STATE OF MICHIGAN

COURT OF APPEALS

ANGELA SHAFT, Plaintiff-Appellee,	UNPUBLISHED September 18, 2014
v	No. 315030 Ingham Circuit Court
JACKSON NATIONAL LIFE INSURANCE COMPANY, Defendant-Appellant.	LC No. 12-000070-CL

Before: FITZGERALD, P.J., and SAAD and WHITBECK, JJ.

PER CURIAM.

Defendant Jackson National Life Insurance Company ("Jackson Life") appeals the trial court's order that rejected its motion for summary disposition under MCR 2.116(C)(10). For the reasons stated below, we reverse and remand for entry of an order of dismissal.

I. FACTS AND PROCEDURAL HISTORY

A. FACTS

Jackson Life hired plaintiff Angela Shaft in April 2009. Shaft worked as a "Processor," which involved the creation and organization of records for new business annuities that Jackson Life maintains for its clients. Within the company, plaintiff was a member of the "Ring Alert" team, and was supervised by her manager, Krista Adair, and the Ring Alert team leader, Cassandra Webster.[1] By all accounts, plaintiff was competent and skilled at her job. Adair considered her to be a "very good employee," and her 2011 performance review was equally positive, describing her as a "huge asset to [defendant's] team." The review also noted that Shaft "use[d] tact and diplomacy" in her dealings with coworkers, "actively support[ed] team members, goals and objectives," and "work[ed] with people at all levels to promote a common interest."

[1] Both Adair and Webster are white women.

Shaft initially worked at Jackson Life's corporate office in Lansing. But as defendant hired more workers, it allowed some employees to work from home. Plaintiff began to do so in early 2011, as did roughly half of the Ring Alert team. To foster collegiality between the team members, who would not necessarily see one another on a daily basis, Adair created an employee newsletter in July 2011. She asked Candace Jones, a black woman who worked as a Processor, to edit the newsletter. Adair encouraged Ring Alert team members to submit personal stories and life updates to Jones, who would then compile the submissions and format them into a newsletter.[2] Adair and Webster had final approval on the letter's content.

Acting on Adair's suggestion to the wider team, plaintiff sent an email to Jones on August 17, 2011 that contained an update on her summer activities, which included an outing to the East Lansing Aquatic Center with her family. Shaft also noted that she and her husband had been cleaning his grandmother's attic and found a number of old televisions, Michigan State University–related items, and vintage clothes. Plaintiff closed her email by stating that she also discovered a small, yellowed ticket in the attic, which purported to admit the holder to a basketball game at the "Masonic Auditorium" on St. Patrick's Day between the Ku Klux Klan and the Knights of Columbus, for the benefit of the "Jewish Relief Fund"—sponsored by the "Advancement of Colored People" with "Greek Referees." Shaft wrote that the ticket "was probably the funniest thing [she and her husband] had found yet" and that there were about "7 things wrong with the event ☺."[3]

Shaft's email upset and offended Jones, who believed that the ticket was "all around bad taste to send in a corporate setting." After informing Shaft that she "probably [wouldn't] include this pic [i.e., a picture of the ticket]" in the newsletter because she "didn't want to offend anyone ☺,"[4] Jones contacted Adair and asked to discuss Shaft's email. Adair agreed, and on August 19, 2011, Jones met privately with Adair and Cassandra Webster. Jones stated that she was offended by the ticket and angry at Shaft—so much so that she expressed the desire to hit Shaft. Jones also said that she would be unable to work with Shaft in an office setting, but could interact with Shaft remotely (i.e., she did not have a problem communicating with Shaft if Shaft continued to work from home). Though Jones told management of her anger at Shaft's email, she never

[2] Shaft claims that Adair stated her employees "needed" to participate in the newsletter—the implication being that submissions to the newsletter were mandatory. Adair explicitly disputes this interpretation in her deposition, stating that participation was encouraged but not required.

[3] In her deposition, plaintiff noted that she understood the Ku Klux Klan to be "an extremist group who only associated themselves with white supremacy" and that the Klan, given its hateful agenda, would be highly unlikely to associate with the other racial, ethnic, and religious organizations (fictitious or not) mentioned in the ticket. She also stressed that it was the historical nature of the ticket—specifically, the possibility of whether the event actually took place, or was a satirical hoax—that sparked her interest.

[4] Shaft responded to this message with a reply that stated: "Seriously, then just leave it off the story. It is a lame story without the card."

personally informed Shaft that the email upset her, thus leaving Shaft unaware that she had caused any offense.[5]

Webster and Adair concurred with Jones that the ticket was offensive, and Adair showed the ticket and Shaft's email to her supervisor, Director of New Business Amy Kunzelman. Kunzelman agreed that the issue was serious, and told Adair to inform Katherine Rypstra, a human resources officer, of Shaft's actions. Adair did so and forwarded the email and ticket to Rypstra. According to Rypstra, she and Adair both felt that it was "extremely inappropriate and bad judgment on [Shaft's] part to send the email. . . . And that we found it to be offensive." Rypstra then brought Shaft's email and ticket to her supervisor, Bruce Raak, director of staffing and associate relations. Rypstra told Raak that she viewed Shaft's actions as "very serious" and a "clear violation of [Jackson Life's] harassment policy."[6] As such, Rypstra felt that they should "discuss terminat[ing]" Shaft. Raak agreed that Shaft's conduct was a fireable offense, but encouraged Rypstra to speak with Shaft to "get her input so we could take that into consideration." However, Rypstra stated that, regardless of the outcome of the meeting, there "was still the very strong possibility [Shaft] would be terminated."[7]

On August 22, 2011, Adair and Rypstra met with Shaft. Rypstra explained to Shaft that she felt the email was "inappropriate, a violation of [Jackson Life's] harassment policy," and was

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[5] In her deposition, Shaft notes that she told a coworker about Jones' August 17, 2011 response to her email (where Jones mentioned the possibility that *others* might find the ticket offensive), and stated that she did not understand how anyone could find the ticket offensive. In response, the coworker apparently implied that Jones had a reputation of being unusually sensitive with regard to race-related matters.

[6] In relevant part, Jackson Life's harassment policy states:

> Whether a particular behavior constitutes harassment may depend on the circumstances. Therefore it is impossible to provide a complete list of all prohibited activities. However, behaviors that may be illegal and ordinarily violate this guideline include the telling of "dirty" jokes in the workplace or during working hours; reference to co-workers in derogatory terms relating to gender, race, age, religion, or other protected-class status; or other conduct that another person reasonably could construe as creating—or contributing to the creation of—an intimidating, hostile, or offensive working environment. Similarly, insulting, degrading, threatening, or otherwise offensive or hostile remarks; graffiti; jokes; posters; writings; gestures; actions; or other communications are strictly prohibited, as are racial, ethnic, or religious jokes or slurs; or any other communications or conduct disparaging or downgrading any racial, minority, ethnic, or religious group.

[7] Plaintiff wrongly claims that Raak stated he and Rypstra decided to terminate Shaft before they met with her. Raak made no such admission in his deposition. Instead, Rypstra stated in her deposition that she and Raak agreed at their discussion that it was *likely* Shaft would be terminated.

"interested in getting [Shaft's] feedback on why she felt [the email and the ticket] were appropriate."[8] Again, Shaft had not been informed by Jones, Rypstra, or anyone in management that Jones was upset by her submission to the newsletter—Rypstra's statement at the August 22, 2011 meeting was the first time Shaft learned of the offense her email caused.

Shaft responded to Rypstra by emphasizing the historical nature of the ticket, which she believed was interesting and "something unusual that [she] wanted to share with the team." Though Rypstra acknowledged that she did not believe Shaft supported the KKK or intended to create a hostile work environment for Jones, she was unmoved by Shaft's explanation. Shaft, according to Rypstra, did not seem to understand how submitting the ticket was "inappropriate in a work environment" and that doing so had potential to cause offense.[9] Rypstra was also concerned that Shaft, not comprehending the seriousness of her conduct, would engage in similar behavior in the future—a factor Rypstra believed mitigated against a remedy less severe than termination. Accordingly, at the close of the August 22 meeting, Rypstra informed Shaft that she, Adair, and Kunzelman had decided to fire her, based on her submission of the ticket and alleged violation of Jackson Life's harassment policy. Jackson Life therefore fired Shaft for conduct that occurred only five days before her termination.

B. PROCEDURAL HISTORY

In January 2012, plaintiff filed suit in Ingham Circuit Court and alleged Jackson Life terminated her because of her race in violation of MCL 37.2202.[10] Specifically, she argued that Rypstra's repeated references to Jones' race, and Rypstra's emphasis on the context of her activity—namely, a white employee sending the ticket to a black coworker—constituted direct evidence of racial discrimination under MCL 37.2202 as interpreted by Michigan case law.

Defendant rejected plaintiff's contention that Rypstra's statements, if made, were direct evidence of racial discrimination. It noted that Rypstra never mentioned plaintiff's race, focused on plaintiff's actions in sending the ticket to a coworker, and stated that it had a legitimate, non-discriminatory reason to terminate plaintiff: her violation of Jackson Life's anti-harassment policy. Defendant argued that because plaintiff could not show direct evidence of racial discrimination, and did not present indirect evidence of racial discrimination under the

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[8] Shaft alleges that Rypstra repeatedly mentioned Jones' race in the meeting, and that she stressed that the context in which Shaft sent the email—i.e., a white employee sending such a message and image to a black coworker—made Shaft's actions inappropriate. Rypstra disputes this account in her deposition, and states that she only asked Shaft if she knew Jones, not any questions related to Jones' race. Rypstra went on to claim that Jones' race was irrelevant in the decision to terminate Shaft—that she would have fired a black employee who sent such a message to Jones because "the document is still the same. This scenario was still the same. The race of the person sending it has no factor."

[9] Shaft's account of the meeting does not comment on her understanding (or lack thereof) on the ticket's potentially offensive nature.

[10] MCL 37.2202 is a section of Michigan's Elliot Larsen Civil Rights Act ("ELCRA").

McDonnell Douglas[11] framework,[12] it was entitled to summary disposition under MCR 2.116(C)(10).

The trial court rejected defendant's motion for summary disposition in a written opinion issued on February 8, 2013. It stated that Rypstra's repeated reference to Jones' race in the pre-termination hearing constituted direct evidence of racial discrimination, which could cause a jury to "reasonably disbelieve defendant's proffered explanation" for firing Shaft.

Soon after the trial court's denial of its motion for summary disposition, Jackson Life appealed the order to our Court, and asked us to reverse the trial court's holding. Our Court rejected defendant's appeal for "failure to persuade the Court of the need for immediate appellate review."[13] Defendant then appealed this order to the Michigan Supreme Court, which remanded the case to our Court for "consideration as on leave granted."[14] The Supreme Court's order gives no further instruction.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Shepherd Montessori Center Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). "Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Construction, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court must consider the pleadings, "affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party." *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000).

III. ANALYSIS

A. MCL 37.2202 AND DIRECT EVIDENCE

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[11] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[12] If the plaintiff fails to present direct evidence of discrimination under the CRA, he "must then proceed through the familiar steps set forth in *McDonnell Douglas*. The *McDonnell Douglas* approach allows a plaintiff to 'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.'" *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *DeBrow v Century 21 Great Lakes, Inc* (After Remand), 463 Mich 534, 537–538; 620 NW2d 836 (2001) (emphasis in original).

[13] *Angela Shaft v Jackson Nat'l Life Ins Co*, unpublished order of the Court of Appeals, entered September 4, 2013 (Docket No. 315030).

[14] *Shaft v Jackson Nat'l Life Ins Co*, 495 Mich 884; 838 NW2d 700 (2013).

MCL 37.2202, in relevant part, prohibits "employer[s]"[15] from "do[ing] . . . any of the following":

> Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status. [MCL 37.2202(1)(a).]

Plaintiffs can show racial discrimination under MCL 37.2202 through direct or indirect evidence. *Hazle*, 464 Mich at 461–463. Direct evidence is "evidence which, if believed, *requires* the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id*. at 462 (emphasis added). If the plaintiff succeeds in showing direct evidence of discrimination, he "can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case." *Id*. The fact that a MCL 37.2202 plaintiff is white places no additional burden on plaintiff—the claim is analyzed under the same standards used for minority MCL 37.2202 plaintiffs.[16] *Lind v City of Battle Creek*, 470 Mich 230, 232; 681 NW2d 334 (2004). This is because MCL 37.2202(1)(a) applies equally to all Michigan citizens and "draws no distinctions between 'individual' plaintiffs on account of race." *Id*.

In cases where a plaintiff presents direct evidence of racial discrimination, and the defendant responds by making a motion for summary disposition, our Court is required to "consider the documentary evidence presented to the trial court in the light most favorable to the non-moving party." *DeBrow*, 463 Mich at 538–539. That is, though the factfinder might reach a different conclusion about the "facially incriminating [evidence]" when presented with the

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[15] MCL 37.2201(a) defines "employer" as "a person who has 1 or more employees, and includes an agent of that person."

[16] Before *Lind*, Michigan courts required white plaintiffs in so-called "reverse discrimination" cases to demonstrate "background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against the majority"—an evidentiary burden that was not required of minority MCL 37.2202 plaintiffs. *Lind*, 470 Mich at 233, overruling *Allen v Comprehensive Health Services*, 222 Mich App 426, 429–433; 564 NW2d 914 (1997).

The federal courts were slow to acknowledge this mandate that, under MCL 37.2202, all plaintiffs be treated equally, however. Contra *Lind*, a number of federal cases (including one cited by defendant) continued to force white plaintiffs to demonstrate "background circumstances." See, for example, *Gardner v Wayne Co*, 520 F Supp 2d 858, 865–866 (ED Mich, 2007); *Chambers v City of Detroit*, 786 F Supp 2d 1253, 1263–1264 (ED Mich, 2011); and *Martinez v Cracker Barrel Old Country Store, Inc*, 2011 WL 3841647 at *7 (ED Mich, August 29, 2011). The Sixth Circuit, however, recently acknowledged *Lind*'s holding, and now places an equal evidentiary burden on all MCL 37.2202 plaintiffs, regardless of their race. *Martinez v Cracker Barrel Old Country Store, Inc*, 703 F3d 911, 915 (CA 6, 2013).

context of the case, "such weighing of evidence is for the factfinder, not for [the Court of Appeals] in reviewing a grant of a motion for summary disposition." *Id*. at 539.

A1. APPLICATION

Here, plaintiff presents evidence that Rypstra repeatedly referenced Jones' race at the pre-termination hearing. Specifically, plaintiff alleges in her deposition that: "Katie Rypstra asked me if I knew who [sic] the KKK was, and I responded with yes. And Katie asked me if I realized that I had sent this document to an African-American, and I said yes, that was who I was instructed to send it to."

Assuming that Rypstra actually made this statement,[17] it does not constitute direct evidence of unlawful discrimination. Plaintiff has failed to produce any evidence that her race—rather than the content of her email—was the reason for her termination. Rypstra's comment on Jones' race does not "require the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions"—indeed, it takes an inference to reach that conclusion because defendant never mentioned *plaintiff's* race in its many statements on why it terminated plaintiff.[18] *Hazle*, 464 Mich at 462. Plaintiff makes this inference and implies that had she not been white, she would not have been discharged. But this is not direct evidence—it is only speculation. The facts show that Jackson Life did not mention Shaft's race, and mentioned Jones' race in the context of explaining how Shaft's email was an inappropriate workplace communication. In other words, the conclusion that follows from the evidence is that it is the content of the message, not the race of the messenger, that led to Shaft's termination. Accordingly, plaintiff has not shown direct evidence that *her* race was a factor in her discharge.

More importantly, were we to adopt plaintiff's argument, employers would be placed in an impossible situation. To avoid potential liability for harassment claims under the ELCRA, an employer must police workplace speech of one employee directed to another, and prevent offensive speech involving race, sex, religion, and the like.[19] Upon receiving a harassment

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[17] Rypstra disputes this allegation in her deposition, but, as noted, on a motion for summary disposition, we are required to view the evidence in the light most favorable to the non-moving party—here, Shaft.

[18] For this reason, we respectfully disagree with the dissent's contention that "defendant emphasized that the races of the parties involved (a white employee sending the document to a black coworker) made plaintiff's action a fireable offense." Defendant only emphasized the race of *one* individual in its pre-termination hearing: Jones, plaintiff's black coworker. Again, plaintiff provides no evidence that defendant ever mentioned or discussed *her* race—she merely provides evidence that defendant mentioned Jones' race.

[19] Under the ELCRA, "[r]espondeat superior liability exists when an employer has adequate notice of the harassment and fails to take appropriate corrective action." *Elezovic v Bennett*, 274 Mich App 1, 7; 731 NW2d 452 (2007). Such remedial measures can include: investigation, "interviewing employees, counseling . . . as well as re-educating the staff about [discrimination]

complaint by one employee against another, any investigation by the employer about such prohibited speech necessarily entails questions on the subject matter that is supposedly offensive. Therefore, as here, if the speech involves race—and is offensive to the employee who complained precisely because of that employee's race—the employer's inquiry will necessarily involve the subject (race) that gave offense.

The ELCRA should not and cannot be read to both place the onus on employers to regulate speech that may constitute unlawful harassment, and then simultaneously penalize an employer when it conducts an obligatory investigation into the very subject raised by the alleged offensive speech. This situation would be the very definition of a Catch 22: the law requires an employer to prohibit harassment in the workplace, but then the law would also hold that any attempt to remedy that harassment opens an employer to liability at trial for unlawful discrimination against the alleged harasser. Were we to credit plaintiff's theory that she has produced sufficient direct evidence to go to the jury, this is precisely the situation we would create for the employer in ELCRA litigation. Accordingly, we do not interpret the statute to create the system of proofs advanced by plaintiff.

Instead, our Court's interpretation of the ELCRA requires an employer to prohibit verbal harassment in the workplace on the basis of protected categories, and, effectively, to implement policies to deal with such harassment. To do so, employers are put in the unenviable position of regulating speech between employees, which by its nature involves ambiguities and innocent mistakes. But this burden of regulating speech should not be made all the more difficult by imposing the threat of dual liability: one when the employer does not act to neutralize perceived harassment; the other when it does. And, if as plaintiff implies, she is an innocent victim of overreaction by the offended employee and agents of defendant, this does not amount to direct evidence of racial discrimination, as much as it is a testament to the range of human responses to conflict and difficulty of policing speech in the workplace.

B. INDIRECT EVIDENCE OF DISCRIMINATION UNDER *MCDONNELL DOUGLAS*

If the plaintiff fails to present direct evidence of discrimination under the ELCRA, he "must then proceed through the familiar steps set forth in *McDonnell Douglas*. The *McDonnell Douglas* approach allows a plaintiff to 'present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination.'" *Hazle*, 464 Mich at 462, quoting *DeBrow*, 463 Mich at 537–538 (emphasis in original).

In Michigan, the

> modified *McDonnell Douglas* prima facie approach requires an employee to show that the employee was: (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others similarly situated and outside the protected class, were unaffected by the

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and the company's [discrimination] policy." *Schemansky v California Pizza Kitchen, Inc*, 122 F Supp 2d 761, 779 (ED Mich, 2000).

employer's adverse conduct. [*Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).]

Our Supreme Court has stressed that the *McDonnell Douglas* test "will necessarily vary in discrimination case" and that its "elements . . . should be tailored to fit the factual situation at hand." *Hazle* at 463, n 6.[20] The final factor, on the inference of discrimination, is established by evidence that other employees, similarly situated and outside the protected class, were treated differently than the plaintiff. *Town*, 455 Mich at 695.

Here, the evidence that plaintiff presents does not constitute indirect evidence of racial discrimination. As noted, the fact that Rypstra mentioned Jones' race at the meeting that ended in Shaft's termination does not indicate that Jackson Life terminated Shaft because she was white. Plaintiff also cites examples where other Jackson Life employees allegedly violated the company's harassment policies and were not terminated, but these examples are not disparate treatment of "similarly situated" individuals because they do not involve individuals who are similarly situated to plaintiff. *Town*, 455 Mich at 695.[21] Accordingly, plaintiff failed to present indirect evidence of discrimination.

V. CONCLUSION

In closing, we emphasize that this is a close case. We further note that because broader questions of fairness and free speech are not before us, we do not rule either on the fairness or wisdom of Jackson Life's decision, nor on Jackson Life's harassment policy and its impact on employees' freedom of expression.[22] Rather, because plaintiff's claim is limited to a very specific, narrow allegation of race discrimination under the ELCRA, we only examine whether plaintiff has introduced sufficient evidence to show that race was a motivating factor in her discharge. She has not met this burden. We therefore remand to the trial court for entry of an order of summary disposition in favor of defendants under MCR 2.116(C)(10). We do not retain jurisdiction.

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[20] See also *Town*, 455 Mich at 697 ("[t]he strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts").

[21] A similarly situated person to plaintiff would be a white employee, who caused another employee to complain of harassment, yet retained his job. None of the examples plaintiff cites involve such individuals.

[22] Plaintiff has not claimed that she is a just cause employee, nor has she invoked the free speech protections of the U.S. or state constitutions.

Reversed and remanded.

/s/ Henry William Saad
/s/ William C. Whitbeck

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FITZGERALD P.J., (*dissenting*).

I respectfully dissent from the majority's decision to reverse and remand for entry of an order of dismissal.

The circuit court denied defendant's motion for summary disposition in light of the fact that plaintiff presented evidence that (1) defendant discharged plaintiff only after making repeated references to her black coworker's race, and (2) defendant emphasized that the races of the parties involved (a white employee sending the document to a black coworker) made plaintiff's action a fireable offense. Viewed in a light most favorable to plaintiff as the non-moving party, the trial court found that this evidence constituted direct evidence of racial discrimination under MCL 37.2202(1)(a) and could lead a reasonable jury to conclude that race was a motivating factor in defendant's decision to terminate plaintiff. Upon de novo review, I agree. I would affirm the trial court's denial of defendant's motion for summary disposition and allow the case to be presented to a jury.

/s/ E. Thomas Fitzgerald