

STATE OF MICHIGAN
IN THE SUPREME COURT

CRAIG HECHT,

SUPREME COURT NO. 150616

Plaintiff-Appellee,

Court of Appeals No. 306870

V

Genesee County Circuit Court

NATIONAL HERITAGE ACADEMIES, INC.,

Case No. 10-93161-CL

(Hon. Geoffrey L. Neithercut)

Defendant-Appellant.

LAW OFFICE OF GLEN N. LENHOFF

BY: GLEN N. LENHOFF (P32610)

ROBERT D. KENT-BRYANT (P40806)

Attorney for Plaintiff-Appellee

328 South Saginaw Street

8th Floor, North Building

Flint, Michigan 48502

(810)235-5660

RIZIK & RIZIK, PC

BY: MICHAEL B. RIZIK, JR. (P33431)

Co-Counsel for Plaintiff-Appellee

9400 South Saginaw Street, Suite E

Grand Blanc, Michigan 48439

(810)953-6000

WARNER, NORCROSS & JUDD, LLP

BY: JOHN J. BURSCH (P57679)

MATTHEW T. NELSON (P64768)

CONOR B. DUGAN (P66901)

Attorneys for Defendant-Appellant

900 Fifth Third Center

111 Lyon Street, NW

Grand Rapids, Michigan 49503-2487

(616)752-2000

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COUNTER-STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction to hear this Appeal pursuant to MCR 7.301(A)(2), which grants the Supreme Court authority to review by appeal a decision of the Court of Appeals.

**COUNTER-STATEMENT OF JUDGMENT APPEALED
FROM AND RELIEF SOUGHT**

Defendant National Heritage Academies has appealed 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 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."

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant has appealed from the jury verdict in this case rendered July 15, 2011. In its verdict, the racially diverse 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. (App 349a-358a.) In its Appeal, Defendant, for the most part, relies upon two arguments. First, Defendant argues this is an especially unworthy case that the public would deplore; and second that the evidence Plaintiff presented at trial was exceptionally unreliable. In each case, Defendant has it backwards.

In fact, this is exactly the kind of case the public would support. Plaintiff was an outstanding young teacher, with a bright future. He was beloved by students and parents alike, but more importantly, he got results. Plaintiff's students consistently excelled, as measured by their standardized test scores. Even his direct supervisor admitted that, "No one is able to teach his students the way he does." Yet when Plaintiff told one joke – the sort of joke his African-American peers made on an almost daily basis – he was singled out and summarily fired. This is the sort of draconian political correctness that has been the subject of sharp criticism recently from across the political spectrum. It is no wonder why a racially diverse jury returned a unanimous verdict for Plaintiff, and against Defendant's reverse racial discrimination.

Defendant nevertheless argues Plaintiff's case would be uniquely *unpopular* with the public. Fortunately, the justice system provided a method for testing Defendant's claim. In this case, the trial court seated a panel of eight men and women from all walks of life, including two African-American women, to hear the case. From July 12 through July 15, 2011, the parties presented to the jury all the relevant evidence. The central truth the 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, including the

use of the infamous “n” word, while Plaintiff was discharged for a single incident of racial joking. The jury determined this was race discrimination, and returned a verdict for the Plaintiff.

Defendant’s second major critique is that the evidence Plaintiff presented at trial was particularly unreliable. Once again the opposite is true; in the case-at-bar, the evidence is especially reliable. In the ordinary direct evidence employment discrimination case, the plaintiff alleges a decision-maker made a bigoted remark to the plaintiff, and the Defendant almost uniformly denies it. But in the case-at-bar, the woman who was second in command in the administration at Defendant’s school testified the decisionmaker explicitly told her that, in the case of racial joking, she applied a double standard for white and black employees. Specifically, Corrine Weaver, the Dean at Linden Charter Academy, testified that in the midst of the decision to discharge Plaintiff, she told the principal, Linda Caine-Smith, that racial comments like the one Plaintiff was accused of 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 Appeal, Defendant denigrated Weaver’s testimony, characterizing it as a mere “interpretation” of what Weaver “thought” Caine-Smith meant. Defendant’s characterization is completely inaccurate. The following is the relevant trial testimony of Corrine Weaver:

- 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.
- 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. (App 10b-11b).

In short, *Caine-Smith admitted to Weaver*, while making the decision to discharge Plaintiff, that when it came to racial banter, she discriminated against white employees. Again, it cannot be emphasized enough: this evidence comes not from Plaintiff, or some ally of Plaintiff, but from Defendant's own Dean, who certainly had no incentive to harm her own employer. The testimony is a classic admission against interest, and is exceptionally reliable.

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 moved for 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, the Court of Appeals issued its decision affirming the trial court in all respects (App 349a). Defendant subsequently filed an Application for Leave to Appeal with this Court.

On September 16, 2015 the Court granted Defendant's application. In its order, the Court directed the parties to address the following issues: (1) whether the Court of Appeals erred when it found sufficient direct evidence of racial discrimination on the basis of the witness's interpretation or understanding of what the defendant's representative said to her; (2) whether the Court of Appeals erred when it concluded the burden-shifting analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) was not applicable and that there was sufficient circumstantial evidence that the plaintiff was similarly situated to African-American employees who had made race-based remarks in the past; and (3) whether the Court of Appeals erred when it held that the trial court did not abuse its discretion in admitting evidence of the defendant employer's disclosures, which were mandated by MCL 380.1230b, to the plaintiff's prospective employers.

Defendant has now filed its Appeal Brief. In its brief, Defendant claims Plaintiff produced insufficient evidence that race discrimination was one motivating factor in its decision to discharge Plaintiff. The truth is that Plaintiff not only produced sufficient evidence, but in fact produced abundant and powerful evidence that race was 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 both direct and indirect evidence sufficient 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 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, 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. Although the law is time-tested and long-settled, Defendant now asks the Court to reverse the unanimous decision in *DeBrow*. There is nothing about the case-at-bar 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 it 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 and indirect evidence.

The Supreme Court has also asked the parties to consider whether 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 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 course by allowing the evidence, but clearly instructing the jury that Defendant had no choice and was obligated by law to make the MCLA §380.1230b disclosures. Appellate courts assess allegations of evidentiary error for abuse of discretion. *Campbell v Dep't of Human Services*, 286 Mich App 230, 235; 780 NW2d 586 (2009). Herein, the trial court deftly handled the issue of the 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 Appeal should be denied.

II. STANDARDS OF REVIEW

Defendant brings this Appeal from the decision of the Court of Appeals to affirm the trial court's orders denying its motions for summary disposition pursuant to MCR 2.116(C)(10), directed verdict pursuant to MCR 2.516, and 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, 62; 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, 118; 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, in its appeal, habitually takes all facts and inferences in the light most favorable to itself, not Plaintiff. Defendant's failure to present the facts consistently with the appropriate standards governing this appeal, and the underlying summary disposition, directed verdict and JNOV motions, fatally compromises the accuracy of its legal arguments, which flow from the flawed factual recitations.

III. FACTS

Defendant's Background

Defendant operates Linden Charter Academy, located in Genesee County, Michigan. At all relevant times, Linda Caine-Smith was the principal at Linden Charter Academy (App 41a); Corrine Weaver was Dean, the second highest Administrative position at the school (App 28a, 180a); and Courtney Unwin was Employee Relations Manager. (App 233a). Caine-Smith and Unwin made the decision to discharge Plaintiff. (App 271a).

Defendant's Disciplinary Policy

Defendant distributed an employee handbook containing its disciplinary policy. (App 12b). 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." (App 12b-13b). The fact that a given offense was not a recurrence was supposed to be a significant mitigating factor in administering discipline. (App 14b). Plaintiff's alleged misconduct in this case was a first violation and not a recurrence. (App 13b).

Plaintiff's Background and Excellent Employment Record

Plaintiff was born August 30, 1974 and is Caucasian. (App 55a, 24b). He has been married to Karensa Hecht for ten years. (App 21b). The couple has three children, ages 1 through 6. *Id.* Plaintiff attended Saginaw Valley State University, where he obtained a bachelor's degree in elementary education and a master's in educational leadership. (App 65a.) Plaintiff began working at Linden Charter Academy in January 2001. *Id.* He started his career with Defendant as a first grade teacher and ended it as a third grade teacher. (App 66a, 4b, 25b). In addition, he provided training to other teachers and extra tutoring to students. (App 66a-67a.)

Plaintiff loved his students, and his students loved him. (App 22b). He described teaching as his personal calling. (App 25b). Plaintiff's performance appraisals as a teacher were all very good. (App 43b-51b). 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 he had a "very good attitude" (App 3b) and she expressed great confidence in Plaintiff's teaching skills, particularly with difficult students. (App 4b). Plaintiff was noteworthy for encouraging the involvement of parents with their children's education. (App 5b).

Plaintiff's students excelled on standardized tests of math, reading and language skills. (App 6b). On Plaintiff's last evaluation prior to his discharge, Weaver exulted, "No one is able to teach his students the way he does." (App 8b). Weaver testified that the other teachers looked to Plaintiff for advice and modeling, and he was well-liked by parents and the entire staff. (App 8b, 15b). The vast majority of Plaintiff's students were African-American. (App 7b). Prior to November 2009, Plaintiff had never exhibited any racial insensitivity and had always shown the utmost respect to African-Americans. (App 40a, 4b, 17b). Before his discharge, Plaintiff had never received any discipline of any kind while employed with Defendant. (App 68a.)

On-going and Pervasive Racial Jokes and Racial Slurs in Defendant's Workplace

Defendant has a written policy that racial statements must be reported and addressed. (App 27a.) This policy is supposed to be applied equally, whether the employee is Caucasian or African-American, but this is not how it was enforced. *Id.*

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”.¹ (App 78a.) Weaver testified she heard the word “nigger” used at the school on 2-3 occasions. (App 23a, 49a, 141a.) Weaver testified she had heard racial banter by African-American employees on twenty other occasions. (App 23a.) 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. (App 24a-26a.) 10-15 people heard this comment, including Plaintiff. (App 26a, 28a.) Jones received no discipline, even though Weaver reported the incident to Caine-Smith. *Id.* On another occasion, an employee named Kevelin Jones told Weaver she could not eat soul food because she is white. (App 30a.) Kevelin Jones received no punishment. (App 31a.) Kevelin Jones also told employee Lisa Code, “You can’t do that [job] because you’re white.” (App 135a.) On yet another occasion, Clarence Scott, who was African-American, looked up at a mural of Dora the Explorer, a cartoon character, on the wall of the school gym. (App 59a.) Noting her skin was dark, Scott stated that she should be named “Lacretia”, which Scott took to be an African-American name. (App 55a-56a.) Several employees, including Plaintiff and Floyd Bell, who

¹ In its Appeal Brief, Defendant claimed Weaver neglected to report these incidents to “administration”. First, Weaver was the Dean of the School; she *is* “administration”. Second, Weaver did report the rampant racial banter at the school to Caine-Smith just before Plaintiff’s discharge, but Caine-Smith shrugged off Weaver’s report because it was African-Americans making the racial comments.

later complained about Plaintiff's alleged racial joking, witnessed Scott's comment. (App 55a.) After it was said, everyone laughed. (App 60a.) Scott received no punishment. (App 56a-57a.)

Defendant has attempted to downplay the rampant racial banter that existed in its workplace, 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.***

On November 3, 2009, in the midst of the investigation that led to Plaintiff's discharge, Weaver informed decisionmaker Caine-Smith that other employees besides Plaintiff had made racial comments in the workplace. (App 10b). 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.*" (App 143a, 10b-11b). Defendant's entire appeal hinges on its claim that Weaver's testimony was somehow vague and unreliable. It was not. 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.
- 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. (App 10b-11b).

Contrary to Defendant's depiction, Weaver did not say this was her "interpretation" or her "perception" of what Caine-Smith said. On the contrary, she clearly 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. (App 11b). 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.*²

Co-decisionmaker Unwin testified that she was also aware that African-American employees at Linden Charter Academy engaged in racial banter. (App 266a). Plaintiff specifically told Unwin about the Dora the Explorer incident involving Clarence Scott. (App 56a, 77a). Unwin agreed this statement was inappropriate, but decided not to investigate it. (App 266a). To the present day, Scott has received no discipline as a result of his racial comments. (App 56a-57a). In fact, no one at the school has even informed Scott that his comment was inappropriate. (App 57a). Despite the widespread racial banter in the workplace, no employee ever received discipline, except for Plaintiff. (App 204a).

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,"

² Defendant asserts in its Brief on Appeal that it had a "zero tolerance policy" for racial intolerance. This contention is false, given the abundant testimony that the school was rife with racially charged language, and Caine-Smith's apparent acceptance of this state of affairs.

which were tables at which the students worked. (App 70a). In addition to Plaintiff and the students, paraprofessional Floyd Bell was in the room. (App 69a). Bell is African-American. (App 55a). Immediately before the incident, the students were transitioning to new stations during workshop time and it was “awful noisy”. (App 70a-71a). At this time, Lisa Code, the Library Technology Assistant, entered the room to return computer tables she had borrowed. (App 69a). Code asked Plaintiff whether he wanted a white table or a brown table. *Id.* Plaintiff believed Code’s statement could be taken two ways, one of them being racial. (App 94a). 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.” (App 70a). Plaintiff turned around to a student and said, “Right”, who answered, “Right”. *Id.* The child was physically in no position to have heard the preceding conversation or anything of a racial nature. (App 71a). In the written statement Code drafted the day after the incident, she did not mention anything about Plaintiff involving students in the banter. (App 35b). Unwin later acknowledged there was never any evidence that any student heard Plaintiff’s remarks. (App 281a). In its appeal, 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 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.” (App 70a). When Plaintiff made the statement, he was talking about the tables. (App 26b). Contrary to Defendant’s claim in its Brief on Appeal, 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”. (App 96a). ***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 about race. Matras, supra.

Initially, Bell did not seem to be offended by Plaintiff's remarks. (App 39b). 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.³ (App 71a, 72a). Plaintiff then turned around and resumed teaching his class. (App 29b). Code told Weaver she thought that Plaintiff was "kidding around" and she did not think he meant to make a racist statement, and Weaver agreed. (App 34a, 36a). Plaintiff testified that, indeed, he was only kidding. (App 71a).

After the incident, Code had no intention of reporting it, because she thought Plaintiff and Bell were just engaging in banter. (App 37b). But that morning she encountered five African-American teacher's aides, who had hearsay knowledge of Plaintiff's remarks, and were upset. (App 36b-38b). Later that day, Bell also reported Plaintiff's comments to Weaver.

After speaking with Code and Bell, Weaver called Plaintiff to her office. (App 27b). Plaintiff explained everything that happened during the incident and that his remark was only a joke. *Id.* Weaver admitted to Plaintiff statements like his "were made all the time" at the school. (App 77a-78a). She then related to him the incident in which Tim Jones said white people should not eat pork chops. (App 78a). Weaver told Plaintiff she planned to address the issue of racial banter at the next staff meeting. *Id.* Plaintiff was nonetheless upset that Bell was offended and asked to speak with him. (App 38a, 57a, 27b).

Weaver called Bell to her office. (App 38a). Plaintiff and Bell talked about the incident. Bell said he had been offended, Plaintiff apologized, and the two men shook hands. (App 38-40a, 72a-73a, 27b). Weaver testified Plaintiff was genuinely apologetic. (App 39a). There

³ 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.

seemed to be good will between the two men as they parted. (App 9b, 41b). The situation was apparently resolved. (App 29b).

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. (App 30b). Plaintiff essentially recounted the same version of events stated above. He also added that he said, "All brown tables should burn". The same day, Plaintiff spoke with Courtney Unwin. Contrary to Defendant's contention in its Brief on Appeal, 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 he made the statement because the white tables were brighter and more attractive than the brown tables. (App 87b). Unwin told Plaintiff that Defendant was considering firing him. (App 81a).

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?

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. (App 31b).

Defendant alleges Plaintiff violated the Defendant's employee handbook by speaking with Bell, and thereby interfering with Defendant's investigation. (App 52b-86b). This is not true. First, Defendant's handbook says nothing about "interfering" with an investigation. *Id.* Defendant's employee handbook states only that the employee is "expected to fully cooperate with the investigation." *Id.* More fundamentally, the allegation Plaintiff interfered with the investigation is inconsistent with the testimony presented at trial. Contrary to what Defendant asserts in its Appeal Brief, *Plaintiff did not "beg" Bell to alter his statement dishonestly, but only asked him 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. (App 284a). 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. (App 31b). In fact, Unwin admitted Plaintiff never asked anyone to lie. (App 283a, 289a).

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 Plaintiff about this issue.* (App 82a, 286a). 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 be taken as fact that Plaintiff never asked Bell to lie, either explicitly or implicitly, and never interfered with Defendant's investigation.* (App 31b, 42b). *Matras, supra.*

Discharge

On November 5, 2009 Caine-Smith and Unwin phoned Plaintiff and told him that he was being fired because he impeded Defendant's investigation. (App 81a-82a). Plaintiff had never

heard this allegation before and had no idea what they were talking about. *Id.* At the time of his discharge from Defendant's employment, Plaintiff was earning \$51,000.00 annually. (App 25b).

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. (App 84a, 110a). Shortly after he began this job, Plaintiff was injured. (App 84a). The injury required stitches, but Plaintiff refused medication. *Id.* The following day Plaintiff developed a painful headache. *Id.* Plaintiff asked his mother-in-law for a pain reliever and she gave him Vicodin. *Id.* Plaintiff took the medicine, not knowing it required a prescription. (App 85a). Plaintiff has never taken illegal street drugs and has never had a drug problem. (App 85a, 19b). As a result of taking the Vicodin though, Plaintiff failed a drug test. (App 85a). Prior to this time, Plaintiff's supervisor at Saginaw Preparatory Academy told him she was interested in making him a permanent employee, but no job offer had been extended. *Id.* Saginaw Preparatory Academy had also not received Defendant's disclosure pursuant to §380.1230b concerning Plaintiff's alleged misconduct. *Id.* Had Plaintiff received the full-time teaching position at Saginaw Preparatory Academy, he would have earned \$30,000.00 per year. (App 86a).

After Saginaw Preparatory Academy, Plaintiff worked a number of stints as a substitute teacher at other schools. *Id.* 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. (App 83a-84a). Plaintiff next worked for one month in the Flushing School District, where he earned \$75 per day.

To obtain his substitute teaching positions, Plaintiff worked through a firm named PESG, a contractual firm for substitute teachers. (App 86a). 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". (App 86a, 33b). Eventually, PESG informed Plaintiff all of the districts in the Genesee County Consortium had turned down his teaching services because of Defendant's MCLA §380.1230b disclosure. (App 87a).

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.⁴ This is approximately the same wage he would have earned if he had obtained the teaching position at Saginaw Preparatory Academy. (App 88a-89a, 315a).

IV. 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 that made a difference 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 made application for leave to appeal to the Michigan Supreme Court. On September 16, 2015 the Supreme Court granted Defendant's application. In its Order, the Court directed the parties to address the following issues: (1) whether the Court of Appeals erred when it found sufficient direct evidence of racial discrimination on the basis of the witness's interpretation or understanding of what the defendant's representative said to her; (2) whether the Court of Appeals erred when it concluded the burden-shifting analysis of *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36

⁴ \$14 per hour x 40 hours x 52 weeks = \$29,120.00 annually.

L Ed 2d 668 (1973) was not applicable and that there was sufficient circumstantial evidence that the plaintiff was similarly situated to African-American employees who had made race-based remarks in the past; and (3) whether the Court of Appeals erred when it held that the trial court did not abuse its discretion in admitting evidence of the defendant employer's disclosures, which were mandated by MCL 380.1230b, to the plaintiff's prospective employers. 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 an ELCRA race discrimination claim. To prevail in such a 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*, 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 Plaintiff failed to produce evidence showing race was a motivating factor in his discharge. On the contrary, the evidence at trial revealed 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 his race in their decision to discharge him. Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was a motivating factor in the challenged employment decision, without resort to additional inferences. *Matras, supra*, 683; *v Malady*, 209 Mich App 179, 185 *rev'd on other grounds* 458 Mich 153, 579 NW2d 906 (1998), 530 NW2d 135 (1995),⁵ *Weburg v Franks*, 229 F3d 514, 522 (6th Cir 2000).⁶ This Supreme Court has ruled that 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 can establish direct evidence 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). For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination sufficient to submit the plaintiff's case to the jury. *Harrison v Olde Financial Corp.*, 225 Mich.App. 601, 609; 572 N.W.2d 679 (1997) (Opinion by Judge Robert Young).

⁵ In its 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 *Lytle* 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.

⁶ Michigan Courts view Federal Title VII cases as persuasive authority in interpreting ELCRA. *Harrison v Olde Financial*, 225 Mich App 601, 606; 572 NW2d 679 (1997).

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 the decisionmaker’s one statement was sufficient to establish an 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 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) *overruled on other grounds by*, *Gross v FBL Fin. Servs., Inc.*, 557 US 167, 180, 129 S Ct 2343, 174 L Ed 2d 119 (2009) is a leading 6th 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 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*, 415. 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 6th Circuit ruled the statements were direct evidence 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 been 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 Court ruled the plaintiff had presented enough direct evidence that his age was a motivating factor in his discharge to preclude summary judgment. Finally, the 6th 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. 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 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 contends 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." *In fact, there is no testimony that Weaver did not remember Caine-Smith's statement. She testified she did remember it.* Contrary to Defendant's depiction, Weaver did not say it was her "interpretation" or her "perception" of what Caine-Smith said. She also did not say, as Defendant somewhat outlandishly implies on page 27 of its Appeal Brief, that she was interpreting Caine-Smith's tone of voice. Weaver's testimony is not "ambiguous" or "benign", as Defendant asserts. On the contrary, 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 who made racial comments were African-American. (App 11b). In other words, Weaver's testimony established Caine-Smith maintained and enforced a double-standard for white and African-American employees. Thus, if Weaver's testimony was true, then race was a motivating factor in Defendant's decision to discharge Plaintiff. *This conclusion does not require any inference.*

To see this is true, one must be clear what is meant by the term "inference". Black's Law Dictionary defines inference as follows:

Inference. In the law of evidence, a truth or proposition drawn from another which is supposed or admitted to be true. A process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted. Inferences are deductions or conclusions which with

reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

An “inference” thus is a deduction that is the logical consequence of other facts in evidence.

There is a distinct difference between evaluating evidence, as the jury did in the case-at-bar, and drawing an inference. This is best illustrated in *DeBrow, supra*. In *DeBrow*, the plaintiff’s supervisor, according to Plaintiff’s testimony, told him he was “getting too old for this shit”. The Court conceded that this statement did not prove to a certainty that the supervisor discriminated against the plaintiff on the basis of age. One can gather from the case the supervisor did not even admit he made the statement. Indeed, the Court conceded the statement was subject to more than one interpretation. The Court wrote:

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, emphasis added).

What is apparent from this citation is that the Court did not equate direct evidence with scientific proof. As the Court notes, the supervisor’s statement might not prove age discrimination at all. It may be an expression of sympathy. As it was based only on the Plaintiff’s testimony, it might not have been said at all. The Supreme Court nonetheless ruled the statement constituted direct evidence sufficient to submit the case to the jury.

This is because, although the jury had to evaluate the evidence, and decide whether it believed it, it did not have to use the powers of deduction. Contrast this with the fact situation in *Blair v Henry Filters*, 505 F3d 517 (6th Cir 2007). In *Blair*, the plaintiff's supervisor told him that he removed him from an account because he was "too old". The 6th Circuit held this was not direct evidence of discrimination, and, in so doing, compared the case to *DeBrow*:

Tsolis's April 2001 statement that Blair was "too old" to handle the Ford account is direct evidence that Tsolis removed Blair from the Ford account because of his age. Blair's complaint, however, does not assert this adverse-employment action as a basis for his discrimination claims; instead, he grounds his discriminatory-discharge claims solely upon his *termination*. An inference is required to connect this statement to the decision to terminate Blair (specifically, the inference that Henry Filters fired Blair for the same reason it removed him from the Ford account), so Tsolis's statement is not direct evidence that Henry Filters terminated Blair because of his age. This fact distinguishes Blair's case from *DeBrow v Century 21 Great Lakes, Inc.*, 463 Mich 534, 620 NW2d 836 (Mich 2001), where the employer said that the employee was "getting too old for this shit" during the conversation in which the employee was terminated. *Id.* at 838. Because the employer in *DeBrow* referred directly to the plaintiff's age as a reason for his discharge, no inference was necessary to connect that statement to the adverse-employment action. *Blair*, 525.⁷ (Emphasis in the original).

The direct evidence in the case-at-bar requires no inference like the one necessary in *Blair*. Weaver testified Caine-Smith stated directly 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 heard, that she (Caine-Smith) held employees to different standards based on their race. Furthermore, the comment was made while the two women were discussing the decision to discharge Plaintiff. As such, the comment is textbook direct evidence.

As with all testimony, the jury still had to determine whether Weaver's recollection was credible and accurate. At this juncture, it is important to point out that Weaver's testimony is

⁷ It should be noted, however, that the *Blair* Court found that the supervisor's statements were important, indeed decisive, indirect evidence of age discrimination sufficient to defeat a motion for summary disposition.

extraordinarily credible. The typical direct evidence discrimination case involves a Plaintiff asserting the defendant made a discriminatory statement, while the defendant almost always denies it. In this case, the testimony that the decisionmaker made the discriminatory statement came from Defendant's own Dean, Corrine Weaver. 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 straightforward determination of fact. It was not an inference from the evidence, because the jury was not required to deduce anything to make 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 simply told Weaver the truth: when it came to discharging Plaintiff for making racial comments, she discriminated on the basis of race.

What Defendant is actually advocating in this case is that direct evidence include only evidence that does not even require the jury to evaluate its truth or accuracy. If this were the standard for direct evidence, the only evidence that would pass muster would be sworn testimony of a decision-maker herself that race was a factor in her discharge decision. Needless to say, this is not now the law, and there is no good argument that it should be. The question in every race discrimination case is whether race was a motivating factor in the adverse employment action. For all intents and purposes, in the case-at-bar Defendant's own witness said it was. The trial court thus was correct in denying Defendant's motions for summary disposition, directed verdict and JNOV based on direct evidence, and this Court should not accept Defendant's invitation to change the law to overturn the trial court's decisions.

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, for which courts use the *McDonnell Douglas* burden-shifting analysis.⁸ To establish a prima facie indirect evidence case under *McDonnell Douglas*, the plaintiff must 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. *Texas Dept. of Community Affairs v Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1094 (1981). As Defendant correctly notes on page 31 of its brief, the *McDonnell Douglas* shifting burden analysis is a *tool*, not an end in itself. It is designed to "progressively sharpen the inquiry into the elusive factual question of intentional discrimination." *Hazle, supra*, 466 (quoting *Burdine, supra*, 420 US 248, 256 n 8).

Defendant argues in its Brief on Appeal 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. Although Defendant's assertion is factually wrong, it is also overly narrow. Contrary to Defendant's position, the Michigan Supreme Court has held, "[A] plaintiff is not required to

⁸ See *McDonnell Douglas Corp v Green*, 411 US 792, 802-805; 93 S Ct 1817; 36 L Ed2d 668 (1973). It should be noted that, among the questions this Court directed the parties to consider was whether the Court of Appeals erred when it concluded that the *McDonnell Douglas* burden-shifting analysis was not applicable. In this respect Plaintiff generally agrees the *McDonnell Douglas* burden shifting approach is a useful tool in assessing the sufficiency of evidence at the summary disposition, directed verdict and JNOV stages of litigation, so long as the burden shifting approach remains a *tool* in assessing whether there exists a genuine issue of material fact that race discrimination occurred, and does not become an end in itself.

show circumstances giving rise to an inference of discrimination in any one specific manner...”
Hazle v Ford Motor Co., 464 Mich 456, 471; 628 NW2d 515 (2001). Rather, the elements of the *McDonnell Douglas* prima facie case are adapted to the present factual situation. The elements of a prima facie case under the *McDonnell Douglas* approach should be tailored to the facts and circumstances of each case. *Hazle, supra*, at 463 n. 6.

In *Blair v Henry Filters*, 505 F3d 517 (6th Cir 2007) the 6th Circuit Court of Appeals elaborated on this fundamental precept of discrimination law:

Thus, to establish a prima facie case of age discrimination, a plaintiff normally must show that: (1) he or she was a member of a protected age class (i.e., at least forty years old); (2) he or she suffered an adverse employment decision; (3) he or she was qualified for the job or promotion; and (4) the employer gave the job to a younger employee. See *Rowan*, 360 F.3d at 547. The Supreme Court and this court have set forth a number of more specific ways by which a plaintiff may satisfy the fourth element. See e.g., *O'Connor v Consol. Coin Caterers Corp.*, 517 US 308, 313, 116 S Ct 1307, 134 L Ed2d 433 (1996) (concluding that a plaintiff alleging age discrimination may satisfy the fourth element by introducing evidence that the plaintiff was replaced by someone “substantially younger”); *McDonnell Douglas*, 411 US at 802, 93 S Ct 1817 (concluding that a plaintiff turned down for a job may show “that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications”); *Wright v Murray Guard, Inc.*, 455 F3d 702, 707 (6th Cir 2006) (concluding that a fired plaintiff may show that “ ‘he or she was replaced by someone outside the protected class or was treated differently than similarly-situated, non-protected employees’ ” (quoting *DiCarlo*, 358 F.3d at 415)); *Monette*, 90 F3d at 1185 (concluding that a plaintiff alleging discrimination on the basis of disability may show that “after rejection or termination the position remained open, or the disabled individual was replaced”). We have held that, in cases involving a reduction-in-force, “the fourth prong is modified so that the plaintiffs must provide ‘additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.’” *Rowan*, 360 F3d at 547 (quoting *Ercegovich*, 154 F3d at 350).

We must keep in mind, however, that these are merely 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. See *McDonnell Douglas*, 411 US at 802 n 13, 93 S Ct 1817 (“The facts necessarily will vary in

[employment discrimination] cases, and the specification above of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.”). ***The key question is always whether, under the particular facts and context of the case at hand, the plaintiff has presented sufficient evidence to permit a reasonable jury to conclude that he or she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination.*** *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089; *DeBrow*, 620 NW2d at 838 n. 8. *Blair*, supra, 529 (Emphasis added).

In *Blair*, the 6th Circuit held that various age-related statements made by the decisionmaker, although they did not rise to the level of direct evidence, were sufficient to satisfy element four of a prima facie indirect evidence case:

We conclude that Blair has offered evidence sufficient to create a genuine issue of material fact regarding the single disputed element of his prima facie case. The parties do not dispute that Blair was over forty years old, that he was qualified for the job, or that he suffered an adverse employment decision. Instead, the dispute centers on the fourth element-whether Blair has offered “additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled out the plaintiff for discharge for impermissible reasons.”

Each of Tsolis'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. These statements demonstrate that Blair's direct supervisor (1) repeatedly mocked Blair's age, (2) removed Blair from a lucrative account because of his age, and (3) told other employees that he wanted younger salesmen. asserting that Tsolis's various statements are not relevant because he was not a decision maker regarding Blair's employment. *Blair*, 530 (citations removed).

The 6th Circuit has also held that “circumstantial evidence establishing the existence of a discriminatory atmosphere at the Defendant’s workplace” may serve as circumstantial evidence of individualized discrimination against Plaintiff. *Griffin v Finkbeiner*, 689 F3d 584, 595 (2012).

In the case-at-bar, Plaintiff met the fourth element of his prima facie case by (1) demonstrating that he was treated less favorably than similarly situated coworkers and (2) presenting testimony of Corrine Weaver that the decisionmaker held white and African-American employees to different standards with regard to racial banter. Each of these two bases

is independently sufficient to satisfy Plaintiff's prima facie case; but to give proper consideration to the overall context of this case, the Court should consider them together and in combination. See *Rachells v Cingular Wireless Employee Services LLC*, 732 F3d 652, 665 (6th Cir 2013).

To establish two employees are similarly situated, a plaintiff must show that all of the relevant aspects of his employment were nearly identical to those of the other employee. *Town*, at 700. In *Ercegovich v Goodyear Tire and Rubber Co*, 154 F3d 344 (6th Cir 1998), the 6th Circuit stated that to be similarly situated the comparable must:

[H]ave 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....

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."

Precise equivalence between employees is not required. Rather, the plaintiff must show that the employees were engaged in conduct of "comparable seriousness." *Hollins v Atlantic Co*, 188 F3d 652, 659 (6th Cir 1999). Numerous other jurisdictions have elaborated on this concept. The 7th Circuit Court of Appeals held, "In a disparate discipline case, the similarly-situated inquiry often hinges on whether a coworker engaged in comparable rule or policy violations and received more lenient discipline." *Coleman v Donahoe*, 667 F3d 835, 850 (7th Cir 2015). The 8th Circuit Court of Appeals stated, the plaintiff must show that she and her comparator were, "involved in or accused of the same or similar conduct and were disciplined in different ways." *Rodgers v U.S. Bank, N.A.*, 417 F3d 845, 852 (8th Cir 2011). The 9th Circuit ruled, "The employees need not be identical, but must be similar in material respects. Materiality depends on the context and is a question of fact that cannot be mechanically resolved." *Earl v Nielsen Media Research, Inc.*, 658 F3d 1108, 1114-1115 (9th Cir 2011). The identity of job responsibilities is

often not relevant if the offense is forbidden regardless of job responsibilities. *Wheat v Fifth Third Bank*, 785 F3d 230, 237 (6th Cir 2015). The 1st Circuit summarized:

The test is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Much as in the lawyer's art of distinguishing cases, the "relevant aspects" are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples. *Conward v Cambridge School Committee*, 171 F3d 12, 20 (1st Cir 1999)

The 7th Circuit Court of Appeals further elaborated:

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).

In the case-at-bar, Defendant primarily argued Plaintiff was not similarly situated to his African-American co-workers because their conduct was not of “comparable seriousness”.⁹ In comparing different incidents to determine whether the “comparable seriousness” standard is met, the U.S. Supreme Court has held:

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 employee's misconduct as grounds for terminating him was merely a pretext. *McDonald v Santa Fe Trail Trans. Co.*, 427 US 273, 283; 96 SCt 2574; 49 L Ed2d 493 (1976), quoted with approval in *Venable v General Motors*, 2001 WL 682483, pg. 3 (Mich App).

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. Plaintiff admitted he said, “Miss Code, you know I want a white table, white tables are better.” (App 70a). Plaintiff testified that 30 seconds later he said brown should burn, but 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 Defendant's investigation, Plaintiff told Unwin that only the first statement had anything do with race. On appeal, all facts must be viewed in the light most favorable to Plaintiff, and 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. 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

⁹ See Defendant's Brief on Appeal, pg. 28.

it.” *NLRB v Foundry Div. of Alcon Indus.*, 260 F3d 631, 635 (6th Cir 2001). Because Plaintiff never used the “n” word, his conduct was not exactly the same as his comparators. But the inquiry is whether there are comparators, not “clones”. *Coleman, supra*. As long as the distinctions between Plaintiff and his comparators are not “so significant that they render the comparison effectively useless” they do not prevent 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”.

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 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 to administration. The truth is that Defendant’s argument supports Plaintiff’s case, not Defendant’s case. One construction of the evidence is that racial joking by African-American employees was so rampant and accepted that no one even bothered to complain. Besides, *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. After all, it was Administrator Weaver herself, the school’s Dean, who witnessed at least twenty racial or racist comments, but did nothing. As the Court of Appeals noted in the case-at-bar:

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. (App 349a-358a).

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. Weaver was not alone in viewing the racial comments, jokes and slurs made by African Americans as *de facto* permissible. At the heart of this case is the statement of Caine-Smith, the person who discharged Plaintiff, that "It happens among African-Americans and it's not the other way around."

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 his comment that "brown should burn" was a comment directed at the tables, not at African-Americans, and he informed decisionmaker Unwin of this fact. This is in keeping with Plaintiff's employment record, which was completely devoid of any hint of racism or violence. 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 rule applied to everyone, regardless of staff position, the employment position of the alleged offender was not a relevant difference between Plaintiff and his comparators.

Defendant argues 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. As such, Plaintiff's alleged interference is not a distinction between Plaintiff and his comparators.

Lastly, Defendant argues that if Defendant had done nothing in response to Plaintiff's comments, it risked liability for tolerating a racially offensive work environment. Defendant has it backwards. Defendant *did* tolerate a racially offensive environment. The solution to this problem was not to single out Plaintiff for punishment, but to enforce uniformly its policy against racially offensive comments. If Defendant has exposed itself to liability, it is because it failed to enforce its own policies in a professional and consistent manner.

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. As previously argued, however, this approach to establishing a prima facie case is not exclusive. In *Blair v Henry Filters*, 505 F3d 517 (6th Cir 2008), the 6th 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. 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 that the plaintiff was too old to handle an account and was the "old man on the sales force". The 6th 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.

Plaintiff has argued Caine-Smith's statement to Weaver, *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 indirect evidence, and therefore is 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 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 an issue of 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 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, but only to supplement his statement to add 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 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. Instead, they 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 during this litigation 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 6th 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 Corp.*, 533 F3d 381, 393 (6th Cir 2008) the 6th Circuit held 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 a genuine issue of fact 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. Thus, because there is a genuine issue of material fact that Defendant's proffered reason for discharging Plaintiff was pretext for discrimination.

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 disciplinary standards based on race;
- Defendant failed to follow its own disciplinary procedures in deciding to fire Plaintiff; and
- Plaintiff was an excellent employee with no history of racism.

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 a new trial.

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.

Defendant argues 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. (App 88b)

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 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. Plaintiff sued Defendant pursuant to ELCRA. An employee who proves an employer violated ELCRA is entitled to 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 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. To the contrary: 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. (App 89b)

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 the MCLA §380.1230b disclosure, and declined to hire Plaintiff. It would have been grossly unfair to allow 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 were viewed as analogous, the ways they were applied in the case-at-bar and *Awkerman* were totally different. 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

that Plaintiff was not entitled to damages for the MCLA §380.1230b disclosures. *Awkerman* is therefore completely irrelevant to the case-at-bar.

Finally, Defendant argues the Court of Appeals erred by “failing to acknowledge that Plaintiff’s inability to find a teaching job was the result of “unprofessional conduct”, not NHA’s decision to end Hecht’s employment.” This is an example of the fallacy called “begging the question”. That was what the trial in this case was all about. Was Plaintiff discharged for “unprofessional conduct” or because of racial discrimination? The jury determined Plaintiff’s discharge was the result of discrimination.

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 read 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 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 awarded Plaintiff 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.

V. 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 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 it 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.

As to the evidentiary issue, the Court should reject Defendant’s argument that it is entitled to a new trial based on the trial 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 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: 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 Appeal should be denied.

VI. 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: December 15, 2015

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

Dated: December 15, 2015

/s/Robert D. Kent-Bryant
 ROBERT D. KENT-BRYANT (P40806)
 Law Office of Glen N. Lenhoff
 Attorney for Plaintiff

Dated: December 15, 2015

/s/Michael B. Rizik, Jr.
 MICHAEL B. RIZIK, JR. (P33431)
 Rizik & Rizik, PC
 Co-Counsel for Plaintiff