MMA’s activities involves representing its members’ interests before the state and federal courts, legislatures, and administrative agencies. Through effective representation of its membership before the judicial, legislative, and executive branches of government on issues of importance to the manufacturing community, the MMA works to foster a strong and expanding manufacturing base in Michigan. The MMA appears before this Court as a representative of approximately 2,400 private business concerns, all potentially affected by the dispute in this case.

The interests of manufacturers are coextensive with the interests of the citizens of Michigan. Simply put, manufacturing is the backbone of Michigan’s economy. Manufacturing is the largest sector of the economy, generating 18 percent of the gross state product, comprising

13.8 percent of total nonfarm employment in Michigan, and employing 563,000 Michigan residents. And growing: From June 2009 through November 2013, employment in Michigan's manufacturing sector rose by 124,600 jobs (28.4 percent), and 44 percent of nonfarm jobs added in Michigan since the recession ended have been in the manufacturing sector. Michigan is the national leader in new manufacturing job creation since the recession ended, outpacing the next closest states by about 50 percent.

Manufacturing has always contributed substantially to Michigan job growth and economic output, and the promotion of a thriving manufacturing sector in Michigan is of the utmost importance to the future economic survival of this state. The issues in this case therefore substantially affect not only the manufacturing sector, but also the economy of the State of Michigan as a whole, including employment levels, economic growth, and the ability of Michigan industries to compete in the regional, national, and global marketplaces.

The issues before the Court are of critical concern for Michigan manufacturers because, due to the size of their workforce and the nature of the "shop floor" work environment, manufacturers often find themselves defending employment discrimination and harassment claims. If the Court of Appeals majority opinion stands, then manufacturers likely will experience an increase in such lawsuits, with many including frivolous claims like the plaintiff's here. Applying the majority's analysis to claims involving circumstantial evidence of discrimination, those lawsuits will devolve into second-guessing the employer's business judgment. This uncertainty will prevent the litigants from properly evaluating the merits of claims, making it difficult to resolve disputes without judicial intervention. The end result will be an increased cost of doing business in Michigan and the appearance of an unattractive and costly venue for all employers looking to do business here.

Statement of Facts

The MMA adopts the statement of facts set forth in NHA's appeal brief.

Standard of Review

The MMA adopts the standard of review set forth in NHA's appeal brief.

Argument

The Court of Appeals' decision is bad for employers and employees alike. For employers, the decision places them in an employment-discrimination Catch-22. If the employer acts appropriately to remedy racism in the workplace, then it risks opening itself up to "reverse" discrimination claims like the plaintiff's here. If the employer fails to act, then racism goes unpunished, and the result for employees is a potentially hostile work environment. And here, the result for the students and other employees at NHA would be a racist teacher continuing to teach third grade. This world is good for no one except the racist, yet that is the world the Court of Appeals majority says we live in.

It does not have to be. The Court of Appeals majority brought us here not through faithful application of this Court's precedent, but rather through a convoluted misapplication of that precedent. Specifically, the Court of Appeals erred by holding (1) that a second-hand comment about what someone *understood* a supervisor's statement to mean was "direct" evidence of discrimination; and (2) that the well-established *McDonnell Douglas* burden-shifting framework does not apply following the submission of the case to a jury.

I. The Court of Appeals Misapplied this Court's Precedents When It Erroneously Concluded that the Plaintiff Presented "Direct" Evidence of Discrimination

A. Direct v. Indirect Evidence

In employment-discrimination cases, an employee can establish proof of discriminatory intent by either direct or indirect (circumstantial) evidence. *Hazle v Ford Motor Co*, 464 Mich

456, 462; 628 NW2d 515 (2001). The distinction matters: generally speaking, a plaintiff with direct evidence of discrimination has a far greater likelihood of reaching a jury than a plaintiff with only indirect evidence of discrimination.

Discrimination claims relying on indirect, circumstantial evidence proceed under the *McDonnell Douglas* burden-shifting framework. *Hazle*, 464 Mich at 462. Under this framework, to establish a *prima facie* case of discrimination, an employee must show (1) he belongs to a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; and (4) others, similarly situated and outside the protected class, were treated differently. *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997). The establishment of a *prima facie* case gives rise to a rebuttable inference of discrimination. To dispose of the inference, an employer need only “articulate a ‘legitimate, nondiscriminatory reason’ for plaintiff-[employee]’s termination.” *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998). The employee must then establish that the articulated reason was not the true reason, but merely a pretext for discrimination. *Id.* at 174. At all times, the burden of persuasion rests with the employee to prove intentional discrimination. *Hazle*, 464 Mich at 464 n8.

This burden-shifting framework does not apply when there is direct evidence of discrimination. *Debrow v Century 21 Great Lakes*, 463 Mich 534, 540; 620 NW2d 836 (2001). Instead of relying on inferences and rebuttable presumptions, direct evidence is “evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions.” *Hazle*, 464 Mich at 462 (quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (6th Cir 1999)) (emphasis added). “[D]irect evidence’ refers to ‘a smoking gun’ showing that the decision-maker relied upon a protected

characteristic in taking an employment action.” *PowerComm v Holyoke Gas & Elec Dep’t*, 657 F3d 31, 35 (1st Cir 2011). “Such evidence would take the form, for example, of an employer telling an employee, ‘I fired you because you are disabled’” (or white, or too old). *Smith v Chrysler Corp*, 155 F3d 799, 805 (6th Cir 1998). In short, “only the most blatant remarks, whose intent could be nothing other than to discriminate” constitute direct evidence. *Sharp v Aker Plant Services Group*, 726 F3d 789, 798 (6th Cir 2013) (quotations omitted). “Evidence of discrimination is not considered direct evidence unless a racial motivation is explicitly expressed.” *Amini v Oberlin College*, 440 F3d 350, 359 (6th Cir 2006).

“In a direct evidence case involving mixed motives, *i.e.*, where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a[n employee] must prove that the [employer’s] discriminatory animus was more likely than not a ‘substantial’ or ‘motivating’ factor in the decision.” *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003) (citing *Price Waterhouse v Hopkins*, 490 US 228, 244 (1989)). In such cases, “a defendant may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision.” *Id.* Unlike cases proceeding under the burden-shifting framework, “an employer may not avoid trial by merely ‘articulating’ a nondiscriminatory reason for its action.” *Harrison v Olde Financial Corp*, 225 Mich App 601, 613; 572 NW2d 679 (1997). In other words, because direct evidence is akin to a “smoking gun,” an employee-plaintiff presenting such evidence is generally much more likely to survive summary disposition.

B. This Was Not “Direct” Evidence

The Court of Appeals wrongly concluded that Hecht presented “direct” evidence of discrimination. Inferring discrimination from a witness’s summary of what she *thought* a decision-maker *meant* during a conversation is the exact opposite of “direct.” The statement at

issue was testimony from Dean Corinne Weaver about a conversation she had with Principal Linda Caine-Smith, which Weaver understood to mean that Caine-Smith had heard racial bantering from other employees “under different circumstances”:

[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.

(Slip Op at 3; emphasis added.)

According to the majority, “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.” (*Id.* at 4.) But there was no testimony about the substance of “Caine-Smith’s response.” Instead, Weaver was drawing an inference about what she *thought* Caine-Smith *intended*, and then the majority drew another inference to conclude that Hecht was not treated the same as African Americans who engaged in racial bantering. After making these inferential leaps, the majority then labeled the evidence “direct.”¹

¹ Hecht’s Brief on Appeal also fails in its attempt to recharacterize Weaver’s testimony. Weaver expressly *denied* that Caine-Smith made a distinction based on race and reiterated that Weaver was expressing her belief of what Caine-Smith meant. (Hecht App 11b (“Q. Okay. So there was a distinction between [Hecht] – there was a distinction Caine-Smith – Ms. Caine-Smith made between Craig and the other jokesters; and that distinction was racial; correct? A. No.”)).

To reach its conclusion, the majority misapplied *Debrow v Century 21 Great Lakes*, 463 Mich 534; 620 NW2d 836 (2001). In *Debrow*, the decision-maker directly told the employee during his termination meeting that the employee was “getting too old for this shit.” *Id.* at 538. That statement expressly referenced the employee and his age, and unambiguously linked the employee’s termination to his age. This Court explained that, “[c]onsidered 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.” *Id.* at 539.

That is a far cry from the statement here. Weaver’s summary of Caine-Smith’s statement was not made directly to Hecht, nor was it made during a termination meeting. There was no explicit expression of discrimination. Instead, the majority concluded that Weaver’s testimony *implied* that Caine-Smith acted with discriminatory animus. Indeed, as Judge Wilder correctly noted in his dissent, “Weaver’s summation of what Caine-Smith allegedly said cannot *on its face* establish that [Hecht’s] race was a factor in Caine-Smith’s decision to terminate [Hecht]. Rather, at a minimum an *inference* must be drawn[.]” (Slip op. dissent at 3; emphasis in original.) “The majority classified Weaver’s testimony as rain; I would find that, in reality, it was only a wet raincoat.” (*Id.*)

The statements in this case are nothing like the statements found to be “direct” evidence of discrimination in other cases. For example, in *Johnson v University of Cincinnati*, 215 F3d 561, 577 n7 (6th Cir 2000), a university president stated, “[w]e already have two black vice presidents. I can’t bring in a black provost.” This obviously required no inferences for the court to conclude that racial consideration motivated, at least in part, the employment decision. *Id.* Likewise, in *Abuali v State*, 2001 WL 1585300, at *2 (Mich App 2001), an employee presented

direct evidence of national-origin discrimination by alleging, among other things, that a supervisor told the plaintiff that Arabs were “evil” and that “all those who believed in Islam believed [sic] in a fake religion, that the Prophet Muhammad was phoney [sic], and we were all going to hell because we did not accept Jesus.”

In contrast, when a court must draw any inference to conclude that the statements were discriminatory, the statements are not “direct” evidence of discrimination. In *Bland v Comprehensive Logistics Co*, 2013 WL 2096625, at *2 (Mich Ct App 2013), for example, the court rejected the plaintiff’s argument that a vice president’s statements about favoring a “younger, more aggressive workforce” were direct evidence of age discrimination. Likewise, in *Williams v Ford Visteon Motor Co*, 2005 WL 1459612, at *2 (Mich Ct App 2005), the court held that the alleged statement, “a lot of you black guys always seem to end up in prison,” was not direct evidence of discrimination. The court held that the statement was not related to the employee’s employment, even though the employer allegedly refused to hire the employee because of a prior murder conviction. And in *Howard v Ford Motor Co*, 2010 WL 46876, at *3 (Mich Ct App 2010), the court held that an alleged statement by the employer’s agent that the employee would be in a higher position if not for his disabled hands was not direct evidence of disability discrimination. The court explained that, unlike in *Debrow*, “In our case, the statement could mean many different things and did not seem to impact the decision to terminate plaintiff. It is not direct evidence that would alone automatically preclude summary disposition.” *Id.*

The Court of Appeals majority stated that its drawing of inferences simply showed the statement was subject to “varying interpretations” and that it was up to the jury to determine which interpretation applied. The majority relied on a statement from *Debrow*, where this Court noted that the “getting too old” remark was direct evidence of discrimination even though it

“may be subject to varying interpretations.” (Slip op. at 4; quoting *Debrow*, 463 Mich at 539.) But that was simply an acknowledgement that, even with direct evidence, the employer can avoid liability by proving to the jury that it would have made the same decision absent the impermissible age-based reason. See *Harrison*, 225 Mich App at 613 (“in addition to challenging the credibility of the plaintiff’s claims of discrimination, in a case involving direct evidence of discriminatory action, the employer may also assume the burden of persuading the factfinder that, even if the plaintiff’s allegations are true, the employer would have made the same decision without consideration of discriminatory factors”). This Court did not suggest that evidence can be “direct” if a court must draw inferences to reach a conclusion that the statement was discriminatory.²

Direct evidence of discrimination is rare. *Robinson v Runyon*, 149 F3d 507, 513 (6th Cir 1998) (“Rarely will there be direct evidence from the lips of the defendant proclaiming his or her racial animus.”). The Court of Appeals majority’s approach here would make it far less rare. The majority’s approach introduces uncertainty and confusion in the direct-evidence analysis. Reviewing courts would be required to treat any comment that an employee “thinks” is discriminatory as direct evidence, even if it does not explicitly reference discrimination against the employee. The majority’s ruling thus turns every perceived slight into a direct-evidence case, assuredly resulting in a proliferation of employment-discrimination lawsuits founded solely

² The majority made another critical mistake by improperly engrafting the “similarly situated” analysis used when analyzing circumstantial evidence of discrimination to what is supposed to be a straightforward direct-evidence analysis. Its opinion expressly assumed that Hecht was treated less favorably than similarly-situated African-American employees. In other words, the majority erroneously melded together two distinct and mutually exclusive theories of proving discrimination. See *Kline v Tenn Valley Auth*, 128 F3d 337, 348-49 (6th Cir 1997) (“The direct evidence and circumstantial evidence paths are mutually exclusive [I]f a plaintiff attempts to prove [his] case using the *McDonnell Douglas–Burdine* paradigm, then the party is not required to introduce direct evidence of discrimination.”).

on speculation and guesswork, a result that conflicts with well-established law. *See, e.g., Hazle*, 464 Mich 474-77 (subjective beliefs cannot establish claim of discrimination). This Court should reverse the majority’s conclusion that Hecht presented direct evidence of discrimination and reaffirm that direct evidence exists only if the evidence demonstrates discriminatory animus on its face, without resort to inferences.

II. The Court of Appeals Erroneously Concluded that the Burden-Shifting Framework Is Inapplicable Following the Submission of a Case to a Jury. Under the Burden-Shifting Framework, the Jury’s Verdict Here Must Be Set Aside.

A. The Burden-Shifting Framework Applies

The Court of Appeals majority likewise erred by holding that the *McDonnell Douglas* framework does not apply to appellate review of a jury decision.³ The majority’s conclusion threatens to leave reviewing courts with no viable standards and guideposts with which to evaluate whether employment-discrimination plaintiffs have provided sufficient evidence of discrimination to support a jury verdict. The majority’s analysis, in short, will make it more difficult for courts to weed out meritless claims like Hecht’s here, and more likely that employers will be faced with frivolous discrimination claims.

Appellate courts review denials of motions for directed verdict and JNOV *de novo*.⁴ *Sniecinski*, 469 Mich at 131. To guide the *de novo* review, Michigan courts have routinely applied elements from the burden-shifting analysis to determine whether an employee provided sufficient evidence for a jury finding of intentional discrimination. This Court in *Sniecinski*, for

³ *Amicus* asserts that the *prima facie* case and pretext elements apply regardless of whether the court is reviewing a directed verdict or a JNOV motion. It further notes that while the majority stated that NHA’s directed verdict motion was not being appealed, this is in error, as noted in Judge Wilder’s dissent. (Slip op. dissent at 7.)

⁴ The applicability of *McDonnell Douglas* by the trial court on motions judgment as a matter of law or JNOV and by appellate courts is distinct from the issue of whether juries should be instructed on the *McDonnell Douglas* standard. This is because one of the stated rationales for declining to instruct juries—possible “juror confusion”—does not apply to the court’s review.

example, stated on review of the denial of motions for directed verdict and JNOV that an employee “must present evidence” of a *prima facie* case and then, if the employer articulates a legitimate, nondiscriminatory reason for the adverse action, demonstrate pretext. *Id.* at 134. The Court reversed the denial of the motions because the employee “failed to establish causation under either the *McDonnell Douglas* test or the direct evidence test.” *Id.* at 136. *See also Matras v Amoco Oil Co*, 424 Mich 675, 685; 385 NW2d 586 (1986) (“the *McDonnell Douglas* *prima facie* case approach folds into the traditional directed verdict/judgment notwithstanding the verdict standard”); *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005) (citing and analyzing whether the employee established *prima facie* case of retaliation on an appeal of a JNOV motion); *Town*, 455 Mich at 702-07 (analyzing *prima facie* case of discrimination and pretext on appeal of decision granting motion for directed verdict).

Court of Appeals decisions also demonstrate that this framework applies after the case has been submitted to a jury. *See, e.g., Campbell v Human Services Dep’t*, 286 Mich App 230, 239-43; 780 NW2d 586 (2009) (on appeal of denial of motion for a directed verdict, analyzing whether the employee established the fourth element of her *prima facie* case and whether there was a triable issue on pretext); *Jernigan v Gen Motors Corp*, 180 Mich App 575, 585-86; 447 NW2d 822 (1989) (on appeal of denial of employee’s JNOV following verdict in employer’s favor, concluding that after the employee established a *prima facie* case and the employer articulated a nondiscriminatory reason, the jury’s verdict was not against the great weight of the evidence where the employee did not establish pretext).

To support its conclusion that the *McDonnell Douglas* framework does not apply after the case is submitted to the jury, the majority relied solely on *Brown v Packaging Corp of*

America, 338 F3d 586 (6th Cir 2003). But the Court of Appeals majority cited the *dissent* from that case. *See id.* at 587, 595 n1. The majority in *Brown* correctly observed that the “elements of a *prima facie* case frequently are still relevant after the case has gone to the jury.” *Id.* at 597 n3 (Clay, J., writing for the court).

Other cases confirm that the Sixth Circuit does not abandon the *McDonnell Douglas* framework after the case is submitted to a jury. In *Noble v Brinker Intern*, 391 F3d 715 (6th Cir 2004), for example, the Sixth Circuit noted that the “ultimate question,” of course, is “whether the plaintiff has proven that [his] discharge was intentionally discriminatory,” but this does not mean the *McDonnell Douglas* framework has no role on appeal following a jury verdict. *Id.* at 721. To the contrary, the Sixth Circuit *rejected* the employee’s argument that the court was precluded from considering whether the employee proved a *prima facie* case simply because the employee survived summary judgment. *Id.* at 725-26. Specifically, the *Noble* court explained that, although the reviewing court should not focus *solely* on whether an employee has made out a *prima facie* case, “that is not to say that the evidentiary underpinnings of a plaintiff’s *prima facie* case are irrelevant or insulated from examination by this court to aid its determination whether the evidence *in toto* is sufficient to support a finding of intentional discrimination.” *Id.* at 725. The court further explained that if a reviewing court did not examine evidence of a *prima facie* case, this would effectively insulate the employee’s claims from review:

[A] court may not, after a trial on the merits, grant judgment as a matter of law *merely because* the plaintiff failed to establish a *prima facie* case, but when the indirect method of proof is the only remaining avenue by which a plaintiff can establish his claim of intentional discrimination, it is necessary and appropriate for a court to evaluate the evidence supporting the plaintiff’s *prima facie* case. In fact, the Supreme Court’s criticism of the Fifth Circuit in *Reeves [v Sanderson Plumbing Products]*, 530 US 133 (2000) demands as much. To hold as *Noble* requests “would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and [the U.S. Supreme Court

has] reiterated that trial courts should not ‘treat discrimination differently from other ultimate questions of fact.’”

Id. (quoting *Reeves*, 530 US at 148; emphasis in original). Ultimately, *Noble* reversed the denial of a motion for judgment as a matter of law because there was insufficient proof to establish the fourth element of the employee’s *prima facie* case, namely whether he was treated differently than similarly situated employees outside his protected class. *Id.* at 728-32. Thus, the Court of Appeals majority here was simply incorrect that the *McDonnell Douglas* framework does not apply on appeal from a jury verdict.

B. Properly Applying the Burden-Shifting Framework, the Plaintiff’s Case Fails: Plaintiff Failed to Identify Similarly Situated Employees Who Were Treated More Favorably, and Courts May Not Second-Guess an Employer’s Business Judgment in Deciding to Terminate an Employee Who Makes Racist Statements on the Job.

Properly applying the *McDonnell Douglas* analysis to this case, it becomes readily apparent that Hecht did not present sufficient circumstantial evidence of intentional discrimination to justify the verdict. Simply put, a Michigan employer should not be subject to a damages award for discrimination when it acts to *remedy* a potentially hostile work environment caused by an employee making racist statements on the job.⁵

Under the burden-shifting framework, Hecht’s claim fails because he did not produce evidence that any similarly situated employees were treated more favorably than he was. Under Michigan Law, “similarly situated” means that “*all* relevant aspects” of Hecht’s employment situation must be “nearly identical” to those of his comparator’s situation. *Town*, 455 Mich at 699-700 (emphasis added). *See also Mitchell v Toledo Hosp*, 964 F2d 577, 583 (6th Cir 1992)

⁵ Hecht implicitly recognizes this Catch-22, but asserts that he was unfairly singled out for punishment. (Hecht Br at 34). In other words, he effectively claims that the racially offensive environment he contributed to should have been allowed to continue. Under his theory, an employer would never be able to remedy hostile work environments.

(to be “similarly situated,” “the plaintiff and the colleagues to whom he seeks to compare himself 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”) (citations omitted). Here, as detailed by NHA in its brief, the majority failed to resolve differentiating factors between Hecht’s conduct and the conduct of his alleged comparables. Perhaps most critically, Hecht’s inappropriate racial comments were made in front of students in a school whose student body is approximately 93 percent African American, while none of the other alleged racial bantering involved students. Moreover, none of the other alleged statements were reported to supervisors, and none of the alleged comparable employees attempted to interfere with an investigation, as Hecht did here.

Another critical flaw in the majority’s analysis is that it attempts to usurp the employer’s business judgment in deciding how to appropriately remedy potential hostile work environments. Under *Faragher v Boca Raton*, 524 US 775 (1998), and *Burlington Industries v Ellerth*, 524 US 742 (1998), an employer may avoid liability to a Title VII hostile work environment claim and assert an affirmative defense by establishing two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 US at 807; *Ellerth* 524 US at 765.⁶ Exercising reasonable care to “prevent and correct” harassing behavior often takes the form of disciplining or terminating the individual responsible for creating the hostile work environment. *See, e.g., Collette v Stein-Mart*, 126 F App’x 678, 686 (6th Cir 2005)

⁶ The *Faragher/Ellerth* affirmative defense “is equally applicable to claims of racial harassment.” *Allen v Michigan Dep’t of Corr*, 165 F3d 405, 411 (6th Cir 1999).

(employer established affirmative defense where it suspended harasser pending an investigation and terminated him six days later).

Similarly, for hostile-work-environment claims under the ELCRA, a plaintiff must prove that the employer “failed to take prompt and adequate remedial action upon notice of the creation of a hostile work environment.” *Chambers v Tretco*, 463 Mich 297, 311; 613 NW2d 910 (2000). Thus, employers can defeat such claims by demonstrating that its remedial action to address the alleged hostile work environment was prompt and adequate. *Id.*

The Court of Appeals majority’s analysis here, however, undermines the well-settled rule that courts do not second-guess the soundness of an employer’s business judgment in deciding what remedial action is appropriate. To establish pretext, an employee “cannot simply show that the employer’s decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.” *Town*, 455 Mich at 704 (quotation omitted). To this end, “[t]he soundness of an employer’s business judgment . . . may not be questioned as a means of showing pretext.” *Dubey v Stroh Brewery Co*, 185 Mich App 561, 566; 462 NW2d 758, 760 (1990). In other words, “it is inappropriate for the judiciary to substitute its judgment for that of management.” *Smith v Leggett Wire Co*, 220 F3d 752, 763 (6th Cir 2000). Accordingly, “[a]s long as an employer has an honest belief in its proffered nondiscriminatory reason for discharging an employee, the employee cannot establish that the reason was pretextual simply because it is ultimately shown to be incorrect.” *Majewski v Automatic Data Processing*, 274 F3d 1106, 1117 (6th Cir 2001).⁷ Second-guessing NHA’s business judgment regarding the

⁷ In *Movsisyan v IPAX Cleanogel*, 2013 WL 2494979, at *6 (Mich App June 11, 2013), the Court of Appeals concluded that “the Sixth Circuit’s ‘honest belief’ rule is no more than a different iteration of Michigan’s business judgment rule.”

appropriate disciplinary action to take is precisely what happened in the trial court and the Court of Appeals, and what Hecht advocates for throughout his appellate brief.⁸

The majority's ruling places employers such as NHA in a quandary. To avoid liability for maintaining a hostile work (or educational) environment under state and federal law, employers must take swift action.⁹ But, by failing to apply a pretext analysis (along with the business-judgment rule), disciplinary actions taken against harassers will be second-guessed by the harasser, the trial court, and the jury. Courtrooms will turn into the very "super personnel departments" they are not supposed to be, as the perpetrators of the harassing behavior (here, Hecht) transform their inappropriate behavior into a viable lawsuit. Such a result was not intended by the ELCRA, because instead of taking steps to prevent harassment, employers will be hesitant to act for fear of being slapped with a discrimination lawsuit. The majority's ruling does not strike the proper balance between these competing interests. *See Sanchez v Lagoudakis*, 458 Mich 704, 722; 581 NW2d 257 (1998) (recognizing need to balance employer's competing obligation not to discriminate with obligation to comply with statutory law).

For all of these reasons, this Court should reverse the Court of Appeals majority's decision and reaffirm that the *McDonnell Douglas* elements are relevant and must be considered when determining whether an employee has proven intentional discrimination, even after the case is submitted to a jury. The Court should also conclude that Hecht failed to establish both that other similarly-situated employees were treated more favorably and that NHA's legitimate, non-discriminatory reasons for his termination—Plaintiff's conscious decision to engage in

⁸ For example, Hecht's Brief on Appeal focuses on whether any student actually heard the racist remarks. This is irrelevant because Hecht cannot challenge NHA's business judgment that it is inappropriate for teachers to make racist statements in the classroom, regardless of whether any student hears the comments.

⁹ As the NHA notes in its Appellate Brief, even Hecht agreed that some discipline was warranted, although he disagreed with the severity of the penalty.

harassing behavior that could potentially subject NHA to liability and then interfering with the investigation—were a pretext for discrimination.

Conclusion

The Court of Appeals' decision is bad for the workplace environment in Michigan, for both employers and employees. Employers are paralyzed in an employment-law Catch-22 where a lawsuit awaits no matter the decision, and employees are left with a workplace where harassment not only goes unpunished but is actually rewarded. This cannot be, and should not be, Michigan law. The MMA asks this Court to vacate the Court of Appeals decision and direct that a judgment be entered in NHA's favor for the reasons stated in the dissent.

Respectfully submitted,

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