STATE OF MICHIGAN

COURT OF APPEALS

FELICIA SCOTLAND,

Plaintiff-Appellant,

v

DTE ENERGY CORPORATE SERVICES, LLC,

Defendant-Appellee.

UNPUBLISHED
December 30, 2025
10:02 AM

No. 369512
Wayne Circuit Court
LC No. 20-001542-CD

Before: RIORDAN, P.J., and WALLACE and TREBILCOCK, JJ.

PER CURIAM.

Plaintiff, Felicia Scotland, brought this action alleging age, gender and race discrimination; hostile work environment; and retaliation under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. She appeals as of right from the trial court's December 6, 2023 order granting defendant's motion for summary disposition.

On appeal, plaintiff argues the trial court erred in: (1) granting summary disposition of her ELCRA hostile work environment discrimination claim; (2) denying her cross-motion for summary disposition of her ELCRA retaliation claim; and (3) subsequently revisiting its earlier opinion and order and granting summary disposition of her ELCRA retaliation claim sua sponte, shortly after declaring a mistrial in the midst of plaintiff's opening statement on the first day of trial. Plaintiff further argues the trial court abused its discretion by improperly: (1) excluding certain evidence as hearsay when it was: being admitted for its effect upon the listener, constituted admissions of a party-opponent, and/or was being offered to show why plaintiff made certain complaints and her good faith in doing so; (2) quashing several of plaintiff's trial subpoenas for witnesses who would testify that plaintiff's complaints were filed in good faith or would testify for other permissible purposes; (3) precluding plaintiff's internal complaints of discrimination in limine; and (4) barring evidence of future damages in limine. Finally, plaintiff contends this matter should be reassigned to a new judge upon remand in light of the assigned trial judge's allegedly pervasive bias against plaintiff and her counsel.

We reverse in part, affirm in part, and remand to the trial court for further proceedings consistent with the opinion. We find there is no basis for disqualification of the trial judge.

I. FACTS UNDERLYING THE LITIGATION

After obtaining a Master of Science degree in taxation from Walsh College in 2000, and with twelve-years' experience working as an accounts receivable and credit supervisor at the Jervis B. Webb Company, plaintiff, Felicia Scotland, commenced a twenty-year career within defendant DTE's tax department, accepting a position as a tax technician in 2002. She was promoted to the tax advisor position later that year.

Nine years later, plaintiff was promoted to the senior tax advisor position. She received positive performance reviews in that position from 2011-2014, while indicating that her goal was a promotion to principal tax advisor, a higher-level, better paid position.

In late 2015 when she was 49 years old, plaintiff was called into a meeting that lasted hours with her then manager, Michael Dompier, where she was blamed for their team's low engagement scores in a recent Gallup poll. Plaintiff then met with her director, Mary Lewis, to discuss this issue and explain that it was instead the result of plaintiff's two direct supervisors having recently left the department, that she wanted to be promoted to principal, but instead someone from outside the company[1] was hired as replacement principal who "kind of mixed up everything." Ms. Lewis allegedly responded: "Well, what is your age anyway, because I know you have kids that are graduating from college." Plaintiff found this question to clearly imply that she was deemed too old to be promoted to principal and cut short the conversation. In November 2015, plaintiff filed an internal complaint against Lewis and Dompier for their ageist, discriminatory comments and actions arising from this "low Gallup poll incident." Lewis was thereafter terminated by DTE in January or early February 2016. Plaintiff asserts that everyone assumed her internal complaint was the reason for that termination and she thereafter experienced retaliation from management.

Shortly thereafter, in February 2016, plaintiff was given a low overall performance rating for 2015, the first of her career. She testified at her deposition that, because this rating was undeserved and in retaliation for her having filed the internal complaint, she filed a formal dispute, with the "meets many" rating at issue eventually being overturned for a "fully meets" rating. Plaintiff testified that, because she filed the internal complaint, she was ostracized by her co-workers and superiors, called a "troublemaker" by tax manager Reema Biel, and was not invited to events or included in important projects by management.

Further, following her filing of the internal complaint and suffering retaliation at the end of 2015, plaintiff and her entire team were transferred and began reporting to manager Terry Yee. Plaintiff testified that Yee subjected her to his racially discriminatory views and beliefs. In 2015, before plaintiff's transfer to his supervision, Yee allegedly told her that "black people don't make good accountants," and that she should direct her son away from pursuing a master's in accounting (thereby imputing that she, an African-American woman, was likewise not a good taxation accountant). She reported these statements to managers Dompier and Biel, who dissuaded her from more formally reporting anything to DTE Human Resources, insisted that she was mistaken and had misheard Yee, and indicated that they would follow up with him. When plaintiff told Yee

[1] A thirty-year-old Caucasian woman.

in July 2016 that she was concerned to work with him as her manager, in light of that earlier remark, he reaffirmed his racially discriminatory sentiment, pointing out another senior tax advisor, the only other African-American in the department, whom he said was not a good accountant, i.e., not capable.

Plaintiff also testified that she was treated differently based on her race than a coworker, Scott Ashlock, a young Caucasian man initially hired as a tax technician. Despite Ashlock not having a master's degree in taxation or any notable prior tax work experience (unlike plaintiff when she was hired), he received two promotions in less than two years to the same senior tax advisor position it took plaintiff nine years to attain. Plaintiff testified that Ashlock being on her team caused her work environment to become increasing hostile to her. When plaintiff was moved to a work station behind Ashlock, he promptly moved to where she had just been moved from (even though plaintiff was told to move so the team could all be in close proximity to each other). A co-worker informed her that he moved away from her because he does not like the scent of the lotion she uses (and can't stand her smell),[2] does not like her, and wants nothing to do with her. She was shocked and humiliated that he was making such hostile, derogatory statements about her to her co-workers. Plaintiff further alleged that Ashlock also engaged in harassing conduct toward plaintiff, such as physically standing in her way in order to block her path, making comments about how she speaks and dismissive comments and gestures to diminish her work performance, refusing to communicate with her when she is sitting nearby or include her in communications with regard to their shared tax work (including indicating that her work is not complete when it is), shutting meeting room doors when she was behind him and letting the elevator doors shut in her face. Additionally, Ashlock and their manager Yee sat together daily to work and converse and frequently criticize and denigrate African-American tax organization employees, e.g., as having poor work ethic, but would not make negative comments about non-African-American employees whom she believed to have poor work ethics.

In 2017, plaintiff identified a ten-million-dollar error in DTE's federal tax return that Ashlock failed to identify and correct when filing the return. Shortly afterward, Yee called a meeting with plaintiff, Ashlock and other team members at the "whiteboard" just outside of where plaintiff's desk cubicle is located to discuss this error, how it should have been noticed, and how it will be addressed going forward. Plaintiff testified that Ashlock stuck his rear-end into her cubicle, blocking her ability to see the writing on the board. Yee asked plaintiff how it should be done, and when plaintiff got up to squeeze past Ashlock to see the whiteboard and respond, Ashlock pushed by her to go back to his own desk and knocked her into the wall. Plaintiff testified that she was standing at the board talking to Yee, that Ashlock walked by, and with his right hand and shoulder pushed plaintiff's body into the wall.

As Yee admitted in his deposition, Yee reported this incident to their director Patrick Lee. Lee then approached plaintiff to discuss the matter the following day, and plaintiff reported how Ashlock pushed her into the wall. Lee's response was to repeatedly ask plaintiff if she wanted to go to HR, and plaintiff responded "Well, I'm already being harassed and retaliated against so

[2] Even though she uses the same scented lotion made available in the bathroom as "pretty much everyone in that department."

what's going to happen now if I go to HR? Can you protect me?" Plaintiff testified that, in response, Lee told her that there is nothing he could do to help with how people treated her there.

No investigation or report was ever made regarding the whiteboard incident despite plaintiff's report to Lee, until plaintiff made an internal complaint on March 20, 2019 (and followed-up on March 31, 2019) just over a year later. Ashlock confirmed that Lee never spoke with him about his pushing plaintiff and he was never disciplined, contrary to a note written by Lee. In fact, Ashlock was promoted a short time afterwards.

Plaintiff later informed her director Patrick Lee of her manager Terry Yee's racially discriminatory statements and conduct (such as how he always favored the younger, Caucasian male Ashlock over her despite her better credentials and extensive experience), and he indicated that he would deal with it. But nothing was done to remedy the situation, and so she included that issue in one of her internal complaints.

Plaintiff argues that she suffered retaliation as a result of filing internal complaints and reporting the foregoing discriminatory statements and behavior of her manager and co-worker. For example, manager Biel singled out and berated plaintiff for allegedly touching Biel's chair at a meeting, in front of manager Yee and a director, and, in the spring or summer of 2018, told plaintiff's close co-worker of eleven years that she was a "troublemaker" and that "she cringes whenever she sees the two of us hanging out or talking and that she can't stand the sight of [plaintiff]" to induce this co-worker to ostracize plaintiff.

Plaintiff alleges she suffered a deterioration in mental health from these ongoing hostile work environment and retaliation incidents, so she contacted DTE's Employee Assistance Program and began receiving treatment, and was placed on a work-related medical leave of absence from September 17, 2019-March 10, 2020. She was cleared to return to work on a part-time basis, and endeavored to do so, but was informed on or about December 18, 2019 that she could only return when cleared for full-time work. Upon her return to full-time status on or about March 10, 2020, she learned that a younger, Caucasian employee had been hired as a principal while she was on leave, despite being told by leadership, in response to her inquiries the year before, that there was no room for a principal in the tax department.

On January 31, 2020, Plaintiff filed a complaint in Wayne County Circuit Court setting forth the basis for her internal complaints at DTE and asserting hostile work environment, discrimination, and retaliation claims pursuant to the ELCRA. At approximately the same time, after approximately 20 years of exemplary performance reviews, plaintiff began to receive negative performance reviews. While she received an "on track" 2019 midyear review just two weeks before going on medical leave; she received a "meets many" rating on her annual review, which reduced her performance bonus in half (over $5,000), and denied her an annual merit salary increase. Co-worker Susan Stieber testified that she similarly received a retaliatory low performance review for the first time upon returning from a medical leave of absence and after having filed an internal complaint. Plaintiff met with and discussed the substance of her March 20, 2019 internal complaint and the low 2019 year-end performance review with HR representative Micah Lamb. Lamb ultimately suggested that plaintiff had a right to make use of the dispute resolution process regarding her "meets many" 2019 year-end performance review, and she did

so. However, that rating was upheld by the HR vice president without her appearing to have examined plaintiff's full rebuttal documents.

Further, plaintiff was given an assignment that required her to perform the work that a tax attorney had previously been handling, a task that no one in the tax organization knew how to do. Plaintiff contends being given this "off the chart" complex new assignment in part resulted in her receiving the "meets many" performance review just after returning from her medical leave of absence. DTE then placed her on a performance improvement plan (PIP) approximately 90 days after her return from the medical leave of absence. Plaintiff testified that her being given this complex new assignment, apparently contributing to the low performance review just after returning from her multi-month medical leave of absence, and then placing her on the PIP shortly thereafter, constituted retaliation and was a means to set her up to fail, and "get rid of" her.

In the course of the civil litigation, defendant served requests for production, at least three of which would have required plaintiff's disclosure of the three-page document showing the ten-million-dollar error Ashlock failed to detect, as it supported her allegations in this case, and plaintiff provided the document to her counsel, only. Additionally, the parties to this litigation had previously agreed to a protective order regarding documents produced during discovery that covered this document. Plaintiff's counsel introduced the document in the course of Ashlock's deposition. The following week, on February 1, 2021, tax director Patrick Lee terminated plaintiff for providing that document to her counsel, and this production was represented by defendant to be the sole basis and "business justification" for the termination. Defendant was of course aware of plaintiff's ongoing ELCRA litigation at the time of her termination and, at the time thereof, she was less than a month away from vesting full medical benefits in her DTE retirement.

On March 1, 2021, Plaintiff filed her Second Amended Complaint (SAC), which included allegations pertaining to her retaliatory termination to her preexisting retaliation count.

II. PROCEDURAL HISTORY

On July 27, 2022, defendant filed a motion for summary disposition of plaintiff's SAC pursuant to MCR 2.116(C)(10). On August 26, 2022, plaintiff filed a cross-motion for partial summary disposition on her retaliation claim pursuant to MCR 2.116(B)(1) and (I)(2). Following briefing and oral argument on October 13, 2022, the trial court entered a November 11, 2022 order denying plaintiff's cross-motion and a November 16, 2022 order granting defendant's motion for summary disposition, "with the exception of her claim for retaliatory termination contained in [c]ount III of [p]laintiff's [s]econd [a]mended complaint, finding a question of fact." Defendant filed a motion for reconsideration of this last order to the extent that it denied defendant's motion for summary disposition, claiming that plaintiff providing the three-page tax document constituted an "intervening cause" to defendant's retaliation. Plaintiff filed a response at the trial court's request. The Court entered an April 6, 2023 order denying reconsideration, finding a question of fact as to causation:

> At issue here is the fourth element in the retaliation claim: a causal connection between [p]laintiff's protected activity and the adverse employment action against her. Plaintiff alleges that [d]efendant's decision to terminate her on February 1, 2021, based on her disclosure of a sensitive, three-page document to her attorney,

> is a retaliatory pretext for filing her complaint on January 31, 2020, in violation of the ELCRA. Considering [p]laintiff was terminated after filing her complaint alleging ELCRA violations, and that the parties were subject to a protective order at the time of the disclosure of the sensitive document, the [c]ourt finds a dispute exists on the issue of causation surrounding [p]laintiff's termination. Therefore, the [c]ourt denies [d]efendant's [m]otion for [r]econsideration.

The trial court thereafter granted several of defendant's motions in limine to exclude evidence of plaintiff's dismissed claims,[3] evidence of prior litigation, plaintiff's claim for future damages, and hearsay testimony from plaintiff. Plaintiff's contends these rulings were an abuse of the trial court's discretion because they improperly limited her ability to present evidence of her protected activities that defendant retaliated against, and prematurely prevented plaintiff from presenting future damage evidence. Two applications for leave to appeal from these motion in limine rulings were denied, with a dissent by one of the judges on one of the orders denying plaintiff's applications for leave to appeal.

The trial court likewise granted defendant's motions to quash the trial subpoenas of current or former DTE employees Micah Lamb, Renaldo Major, Susan Stieber, and Martina Boda, who purportedly would provide testimony regarding plaintiff damages; the retaliatory, pretextual nature of DTE's treatment of plaintiff in response to her protected activity; and impeachment of its decision-makers.

The Friday before trial was set to commence (August 4, 2023) plaintiff filed a bench brief arguing that introduction of her previous internal complaints (not just her initial court complaint) was necessary to establish essential elements of her retaliation claim as the jury must be informed of what actions caused defendant to retaliate in the first place, i.e., the basis for that claim in the complaint. This argument resulted in the court adjourning the trial that was to commence the following week.

At a November 7, 2023 motion hearing, the trial court reversed its earlier evidentiary ruling and held that plaintiff was permitted to introduce her complaint as a trial exhibit and obtain limited testimony regarding its underlying factual allegations: "The [c]ourt will admit the complaint . . . . You may ask [plaintiff] if her complaint alleged race, age, discrimination and other issues that were dismissed. . . . [A]nything beyond this questioning I will give the parties a warning and have a sidebar . . . ."

> The Court: What specifically, let's put it out there. What, specifically, are you plan[ning] to ask her?
>
> Mr. Marko: Just anything from the complaint.
>
> The Court: Okay[.]

[3] An actual written order memorializing the trial court's grant of this motion was apparently, errantly not entered.

The court later reiterated: "I'm permitting you to admit the complaint with all the allegations."

The parties appeared for trial on December 4, 2023 and commenced voir dire. According to the affidavit of a dismissed potential juror, and statements of two other potential jurors, during voir dire the trial judge would cut off plaintiff's counsel's questioning and roll her eyes in response to his questioning. By these accounts, the trial judge did not treat defense counsel similarly, and that this disparity in treatment made plaintiff's voir dire difficult and exhibited bias in favor of the defense.

Plaintiff's counsel commenced his opening argument, and referred to Ashlock failing to catch the $10.4 million-dollar error, plaintiff catching the error, and Ashlock being mad about these circumstances and pushing plaintiff into a wall, whereupon plaintiff filed an internal complaint with defendant. Defendant objected, asserting the ELCRA discrimination claim had been dismissed, the court acknowledged that dismissal, and plaintiff's counsel stated he was merely reciting allegations from the complaint that is admitted in evidence, which the court acknowledged, stating, "Okay. Go ahead."

Shortly after this reconfirmation that the complaint and its allegations were admitted in evidence, plaintiff's counsel again read allegations from the complaint as part of his opening statement. At this point, without any objection or request for a mistrial having been made by defense counsel, the trial court sua sponte interjected—without any warning or sidebar—stated she needed to take a break, excused the jury, and then stated she was debating whether she should call a mistrial. Plaintiff's counsel explained that his argument was completely within the scope of her ruling in light of the complaint and its allegations being admitted into evidence (and he was obviously not taking any testimony from the plaintiff), but the trial court nonetheless declared a mistrial, claiming plaintiff's counsel had gone beyond the scope of the court's orders:

> The Court: No, I specifically said that you could not get into the claims that were dismissed, and that's precisely what you're doing.
>
> Mr. Marko: I'm showing an exhibit that's been admitted.

The court declined to read the copy of the pertinent November 7, 2023 motion hearing transcript to confirm the content of its earlier ruling and failed to consider any alternative remedies before declaring the mistrial.

On December 6, 2023, two days after declaring the mistrial, the trial court, sua sponte, issued an opinion and order reversing her prior summary disposition and motion for reconsideration rulings and granted summary disposition of plaintiff's remaining retaliation claim. The opinion and order held, pursuant to MCR 2.604(A), that it previously committed palpable error in finding an issue of material fact regarding the causation element, and that the amount of time between defendant purportedly firing plaintiff for violating company policy (in providing the three-page tax document to her attorney) and plaintiff's protected activity of filing her complaint was, as a matter of law, too great for there to be a causal connection between the two. However, those facts had at all relevant times been before the court and no explanation was provided for this sudden change of opinion two days after sua sponte declaring a mistrial.

Plaintiff thereafter filed a December 18, 2024 motion seeking to have the trial judge recuse herself, demanding immediate review by the chief judge should she fail to do so (and seeking a stay until such review occurs), and to have the December 6, 2023 opinion and order dismissing the plaintiff's case set aside. Plaintiff based the motion upon trial judge's purported historic animus with co-plaintiff's counsel, her purported conduct reflecting alleged bias during voir dire, and her subsequent sua sponte declaration of a mistrial, and sua sponte entry of summary disposition of plaintiff's last claim thereafter. Plaintiff likewise filed a timely December 21, 2023 motion for reconsideration of the December 6, 2023 opinion and order.

On January 9, 2024, the court denied plaintiff's motion for reconsideration of the opinion and order granting summary disposition. On January 11, 2024, the court and denied plaintiff's motion for the trial judge's recusal and referred the issue to the chief judge for de novo review under MCR 2.003(D)(3)(a)(i).

Plaintiff filed a supplement to her recusal motion, defendant filed a response, and the chief judge entered an opinion and order denying the plaintiff's motion, on January 17, 2024, finding that there was no basis on which to disqualify the trial judge.

Plaintiff then filed a timely claim of appeal bringing numerous issues before this Court.

III. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A motion under MCR 2.116(C)(10) . . . tests the *factual sufficiency* of a claim." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

In reviewing a (C)(10) motion, a court must examine the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties and, drawing all reasonable inferences therefrom in favor of the nonmoving party, determine whether a genuine issue of material fact exists. MCR 2.116(G)(5); *Maiden*, 461 Mich at 120; *Downey v Charlevoix Co Bd of Road Comm'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998).

A genuine issue of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence. *West v Gen'l Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court is not permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). "Circumstantial evidence can be evaluated and utilized in regard to determining whether a genuine issue of material fact exists for purposes of summary disposition." *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770, 777 (2004).

"A trial court's evidentiary decisions are reviewed for an abuse of discretion." *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). More specifically, a decision whether to grant a motion in limine or motion to quash a trial subpoena is reviewed for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 431; 697 NW2d 851 (2005); *Fette v Peters Const Co*, 310 Mich App 535, 547; 871 NW2d 877 (2015). An abuse of discretion occurs when a trial court

chooses an outcome outside the range of reasonable and principled outcomes. *Id*. Where a discretionary decision involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility, that legal issue is reviewed de novo. *Yost*, 278 Mich App at 353 (citation omitted).

In reviewing opinions denying a motion to disqualify a judge, an appellate court reviews factual findings for abuse of discretion, but reviews the applicability of facts to the relevant law de novo. *Cain v Michigan Dep't of Corrections*, 451 Mich 470, 503 & n 38; 548 NW2d 210 (1996). "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Id*. at 497.

IV. ANALYSIS

A. ELCRA HOSTILE WORK ENVIRONMENT CLAIM

The prima facie elements of an ELCRA hostile work environment claim are:

> (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Major v Village of Newberry*, 316 Mich App 527, 550; 892 NW2d 402 (2016) (quotation marks and citation omitted).]

Regarding the second element, a plaintiff must show that, but for the protected status, they would not have been subjected to the harassment. *Haynie v State*, 468 Mich 302, 309; 664 NW2d 129 (2003).

As to the fourth element:

> "[W]hether a hostile work environment was created by the unwelcome conduct [is] determined by whether a reasonable person, in the totality of circumstances, would have perceived the conduct at issue as substantially interfering with the plaintiff's employment or having the purpose or effect of creating an intimidating, hostile, or offensive employment environment." [*Major*, 316 Mich App at 550 (quotation marks and citation omitted).]

In determining whether a defendant's conduct is sufficient to state a hostile work environment claim, courts are to consider all of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Hester v Dep't of Corrections*, unpublished opinion per curiam of the Court of

Appeals, issued June 5, 2014 (Docket Nos. 314572, 315553),[4] quoting *Harris v Forklift Sys, Inc*, 510 US 17, 23; 114 S Ct 367; 126 L Ed 2d 295 (1993).[5] In considering the "totality of the circumstance," it should be noted that:

> (1) offensive conduct need not be directed at the plaintiff; (2) the plaintiff need not be present at the time of the offensive conduct; instead, she or he can learn of the conduct second-hand; [and] (3) racial or sexual animus can be inferred from conduct not overtly racial or sexual in nature when the context suggests it[.] [*Ladd v Grand Trunk Western R*, 552 F3d 495, 500 (CA 6, 2009).]

To meet the fifth, respondeat superior element, notice is adequate if, "by an objective standard, the totality of the circumstances were such that a reasonable employer would have been aware of a substantial probability" that the subject harassment was occurring. *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000). An employer may avoid liability in a hostile work environment case under the ELCRA "if it adequately investigated and took prompt and appropriate remedial action upon notice of the alleged hostile work environment." *Id*. at 312 (quotation marks and citation omitted).

As indicated above, the allegations of alleged harassment of plaintiff, an African-American woman who was 49 years old in 2015, based on her race, sex or age, or a combination thereof, include the following:

- her request for promotion to director Mary Lewis in 2015 being rebuffed with the inquiry "how old are you anyway?," following which she filed an internal complaint regarding this ageist discriminatory remark, and received a negative performance review (that she contested and had overturned);

- manager Terry Yee telling her in 2015 that "black people don't make good accountants," and that she should direct her son away from pursuing a master's in accounting (similar to her obtaining a master's in taxation, thereby imputing that she, an African-American woman, was not a good taxation accountant), which statements she reported to managers Dompier and Biel, who dissuaded her from filing an internal report;

- plaintiff expressing her concern about having to report to Yee once he became her manager in July 2016, in light of his earlier remarks, whereupon he reaffirmed his racially

[4] Unpublished decisions of this Court are not binding under the rule of stare decisis, but may still be considered as having instructive or persuasive value. *Youmans v Charter Twp of Bloomfield*, 336 Mich App 161, 217; 969 NW2d 570 (2021), citing MCR 7.215(C)(1).

[5] Michigan courts have recognized that the ELCRA is "clearly modeled after" its federal counterpart, Title VII of the Civil Rights Act, and have looked to federal caselaw interpreting Title VII when interpreting the ELCRA. . . . Though not bound by federal court interpretations of Title VII, we generally find them persuasive in interpreting the ELCRA. [*Miller v Dep't of Corrections*, 513 Mich 125, 137; 15 NW3d 129 (2024) (internal citations omitted).]

discriminatory sentiment, pointing out another senior tax advisor, the only other African-American in the department, whom he said was not a good accountant, i.e., not capable;

- Yee making reference to one of DTE's suppliers who is African-American and works in asset management as a "DA" or "dumb ass," and discussing other African-American employees in negative terms with the young male Caucasian employee Ashlock whom Yee favored, whereas Caucasian employees were not subject to such derision (without plaintiff identifying who those other persons are);

- Differential treatment in promotions and assignments favoring younger Caucasian employees;

- Ashlock subjected her (as the only, or one of the only, African-Americans in the tax department), to unwelcome conduct including pushing her into the whiteboard on the wall as she squeezed past him, telling other co-workers that that he hates the smell of her lotion, does not like her, and wants nothing to do with her, as well as refusing to interact with and avoiding her;

- Tax manager Reema Biel berating her in front of her coworkers and superiors over having purportedly touched Biel's chair while she was gone (which plaintiff says she did not do), and attempting to dissuade one of plaintiff's coworkers from associating with her because she is a "troublemaker" and "she can't stand the sight of her"; and

- Telling director Patrick Lee in 2017 that her future manager Yee made derogatory remarks about African-American accountants and that he reaffirmed his views when she brought this issue forward again after he became her manager; and telling Lee about Ashlock pushing her into the whiteboard, but yet neither Lee nor Yee (who was present at the whiteboard incident) filed a complaint or requested investigation; and Lee told plaintiff there was nothing he could do to help with how people treated her (in regard to her being ostracized as a "troublemaker").

Plaintiff contends the hostile and abusive environment substantially interfered with her employment where she went on medical leave in September 2019 and went on anxiety and depression medication and began therapy due to her work environment.

Plaintiff contends respondeat superior is demonstrated by the foregoing, the fact that supervisors Yee and Biel subjected her to much of the unwelcome conduct and that she filed more than three internal complaints reporting this age-and-race-related discrimination and harassment before filing her January 31, 2020 lawsuit.

Defendant argues that instances of alleged unwelcome conduct that precede the filing of the initial complaint in this case by more than three years, i.e., before January 31, 2017, are outside the relevant statute of limitations and are therefore not properly considered. See *Garg v Macomb County Comm Mental Health*, 472 Mich 263, 284-285; 696 NW2d 646 (2005) (finding the three-year statute of limitations for death or personal injury, now MCL 600.5805(2), applies generally to ELCRA claims). Such instances would include Mary Lewis' ageist remark upon plaintiff's request for promotion to director, and manager Yee's racist remarks about African-Americans not

making good accountants. However, notwithstanding *Garg* and such statute of limitations, in *Campbell v Dep't of Human Servs*, 286 Mich App 230; 780 NW2d 586 (2009), this Court held that "acts occurring outside the limitations period, although not actionable, may, in appropriate cases, be used as background evidence to establish a pattern of discrimination." *Id*. at 238.

Defendant also contends that plaintiff has not established an issue of material fact that the purported harassment: (1) was based on her protected status; or (2) that it created or allowed conduct or communication that was sufficiently severe or pervasive to respectively satisfy the second and fourth elements of the prima facie case and be actionable. Defendant notes the first, March 20, 2019 internal complaint raised Yee's pre-statute-of-limitations racist remarks (the latest of which occurred almost three years earlier); Ashlock telling her co-workers that he hated the smell of her lotion, did not like her and avoided and refused to work with her; Ashlock being shown favoritism in advancing more quickly in the company than she did in her own timeframe; and that Ashlock pushed her into a whiteboard after he got upset over the large error he failed to detect and correct. Defendant contends there is no evidence connecting Ashlock's remarks to plaintiff's protected status as a 49-year-old African-American woman, but rather merely reflect that he dislikes and does not want to interact with her, which he relayed to coworkers. Defendant also contends that there is no evidence connecting plaintiff's protected status to the issue of the length of time it took Ashlock to advance to the senior tax advisor position compared to the length of time it took plaintiff to advance to that position.[6]

The second, March 28, 2019 complaint asserted plaintiff was subject to retaliation from Yee and Ashlock,[7] purportedly based on the complaint she filed against Ashlock in March 2019 for pushing her in 2017.

The third, March 26, 2020 complaint asserted that manager Yee's low 2019 year-end performance review of plaintiff (following her returning from a work-related medical leave of absence from September 17, 2019-March 10, 2020), was directed at her leave of absence and that it did not mention any accomplishments and most of the comments were negative. Defendant contends this evaluation does not implicate plaintiff's protected status.[8]

Defendant's brief on appeal also references a September 6, 2019 complaint, addressing the incident where tax manager Biel allegedly yelled at plaintiff for touching her chair, arguing that

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[6] We note that the complaint regarding Ashlock's advancement, as compared to plaintiff's, sounds in alleged disparate treatment based on racial discrimination, rather than sounding in hostile work environment, although evidence of this issue factors minimally into the totality of the circumstances of a prima facie hostile work environment claim

[7] Plaintiff alleges Ashlock contacted an outside vendor with questions about plaintiff's work instead of contacting plaintiff, and Yee did not provide her with data that she needed to complete her work from home, responding "why do you need it?," as evidenced in respective emails of March 18 and 25, 2019.

[8] We note that this last complaint addresses alleged retaliation, rather than harassment based on protected status creating a hostile work environment.

this incident is addressed in plaintiff's deposition testimony, but the internal complaint is not included in the lower court record. In any event, defendant argues, no evidence connecting this incident to plaintiff's protected status is apparent.

While plaintiff relies on *Hester* in support of the second element of a prima facie case, in that unpublished decision four co-workers testified that the plaintiff received more and less desirable work that Caucasian employees refused. *Hester*, unpub op at 2, 4. "[W]hether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." *Radtke v Everett*, 442 Mich 368, 388; 501 NW2d 155 (1993). Here, corroborative evidence that plaintiff was singled out in the manner claimed on the basis of her protected status is lacking. That said, "[a] party's own testimony, standing alone, can be sufficient to establish a genuine question of fact." *Jewett v Mesick Consol Sch Dist*, 332 Mich App 462, 476-477 (2020). Nonetheless, even considering the age-and-race-based discrimination evidence from outside the statute of limitations as potentially demonstrating a pattern, we find no genuine issue of material fact connecting plaintiff's complaints of communication and conduct within the statute of limitations period to her protected status.

Additionally, we find no genuine issue of material fact as to whether plaintiff's complaints of communication and conduct within the three-year statute of limitations period, amount to her workplace being "permeated with discriminatory intimidation, ridicule and insult[] that is sufficiently pervasive or severe" to constitute a hostile work environment considering the totality of the circumstances, including co-workers not liking the scent of her lotion, avoiding working with her, a Caucasian man being promoted more quickly than her, a year-end performance review having a perceived negative tone, the whiteboard push incident that was unreported for two years, and being accused of tampering with a manager's chair. *Harris*, 510 US at 21. "Conduct that is 'merely offensive' is insufficient to support a hostile work environment claim." *Howard v Bd of Educ of Memphis City Sch*, 70 Fed Appx 272, 282 (CA 6, 2003), quoting *Harris*, 510 US at 21. This is particularly the case where one of the complaints sounds in disparate treatment based on racial discrimination rather than hostile work environment (i.e., the promotion of Ashlock). The communications and conduct instead sound in certain co-workers or supervisors simply disliking plaintiff, or retaliation for her protected activity in reporting the above-referenced issues, i.e., as opposed to sounding in harassment based on protected status. The alleged hostile work environment claim must be linked to the plaintiff's protected status and only those "incidents that occurred because of [plaintiff's protected status] are properly considered in the context of her hostile work environment claim." *Howard*, 70 Fed Appx at 282; see also *Malan v General Dynamics*, 212 Mich App 585, 586-587 (1995).

Plaintiff also argues that "a hostile work environment [claim] can be based on retaliation," but such retaliation was not pleaded as a basis for her hostile work environment claim in her SAC. Further, in the cases plaintiff cites for that principle, the plaintiffs were attempting to prove that a hostile work environment existed where there had been no tangible employment actions taken against them, i.e., those cases address an issue not present here. See *Jordan v City of Cleveland*, 464 F3d 584, 599-600 (CA 6, 2006); see also *Hawkins v Anheuser-Busch, Inc*, 517 F3d 321, 347 (CA 6, 2008). In the present case, plaintiff's retaliation claim alleges and was proceeding on tangible adverse employment actions, e.g., the retaliatory lower 2019 performance review resulted in a reduced performance bonus and denial of her an annual merit salary increase, and the retaliatory termination. Retaliatory harassment plaintiff may have suffered for engaging in

protected activity under the ELCRA is accordingly more properly addressed in the context of her separate retaliation claim.

Thus, we cannot find that the trial court erred by dismissing plaintiff's hostile work environment claim.

B. ELCRA RETALIATION CLAIM

Plaintiff contends that the trial court committed reversible error when it (1) denied her cross-motion for partial summary disposition on her retaliation claim, and (2) later sua sponte dismissed that retaliation claim after twice ruling that it presented a genuine issue of material fact. We agree that the trial court erred in granting summary disposition of plaintiff's retaliation claim and likewise find that the trial court erred in limiting the scope of plaintiff's claim to retaliatory termination for filing her initial civil complaint in this matter on January 31, 2020.

We find, however, that plaintiff has not established entitlement to summary disposition of her retaliation claim as a matter of law, as there is a genuine issue of material fact whether defendant terminated her on the basis of her breach of its internal rules as opposed to terminating her because of her ongoing complaints of discrimination, hostile work environment, and retaliation, including this litigation.

Plaintiff alleged that defendant retaliated against her in violation of the ELCRA, which states in pertinent part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.
>
> * * *
>
> (f) Coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this act. [MCL 37.2701.]

We do not find that plaintiff has presented "direct evidence" of ELCRA retaliation in this case, because it is not "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (quotation marks and citation omitted). Furthermore, plaintiff did not claim direct evidence of retaliation before the trial court, meaning plaintiff waived that argument on appeal. *Jackson v Genesee Co Rd Comm'n*, 999 F.3d 333, 349 n 6 (CA 6 (2021). We accordingly look to whether plaintiff has established a prima facie case of

retaliation via indirect or circumstantial evidence under the *McDonnell Douglas/Burdine*[9] burden-shifting framework. *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 276; 826 NW2d 519 (2012).

The Michigan Supreme Court adopted the prima facie elements of a Title VII retaliation claim to establish a retaliation claim under ELCRA in its *Garg* decision. *Garg*, 472 Mich at 653. The antiretaliation provisions of ELCRA and Title VII have similar language and serve similar purposes and Michigan courts generally find federal court interpretations of Title VII persuasive in interpreting the ELCRA. *Miller*, 513 Mich at 137.

> [T]o establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*El-Khalil*, 504 Mich at 160-161 (quotation marks and citation omitted).]

> Taking into account our caselaw and the guidance provided by *Burlington Northern*, we hold that an employer will be liable for the coworker's actions if (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination, (2) supervisors or members of management have actual or constructive knowledge of the coworker's retaliatory behavior, and (3) supervisors or members of management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances. [*Hawkins*, 517 F3d at 347, citing *Burlington N & Santa Fe Ry Co v White*, 548 US 53, 68-69; 126 S Ct 2405; 165 L Ed 2d 345 (2006).]

"To establish a causal connection, the plaintiff must show that participation in activity protected by the [EL]CRA was a 'significant factor' in the employer's adverse employment action." *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001), superseded on other grounds by *Maldonado v Ford Motor Co*, 476 Mich 372, 388 (2006). A plaintiff must show more than merely temporal proximity between the protected activity and the adverse employment action in order to establish a causal connection between the two events. *West*, 469 Mich at 186.

> Establishment of the prima facie case in effect creates a presumption that the employer retaliated against the employee. If plaintiff establishes a prima facie case then the burden shifts to defendants to articulate a legitimate, nonretaliatory reason for plaintiff's discharge. Upon production of such a reason, plaintiff must demonstrate that the proffered reason was not the true reason for the employment

[9] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973); *Texas Dep't of Community Affairs v Burdine*, 450 US 248; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

> action—i.e., that the reason was a mere pretext for retaliation. [*Braun v Ultimate Jetcharters, LLC*, 828 F3d 501, 511 (CA 6, 2016) (internal quotation marks, citations, ellipses and brackets omitted, cleaned up).]

Defendant claims the sole reason for its termination of plaintiff was her conduct in providing only her counsel with a copy of the three-page document showing the ten-million-dollar error Ashlock failed to identify and correct, in violation of its policies prohibiting the unauthorized disclosure of confidential DTE information. However, while that conduct may have violated its policy, it was also arguably protected activity. MCL 37.2701(a) provides that a person engages in protected activity when they "opposed a violation" of ELCRA or "made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under" the ELCRA. Whether an act constitutes protected activity is a question of fact. *Tullar v Flint Housing Comm'n*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2016 (Docket No. 327093), p 4.

In *Niswander v Cincinnati Ins Co*, 529 F3d 714 (CA 6, 2008), the plaintiff appealed the grant of summary judgment of her retaliatory wrongful termination claim for providing confidential documents to her counsel. The Sixth Circuit, viewing the evidence in the light most favorable to the non-movant plaintiff, balanced "the employer's recognized, legitimate need to maintain an orderly workplace and to protect confidential business and client information, and the equally compelling need of employees to be properly safeguarded against retaliatory actions" in the context of whether disclosure of confidential documents could be deemed to be a protected activity under Title VII's retaliation provision. *Id*. at 722. It did so by evaluating the following six factors it found "relevant in determining whether the delivery of the confidential documents in question was reasonable":

> (1) how the documents were obtained, (2) to whom the documents were produced, (3) the content of the documents, both in terms of the need to keep the information confidential and its relevance to the employee's claim of unlawful conduct, (4) why the documents were produced, including whether the production was in direct response to a discovery request, (5) the scope of the employer's privacy policy, and (6) the ability of the employee to preserve the evidence in a manner that does not violate the employer's privacy policy. [*Id*. at 726.]

The *Niswander* Court found only the first two factors favored the plaintiff, and that they were not heavily in her favor. *Id*. at 727. While the plaintiff had access to the subject documents through her employment, she did not innocently stumble upon them, but rather, specifically searched through the documents at her home office with the purpose of finding evidence of retaliation. Next, the plaintiff only provided the documents to her attorneys in the Equal Pay Act (EPA) litigation in which she was engaged, but the documents were unrelated to that litigation, only had limited relevance to a potential retaliation claim, and were taken and kept by her only to "jog her memory about incidents that she believed constituted retaliation," where she could simply have taken notes rather than turning over confidential documents. *Id*. The Sixth Circuit noted that, if the documents that the plaintiff gave to her attorneys in the EPA litigation "had been directly (or even indirectly) relevant to the EPA claims . . . , her delivery of those documents would clearly constitute participation in that lawsuit." *Id*. at 721. On these facts, the Sixth Circuit found the

balance tilted to the employer, found the plaintiff was not engaged in protected activity in providing the confidential documents to her EPA attorneys, and affirmed summary judgment.

We find the balancing test adopted by the Sixth Circuit in *Niswander* to be persuasive. *Niswander* appropriately identifies some factors courts should consider when an employee's conduct that is otherwise in violation of an employer's reasonable and valid policies may constitute protected activity sufficient to garner protection under the ELCRA.[10] They are to be balanced together, with no one factor controlling.

The facts of the present case, viewed in the non-movant's favor, for purposes of whether plaintiff was engaged in protected activity are quite different from those in *Niswander* and tilt the balance to plaintiff. The confidential tax document at issue was an integral part of plaintiff's ongoing civil rights lawsuit. Plaintiff reviewed the document in the ordinary course of her employment, alerting DTE to the tax error (and Ashlock's failure to notice and correct it) as part of her employment responsibilities. Accordingly, the first factor weighs heavily in plaintiff's favor. Next, plaintiff only provided the document at issue to her attorneys in this civil rights litigation to which it is relevant so that the second factor is also weighs in plaintiff's favor. As to the third factor, while the document contains confidential tax information of DTE, that information would be kept confidential as its production and use was subject to a protective order entered in this litigation and it is highly relevant to plaintiff's claims of unlawful conduct that were then-pending. Ashlock subsequently pushing her into the whiteboard after she reported his failure to notice the error is a factual component of her hostile work environment claims, plaintiff reporting that push and defendant's response (or lack thereof) to such reporting is part of her retaliation claim, and defendant terminating plaintiff's employment for her providing the confidential document disclosing the tax error is itself alleged to constitute defendant's retaliation for plaintiff engaging in the protected activity of opposing defendant's discriminatory, harassing and retaliatory conduct and pursuing her ELCRA lawsuit. The third factor therefore weighs in plaintiff's favor. Fourth, plaintiff produced the document to her attorneys because it was responsive to defendant's requests for production, yet defendant objected to producing that same document in response to plaintiff's requests for production on confidentiality grounds, and the document was needed for plaintiff's upcoming deposition of Ashlock. This fourth factor also favors plaintiff. Under the fifth factor, the defendant had a broad privacy policy, meaning that it weighs in defendant's favor, but we note that it appears defendants were employing it to obstruct needed discovery, and objecting to the document's production even though it was needed for Ashlock's upcoming deposition, even though there was a protective order in place mitigating defendant's confidentiality concerns. Finally, as to the sixth factor, no other ready means for plaintiff to preserve the evidence in a manner that would not violate the defendant's privacy policy is apparent, such that this factor likewise appears to favor plaintiff.[11]

In light of this evaluation of the six *Niswander* factors, plaintiff providing the subject document only to her counsel for its use in proceedings on her ELCRA complaint, subject to a

[10] We do not read *Niswander*'s factors to be the *only* ones courts may consider, and leave it to future matters to further develop this issue.

[11] Again, defendant's privacy was protected via the protective order.

protective order, does not comprise an independent intervening cause for the termination too far removed from the filing of the original complaint as a matter of law. There is a genuine issue of material fact whether this action (that defendant asserts to be the sole basis for plaintiff's termination) was protected activity—opposition to retaliation and participation in her civil rights litigation—and is likewise part and parcel of the ongoing retaliation plaintiff claims she has endured for years following her initial internal complaint regarding Mary Lewis' ageist remarks when she was seeking a promotion in 2015, and her internal complaints that followed.

We accordingly find that the trial court erred in finding plaintiff's retaliation claim was limited to defendant terminating her for filing her January 31, 2020 complaint (and participating in the litigation such as by providing her counsel with the three-page tax document) rather than considering all the protected activity and retaliation alleged in the second amended complaint and articulated and supported by admissible evidence in the briefing on defendant's motion for summary disposition and motion for reconsideration, as well in support of her own cross-motion for partial summary disposition on her retaliation claim. There is evidence sufficient for a jury to conclude that plaintiff suffered adverse employment action due to reporting discrimination, harassment and earlier retaliatory conduct,[12] and further, that it was part of an ongoing course of retaliatory conduct for which the termination was the final act. Such consideration may properly include protected activity and acts of retaliation therefore that may have occurred outside of the applicable three-year general statute of limitations for the ELCRA retaliation claim. *Campbell*, 286 Mich App at 238 (holding such acts may be "used as background evidence to establish a pattern of discrimination" and to put plaintiff's claims and all the alleged discrimination, protected activity, and retaliation in its full context).

Properly viewing the evidence in the non-movant's favor, including the evidence of plaintiff having been subjected to acts of retaliation at her workplace (that she reported and for which there is evidence that she was against subjected to retaliation) there is a ready, reasonable inference to be drawn that defendant merely seized on this tax document issue as an opportunity to remove plaintiff from its workforce and to avoid the vesting of her benefits.[13] See *Holmwood v Pontiac Osteopathic Hosp*, unpublished opinion per curiam of the Court of Appeals, issued December 21, 2001 (Docket No. 333825) (finding that the totality of the circumstances are considering in determining whether there is a question of material fact as to causation and pretext in a retaliation case); *Woods v Dep't of Corrections*, unpublished opinion per curiam of the Court of Appeals, issued April 3, 2018 (Docket No. 3338825) (finding an eight-month gap between the filing of the complaint and subsequent discipline was not too great to establish an issue of fact as to the temporal proximity between them). Evidence demonstrating that there is an issue of material fact for the jury's resolution, on the issue of whether plaintiff's termination for providing the tax document to her attorney was retaliation for engaging in protected activity and mere pretext, and that it was further the final culmination of years of ongoing retaliation (in addition to temporal proximity) includes: that plaintiff previously had a lengthy performance record of "meets

[12] Such as the "meets many" rating on her 2019 annual review, which reduced her performance bonus in half (over $5,000), and denied her an annual merit salary increase.

[13] We also note that it is up to the jury to weigh the credibility of Lee and Dungy, i.e., this Court cannot resolve that issue.

expectations" until she began to engage in protected activity such as making informal complaints to her superiors and filing an internal complaint with defendant, whereupon plaintiff began to receive negative performance reviews and was placed on PIP; following her complaints of discrimination and hostile work environment she was subjected to physical assault and abusive and demeaning comments from co-workers and supervisors, called a troublemaker, and ostracized. Courts have found that such circumstantial evidence in additional to some temporal proximity to be sufficient to create an issue of material fact as to causation (or pretext): *Henry v City of Detroit*, 234 Mich App 405, 414; 594 NW2d 107 (1999); *McLemore v Detroit Receiving Hosp & Univ Med Ctr*, 196 Mich App 391, 396-397; 493 NW2d 441 (1992); *Rymal v Baergen*, 262 Mich App 274, 314; 686 NW2d 241 (2004); *Griffey v Dep't of Corrections*, unpublished per curiam opinion of the Court of Appeals, issued July 21, 2022 (Docket No. 354322), pp 27-31.

Properly viewed in the light most favorable to the non-movant and making all reasonable inferences in the non-movant's favor, defendant's purported termination of plaintiff's employment, in addition to plaintiff's other protected activity for which she contends she has also suffered continued retaliation, provides evidence of it being retaliation for her ongoing protected activity.

C. EXCLUSION OF EVIDENCE TO DEMONSTRATE PLAINTIFF ENGAGED IN OBJECTIVELY REASONABLE PROTECTED ACTIVITY, AN ELEMENT OF HER ELCRA RETALIATION CLAIM

Plaintiff argues that the trial court abused its discretion by granting defendant's broad motion in limine excluding most evidence related to her dismissed discrimination and hostile work environment claims. The excluded evidence—including internal complaints, incidents of harassment, and details of the assault—was, according to plaintiff, essential to establishing that her protected activity, e.g., complaints of discrimination and participation in proceedings, was undertaken in good faith and with objective reasonableness, which are necessary elements of a retaliation claim under Michigan law as set forth in *Braun v Ultimate Jetcharters, LLC*, 828 F3d 501, 512 (CA 6, 2016), and *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1312-1313 (CA 6, 1989).[14] To constitute "protected activity" for purposes of a retaliation claim, plaintiff must demonstrate that she "held an objectively reasonable and good faith belief" that the conduct was unlawful, not that the conduct was actually unlawful. *Braun*, 828 F3d at 512.

Furthermore, plaintiff contends that the jury should hear her entire story, including her history as a DTE employee, the underling conduct that led her to make her internal complaints that, in turn, led to the acts of retaliation (that she likewise reported via internal complaints) and her filing and participating in this ELCRA lawsuit asserting discrimination, hostile work environment and retaliation. See, e.g., *Old Chief v United States*, 519 US 172, 189; 117 S Ct 644; 136 L Ed 2d 574 (1997) (discussing why context matters to jurors).

[14] Again, the antiretaliation provisions of ELCRA and Title VII have similar language, serve similar purposes, and Michigan courts generally find federal court interpretations of Title VII persuasive in interpreting the ELCRA. *Miller*, 513 Mich at 137.

Plaintiff contends the factual basis underlying her complaint is relevant to show that defendant had motive to terminate her, resulting in unlawful retaliation after she filed several internal civil rights complaints with defendant (that included allegations of retaliation) and this lawsuit on January 31, 2020. Defendant, at the time of terminating plaintiff in February 2021, had no way of knowing that plaintiff's causes of action for discrimination and hostile work environment would be dismissed two years later. Plaintiff accordingly contends that defendant's retaliatory termination was motivated by what she alleged in her lawsuit. Plaintiff contends the trial court's rulings (including granting mistrial for reading allegations of the SAC to the jury during opening statement where the SAC and all its allegations were admitted into evidence) impermissibly eliminate reference to any substantive testimony or exhibits of what motivated defendant to terminate plaintiff in the midst of her ongoing lawsuit for conduct related to depositions and discovery in her lawsuit.

Defendant argues the trial court properly exercised and did not abuse its discretion in excluding evidence and testimony relating to discrimination or harassment claims because a substantial risk existed that the jury could render a verdict based on the evidence supporting those claims dismissed via summary disposition. It contends those claims were irrelevant to the sole issue of retaliatory termination and would unfairly prejudice the jury pursuant to MRE 401-403.

However, as already set forth in this opinion, we have found that the trial court erred in finding plaintiff's retaliation claim was limited to defendant terminating her for filing her January 31, 2020 complaint and that participating in the litigation such as by providing her counsel with the three-page tax document did not constitute protected activity.

In light of this ruling, we vacate the trial court's May 1, 2023 opinion and order on defendant's motion in limine and leave it to parties and trial court to address anew on remand, if appropriate.

D. EXCLUSION OF EVIDENCE AS HEARSAY WHEN IT WAS OFFERED TO SHOW ITS EFFECT ON THE LISTENER AND TO ESTABLISH AN ELEMENT OF HER ELCRA RETALIATION CLAIM

Plaintiff challenges the trial court's exclusion of numerous statements as hearsay arguing that they were either not hearsay or offered for non-hearsay purposes, but instead are being offered: to show the effect on the listener (how discriminatory, harassing or retaliatory remarks influenced her decisions, including to complain to her supervisors, file internal complaints, the civil complaint in this case and caused her emotional distress); as admissions of a party opponent under MRE 801(d)(2)(D); or to prove notice and motive, not the truth of the statements themselves.

Defendant's motion in limine specifically sought to exclude the following statements, claiming they were barred as hearsay:

- Plaintiff was told by other coworkers that coworker Ashlock stated that he did not like the way that she smelled or the scent of her lotion; or that Ashlock hates her, can't stand her smell, and wants nothing to do with her.

- Terry Yee (Plaintiff's immediate supervisor who played no role in the decision to terminate her employment) allegedly stated that "black people don't make good accountants," and that she should direct her son away from pursuing a master's in accounting (thereby imputing that she, an African-American woman, was not a good taxation accountant).

- From 2016 to 2019 Yee and Ashlock discussed with each other, and not with plaintiff, the work ethic and work product of an African-American employee in DTE's tax department named Major, by making negative comments.

- Manager Biel allegedly told other unidentified employees not to talk to plaintiff because "she is a troublemaker."

- Plaintiff was told by coworker Stieber that manager Biel told Steiber that plaintiff is a "troublemaker," that she "cringes" when she sees Stieber and plaintiff talking, and she can't stand the sight of" plaintiff.

In light of our holding that the trial court erred in finding plaintiff's retaliation claim was limited to defendant terminating her for filing her January 31, 2020 complaint (and participating in the litigation such as by providing her counsel with the three-page tax document), the context in which the trial court made this preliminary evidentiary ruling has materially changed, and must be reevaluated consistent with this opinion.

E. QUASHING OF SEVERAL OF PLAINTIFF'S TRIAL SUBPOENAS

The trial court also quashed multiple trial subpoenas for witnesses who could testify about discriminatory and retaliatory behavior suffered by plaintiff in her employment with defendant.

Such testimony may be relevant to plaintiff establishing that her complaints to supervisors and superiors, written internal complaints, and her civil complaint in this case was "protected activity" based on her "objectively reasonable and good faith belief" that the communication and conduct she opposed and reported was unlawful. *Braun*, 828 F3d at 512. Plaintiff accordingly argues that quashing the trial subpoenas of Lamb, Major, Stieber and Boda was an abuse of discretion as it violated the plaintiff's right to present a full defense and deprived the jury of corroborating testimony from coworkers and HR personnel.

Once again, the context in which the trial court's ruling on this evidentiary issue was made has materially changed in light of our holding that the trial court erred in finding plaintiff's retaliation claim was limited to defendant terminating her for filing her January 31, 2020 complaint and that participating in the litigation such as by providing her counsel with the three-page tax document did not constitute protected activity.

F. EXCLUSION OF EVIDENCE OF PLAINTIFF'S INTERNAL COMPLAINTS OF DISCRIMINATION

As to the trial court's exclusion of plaintiff's internal complaints of discrimination from evidence in the trial of this matter, once again, the context in which the trial court's ruling on this evidentiary issue was made has changed in light of our holding that the trial court erred in finding plaintiff's retaliation claim was limited to defendant terminating her for filing her January 31, 2020 complaint and that participating in the litigation such as by providing her counsel with the three-page tax document did not constitute protected activity. As a result the trial court must reconsider its ruling on this exclusion of this evidence, consistent with this opinion.

G. EXCLUSION OF EVIDENCE OF FUTURE DAMAGES

The trial court's opinion and order on defendant's motion in limine to exclude evidence of future damages and to strike plaintiff's request for future damages is ambiguous. It orders that "defendant's motion to exclude evidence of future damages is granted. Defendant's motion to strike plaintiff's motion for future damages is denied without prejudice." (Cleaned up). However, defendant filed but one motion and plaintiff did not file a motion for future damages, but rather requests such relief in her SAC. Further, the body of the opinion and order provides:

> Although the determination of the exact amount of a front-pay award is a question for the jury, the initial determination of the propriety of a front-pay award is a matter for the Court. *Arban v West Publishing Corp*, 345 F3d 390, 406 (CA 6, 2003). Courts typically consider the following factors in authorizing awards of front-pay:
>
> > (1) The employee's future in the position from which she was terminated; (2) her work and life expectancy; (3) her obligation to mitigate her damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; (5) the discount tables to determine the present value of future damages; and (6) "other factors that are pertinent in prospective damage awards." *Suggs v ServiceMaster Educ Food* [*Mgt*], 72 F3d 1228, 1234 (CA 6, 1996) (citation omitted).
>
> The Court will address these factors if the jury renders a favorable verdict on plaintiff's retaliation claim. [(Cleaned up).]

Presumably, the court intended to hold a bifurcated trial in which the jury would first decide plaintiff's retaliation claim and, if that verdict was favorable to plaintiff, then it would hold the second portion of the trial in which plaintiff would present evidence of future damages, after which the trial court could make the initial determination of the propriety of a front-pay award, and present the issue of the exact amount of a front-pay award to the jury, if applicable. However, the opinion and order, as currently written, does not actually communicate to the parties how the court intends to proceed.

Plaintiff argues the trial court unlawfully precluded evidence of front pay and future damages, effectively granting summary judgment "in disguise" through a motion in limine—something explicitly forbidden by *Louzon v Ford Motor Co*, 718 F3d 556, 561 (CA 6, 2013): "the exclusion of an entire category of evidence based on the argument that the [p]laintiff will produce insufficient evidence to support the theory." *Gazvoda v Secretary of Homeland Security*, unpublished order of the United States District Court for the Eastern District of Michigan, issued March 13, 2018 (Case No. 15-cv-14099), p 3.

Defendant argues that the issue of front pay and damages was not decided by the court and that plaintiff mischaracterizes or misinterprets the court's order.

While we agree with defendant's assertion that the trial court's opinion and court order did not grant summary disposition on the issue of front pay and future damages, we nonetheless remand this issue to the trial court to provide further explanation as to the procedure through which this issue will be decided at trial.

While plaintiff's brief on appeal includes argument regarding the admissibility of expert testimony from economist Dr. Paranjpe, the trial court's opinion and order does not speak to this issue and it is not ripe for our review.

H. REQUEST FOR CASE TO BE REASSIGNED TO A TRIAL JUDGE ON REMAND

Plaintiff contends on appeal that the trial judge "has shown actual bias and prejudice" against her by way of "disparate treatment of the parties," and requests that the case be assigned to a new judge on remand "[t]o preserve the integrity of the system of justice." Further, as plaintiff notes, this court may, "in its discretion, and on the terms it deems just: . . . (7) . . . grant further or different relief as the case may require." MCR 7.216(A). Plaintiff does not formally appeal the chief judge's opinion and order denying plaintiff's motion for the trial judge's recusal. Cf. *Cain*, 451 Mich at 503. However, her request for the case to be assigned to a different judge on remand based on MCR 2.003(C)(1)(a)-(b) is a de facto request for judicial disqualification, where the issue was previously addressed de novo by the chief judge of the trial court, and we analyze that issue accordingly.

Disqualification of a judge is controlled by MCR 2.003, which, in part pertinent to plaintiff's arguments in the trial court and on appeal, provides that

> [d]isqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.
>
> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in

> *Caperton v Massey*, [556 US 868]; 129 S Ct 2252; 172 L Ed 2d 1208 (2009),[15] or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct. [MCR 2.003(C)(1).]

Plaintiff's brief does not specifically argue that her due process rights are at stake. That said, *Caperton* held that "the Due Process Clause demarks only the outer boundaries of judicial disqualifications." *Caperton*, 556 US at 889.

> In lieu of exclusive reliance on that [judge's] personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. [*Id.* at 883-884 (internal citations and quotation marks omitted).]

"Due process requires that an unbiased and impartial decision-maker hear and decide a case." *Mitchell v Mitchell*, 296 Mich App 513, 523; 823 NW2d 153 (2012) (quotation marks and citation omitted). However, "[a] trial judge is presumed unbiased, and the party asserting otherwise has the heavy burden of overcoming the presumption." *Id.*; see also *Cain*, 451 Mich at 497.

With regard to Canon 2 of the Michigan Code of Judicial Conduct, plaintiff specifically notes subsection (A) provides that a judge "must expect to be the subject of constant public scrutiny" and "must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen" and subsection (B) states that a judge "should promote public confidence in the integrity and impartiality of the judiciary" and "should treat every person fairly, with courtesy and respect."

Under MCR 2.003(C)(l)(b), the test for determining whether there is an appearance of impropriety is " 'whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.' " *People v Aceval*, 486 Mich 887, 889; 781 NW2d 779 (2010) (statement by HATHAWAY, J.), quoting ABA Annotated Model Code of Judicial Conduct, Canon 2A, Commentary (2004).

Plaintiff's argument on appeal claims that the record is "replete with examples" where the trial judge's treatment of plaintiff was disparate from her treatment of defendant. But plaintiff's brief only specifically references "statements offered from the Wayne County Jurors," who

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[15] The *Caperton* decision found the West Virginia supreme court of appeals judge at issue should have recused himself where the president and CEO of a corporation appearing before him helped to elect the judge by contributing $3 million to his election campaign following a trial court's entry of $50 million judgment against that corporation, at a time when it was likely that that corporation would be seeking review in that supreme court of appeals. Plaintiff presents no facts that are even remotely comparable.

expressed shock and dismay by the trial judge's "clear bias against [p]laintiff and her counsel," that were cited earlier in her brief as being "[p]erhaps most persuasive." Plaintiff then argues that all of the instances of the judge's conduct considered cumulatively are sufficient to "create an indubitable picture of bias," and merit the requested relief. However, "[t]his Court will not search the record for factual support for a party's claim." *McRoberts v Ferguson*, 322 Mich App 125, 137; 910 NW2d 721 (2017) (quotations marks and citation omitted).

Considering the affidavit and two statements of potential jurors actually cited in plaintiff's brief and referenced in her argument, those jurors indicated that, during voir dire, the trial judge rushed plaintiff's counsel, would cut him off before he could finish his statements and questions to potential jurors, and "rolled her eyes" when he was speaking to potential jurors, whereas she did not behave or react in this manner to defense counsel during their statements to or questioning of potential jurors.

However, as the chief judge noted in his opinion and order denying plaintiff's motion for the trial judge's recusal de novo pursuant to MCR 2.003(D)(3)(a)(i), the trial judge's impatience with plaintiff's counsel does not establish bias.

> Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. Moreover, partiality is not established by expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women sometimes display. [*People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999).]

Further, while plaintiff fails to specifically raise an argument regarding the trial judge's judicial decisions in granting mistrial and then summary disposition of the remaining retaliation claim, "judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a 'deep-seated favoritism or antagonism that would make fair judgment impossible and overcomes a heavy presumption of judicial impartiality,' " and plaintiff makes no such argument or showing. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001), quoting *Cain*, 451 Mich at 496.

Plaintiff has failed to establish any of the grounds for disqualification set forth in MCR 2.003(C)(1)(a)-(b).

We reverse in part, affirm in part, and remand to the trial court for further proceedings consistent with the opinion. We find there is no basis for disqualification of the trial judge. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Randy J. Wallace
/s/ Christopher M. Trebilcock