STATE OF MICHIGAN

COURT OF APPEALS

JUDITH BURKHARDT,

Plaintiff-Appellant,

v

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
January 22, 1999

No. 197988
Wayne Circuit Court
LC No. 94-434092-NZ

Before: Whitbeck, P.J., and MacKenzie and Murphy, JJ.

WHITBECK, J. (concurring in part and dissenting in part).

I concur in part and respectfully dissent in part.

I. Basic Facts and Procedural History

Plaintiff-appellant Judith Burkhardt appeals the trial court's orders dismissing her claims against defendant-appellee Blue Cross Blue Shield ("BC/BS") of a racially hostile work environment, retaliation and intentional infliction of emotional distress. Burkhardt does not appeal the jury's verdict of no cause on her race discrimination claim.

BC/BS employed Burkhardt, a white female, since 1985. In April of 1993, Burkhardt began a new assignment as manager of BC/BS's Facilities Utilization Review Department (the "FUR"). In the new position, Burkhardt reported to Mary Wisgerhof, the director of the FUR. Burkhardt managed four supervisors, three of whom were white and one of whom was African-American. Each supervisor had a support staff.

Upon beginning her new assignment, Burkhardt had several meetings with the supervisors and members of their support staffs to discuss the FUR. According to Burkhardt, two weeks after she began her position, African-American members of the support staffs told her that there were racial problems in the FUR and that they were considering filing a complaint alleging discrimination. Thereafter, Burkhardt met with the four FUR supervisors and advised them that racial preferences or discrimination of any kind within the FUR would not be tolerated. According to Burkhardt, approximately one week later, Wisgerhof accused Burkhardt of giving favored treatment to African-

American employees who were under Burkhardt's supervision and causing racial division within the FUR.

On May 21, 1993, Wisgerhof and the three white supervisors filed a complaint against Burkhardt in BC/BS's Human Resources Department ("HR") alleging, among other things, that Burkhardt had created a hostile work environment and intimidated and harassed the three white supervisors. On May 31, 1993, Wisgerhof advised Burkhardt not to report to work. Wisgerhof eventually removed Burkhardt from her position as manager of the FUR.

HR conducted a formal investigation of the charges against Burkhardt and concluded that the charges against her were not supported. HR further concluded that the FUR was neither irreparably harmed nor disrupted and that, absent a cause, BC/BS should return Burkhardt to her position as the FUR manager. However, Wisergof's superior, Thomas Walters, agreed that the decision to remove Burkhardt should not be revisited, despite the recommendation of HR to the contrary, and BC/BS did not return Burkhardt to her position.

In her First Amended Complaint, Burkhardt alleged race discrimination, racially hostile work environment and retaliation in violation of the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, and intentional infliction of emotional distress. In her race discrimination claim, Count I, Burkhardt claimed that race was a factor that made a difference in her demotion from her position at the FUR. Burkhardt claimed that she was "punished for attempting to change the status quo from one where racial discrimination and racial favoritism was practiced and tolerated within Defendant's FUR Department to a Department that was supervised in a color blind manner." Burkhardt further claimed that the Civil Rights Act "prohibits racial discrimination on the basis of association."

In Count II, Burkhardt claimed a racially hostile working environment and asserted that "she was subjected to a racially hostile, intimidating and abusive working environment for attempting to manage the FUR Department without regard to race" in violation of the Civil Rights Act. In her retaliation claim, Count III, Burkhardt asserted that she was "retaliated against for attempting to manage the FUR Department without regard to a [sic] employee's race, racial favoritism, or color." In Count IV, Burkhardt claimed that BC/BS had "wantonly and intentionally engaged in extreme and outrageous conduct" by racially discriminating against her as alleged in Count I, by subjecting her to a racially hostile and intimidating working environment as alleged in Count II and by retaliating against her as alleged in Count III. With respect to all Counts except Count IV, Burkhardt alleged generalized "loss of earning capacity, loss of dignity, and enjoyment of life, extreme harassment and mental, emotional distress, all past and future …."

BC/BS had previously moved for summary disposition under MCR 2.116(C)(8) and/or MCR 2.116(C)(10). BC/BS argued that Burkhardt lacked standing to bring a race discrimination claim and that Wisgerhof removed Burkhardt from the FUR because Burkhardt was an ineffective manager and caused problems in the FUR. The trial court denied this summary disposition motion and BC/BS's subsequent motion for reconsideration. However, on the first day of trial, during arguments on the parties' motions in limine, the trial court partially reversed its initial ruling and summarily dismissed Burkhardt's claims for hostile work environment and intentional infliction of emotional distress.[1]

Following Burkhardt's case in chief, BC/BS moved for a directed verdict on Burkhardt's remaining claims of unlawful retaliation and race discrimination. The trial court reserved its ruling on BC/BS's motion, but eventually dismissed Burkhardt's unlawful retaliation claim before submitting the case to the jury. The jury returned a verdict of no cause on Burkhardt's remaining claim of race discrimination.

II. Racially Hostile Work Environment

A. Introduction and Standard of Review

Burkhardt argues that the trial court erred in summarily dismissing her claims alleging a racially hostile work environment. This Court reviews a trial court's order of summary disposition de novo. *Weisman v US Blades, Inc*, 217 Mich App 565, 566-567; 552 NW2d 484 (1996). A trial court may grant summary disposition when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). When reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings and all documentary evidence available to it. *Patterson v Kleiman*, 447 Mich 429, 434; 526 NW2d 879 (1994). Giving the benefit of reasonable doubt to the nonmovant, the court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

B. Section 202(1) of the Civil Rights Act

Section 202(1) of the Civil Rights Act, MCL 37.2202(1); MSA 3.548(202)(1), provides that an employer shall not do any of the following:

> (a) 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.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status....

C. Hostile Work Environment Not Involving Conduct or Communication "of a Sexual Nature"

Under the facts of this case, it is unnecessary to decide whether a claim of discrimination based on hostile work environment, when the allegations of discrimination involve conduct or communication that are not "of a sexual nature," is encompassed by the Civil Rights Act. Rather, for the purpose of deciding this case, we can assume without deciding that Burkhardt is within a protected class and may

maintain a hostile work environment claim on conduct involving race or national origin. See *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996).[2]

D. Federal Precedent

(1) Overview

Burkhardt relies on two federal cases, *Chandler v Fast Lane, Inc*, 868 F Supp 1138 (ED Ark, 1994) and *Clayton v White Hall School Dist ("Clayton II")*, 875 F2d 676 (CA 8, 1989). We often turn to federal precedent interpreting title VII of the Civil Rights Act of 1964, 42 USC 2000e-2000e-17, for guidance when interpreting the Civil Rights Act, although federal precedent is not binding when interpreting Michigan law. *Radtke v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993). See also *Dep't of Civil Rights ex rel Jones v Dep't of Civil Service*, 101 Mich App 295, 303; 301 NW2d 12 (1980). It is instructive, therefore, to review these cases, and the underlying precedents, for the light they may shed on Burkhardt's claims in this matter.

(2) *Chandler*

In *Chandler*, the plaintiffs, employees of the defendant, brought claims under 42 USC 1981 and under title VII of the Civil Rights Act of 1964. While categorizing the title VII claim as "somewhat novel," the federal district court noted that a white person's right to associate with African-Americans is protected by §1981. *Chandler, supra* at 1143. Therefore, the court concluded that an employer's implementation of an employment practice that impinges upon this right is actionable under title VII. *Id.* at 1144. The court commented:

> While the Court recognizes that the Eighth Circuit has not yet been required to address this issue directly, it is nevertheless convinced that the Eighth Circuit would choose, in a case such as this, to follow the lead of those courts which have dealt with the issue. *See Clayton* [*supra* at 679-680] (holding that a white person has standing to assert a Title VII claim based upon a work environment alleged to be hostile to African-Americans.) [*Chandler, supra* at 1144.]

Thus, three points are readily apparent with respect to *Chandler*. First, the federal district court's primary line of reasoning with respect to the right of white persons to associate with African-Americans relied upon §1981. There is no direct counterpart to §1981 in Michigan law. Second, the court recognized that the Eighth Circuit Court of Appeals, and indeed the United States Supreme Court, had yet to rule directly on this issue. We have discovered no subsequent federal appellate ruling dealing with this issue. Third, the court also relied heavily on *Clayton II* for the proposition that a white person has standing to assert a title VII claim based upon a work environment alleged to be hostile to African-Americans.

(3) *Clayton II*

Although accurate in the broad sense, the *Chandler* court's summary of *Clayton II* does not capture an important aspect of that case. Clayton was a white woman employed by the White Hall

School District in Arkansas. Clayton moved outside the White Hall district in 1980, but her child continued to attend a school in the district until 1983. At the end of the 1982-1983 school year, Lloyd Gaynor, an African-American male, employed as a janitor by the White Hall School District, attempted to enroll his child in the district. As did Clayton, Gaynor lived outside the district. The White Hall School District refused to enroll Gaynor's child and began enforcing its policy of requiring residence within the district as a prerequisite for enrollment in the district. After Gaynor's inquiry, the White Hall School District informed Clayton that, pursuant to this policy, Clayton's child could no longer attend the White Hall schools. *Clayton II, supra* at 678.

Clayton sued but the federal district court dismissed her suit with prejudice for failure to allege any theory of recovery based on a racially motivated change in her terms and conditions of employment. However, on appeal, the Eighth Circuit Court of Appeals remanded for entry of dismissal without prejudice. *Clayton v White Hall School Dist* ("*Clayton I*"), 778 F2d 457 (CA 8, 1985).

Clayton then filed an amended complaint alleging various theories of recovery. Most importantly for our analysis here, she claimed that the White Hall School District's actions created a hostile working environment permeated by racial discrimination. The federal district court dismissed this claim without prejudice, and Clayton again appealed to the Eighth Circuit Court of Appeals. *Clayton II, supra* at 678.

When dealing with Clayton's standing to raise issues of racial discrimination directed against a minority co-worker, the court observed:

> The hostile working environment theory of discrimination is based upon an employee's right to work in an environment free of unlawful discrimination, and the injury results from the lost benefits of associating with persons of other racial groups. *See id.* [*Clayton I, supra*] at 459. "[I]t is an emotional or psychological injury to the plaintiff herself which is the gravamen of this cause of action." [*Id.*]
>
> Standing for purposes of Title VII is not limited to minority groups. *See id.* at 459; *Waters v Heublein, Inc,* 547 F2d 466, 469 (9th Cir. 1976), *cert denied,* 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1100 (1977). Rather, it is dependent upon whether the plaintiff is a person claiming to be aggrieved by such discrimination. In *Trafficante v Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10, 93 S.Ct. 364, 366-67, 34 L.Ed. 415 (1972), a unanimous Supreme Court held that such "persons aggrieved" included those who were not themselves the objects of discrimination, but were nevertheless injured "[by] the loss of important benefits from interracial associations." [*Clayton II, supra* at 679.]

The court then found that, because Clayton's claim of a racially discriminatory work environment alleged an injury in fact that was within the zone of interest protected by title VII, she had standing to bring the suit.[3] *Id.* at 680. Again, three points are readily apparent with respect to this analysis. First, the claim of a hostile work environment, although a non-minority claimant can assert it, is not an abstract one. Rather, the non-minority claimant must assert some damage to *the claimant* as a result of the

allegedly hostile work environment. Secondly, in deciding *Clayton II*, the court relied heavily on its previous decision in *Clayton I*. Thirdly, the court also relied heavily on the decision of the United States Supreme Court in *Trafficante, supra.*

(4) *Clayton I*

These points are equally apparent in the decision in *Clayton I*. There, the court described, but did not explicitly adopt, two related theories. The first it labeled the "work environment" theory, that holds that an employee has a right to work in an environment free of discrimination and that a plaintiff has standing to sue for the violation of that right even if he or she is not a member of the minority group allegedly discriminated against. The second, citing *Trafficante,* it labeled the "associational" theory, that provides standing for a plaintiff in similar circumstances who alleges a deprivation, as a result of discrimination, of the right to associate with members of the targeted minority group. *Clayton I, supra* at 459.

(5) The Cases Underlying *Clayton I*

With respect to the "work environment" theory, the court in *Clayton I* cited six cases in support of the proposition that an employee has a right to work in an environment free of discrimination. Of these, four—*Stewart v Hannon,* 675 F2d 840 (CA 7, 1982), *EEOC v Mississippi College,* 626 F2d 477 (CA 5, 1980), *EEOC v Bailey Co,* 563 F2d 439 (CA 6, 1977) and *Waters v Heublein, Inc,* 547 F2d 466 (CA 9, 1976)—rely, to a greater or lesser degree, upon the reasoning in *Trafficante, supra.* It can easily be contended, therefore, that the *Clayton I* court's "work environment" theory is an outgrowth, in the employment setting, of the "associational" theory in *Trafficante.*

In *Trafficante,* the United States Supreme Court construed the meaning of the term "person aggrieved" contained in § 810(a) of the Civil Rights Act of 1968, 42 USC § 3610(a). In that case, two tenants, one white and one African-American, of an apartment complex filed separate complaints with the Secretary of Housing and Urban Development. Each complaint alleged that the owner of the apartment complex discriminated on the basis of race in the rental of apartments in the complex in violation of § 804 of the Civil Rights Act of 1968, 42 USC § 3604. The two tenants claimed that they had been injured in that (1) they had lost the social benefits of living in an integrated community, (2) they had missed business and professional advantages that would have accrued if they had lived with members of minority groups and (3) they had suffered embarrassment and economic damage in social, business and professional activities from being "stigmatized" as residents of a "white ghetto." *Trafficante, supra* at 208. Justice Douglas, writing for a unanimous court, summarized the alleged injury to existing tenants by exclusion of minority persons from the apartment complex as being "the loss of important benefits from interracial associations." *Id.* at 209-210.

Justice Douglas, while noting that the legislative history of the Civil Rights Act of 1968 was "not too helpful," nevertheless discerned an emphasis by proponents of the legislation that "those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." *Id.* at 210. Justice Douglas then noted that the Assistant Regional Administrator for HUD had determined

that "'the complainants are aggrieved persons and as such are within the jurisdiction' of the [Civil Rights] Act [of 1968]" and stated that this construction is entitled to "great weight." *Id.* Justice Douglas also touched upon the role of private individual complainants as private attorneys general:

> ... [T]he complainants act not only on their own behalf but also "as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." The role of "private attorneys general" is not uncommon in modern legislative programs ... . It serves an important role in this part of the Civil Rights Act of 1968 in protecting not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects "the very quality of their daily lives." … [*Id.* at 211.]

Justice Douglas then reached the heart of the matter in his concluding paragraphs:

> The dispute tendered by this complaint is presented in an adversary context. … Injury is alleged with particularity, so there is not present the abstract question raising problems under Art III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole community," … and as Senator Mondale who drafted § 810(a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." …
>
> We can give vitality to § 810(a) only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute. [*Id.* at 211-212.]

One can certainly question the creation of a "right" of association in title VIII of the Civil Rights Act of 1968 based upon the snippets of legislative history quoted by Justice Douglas. Further, while one can certainly challenge the wisdom of transplanting the "associational" theory from a housing setting to an employment setting,[4] it is nonetheless apparent that the federal courts have done so. And yet, it is also clear that there must be *injury* to a non-minority complainant, rather than only to the minority persons who are the direct victims of the alleged discrimination, that this injury must be alleged with particularity and not merely in the abstract, and that this injury must result from some action or inaction by the employer.

Mississippi College, *supra,* is particularly instructive in this regard. There, the Fifth Circuit Court of Appeals discussed the holding in *Stroud v Delta Air Lines, Inc*, 544 F2d 892 (CA 5, 1977). In *Stroud*, the court had held that "plaintiff [a female former flight attendant] is not a person who may assert the rights of prospective male flight attendants who would complain of this illegality." *Id.* at 893. The *Mississippi College* court interpreted *Stroud* as holding that a title VII plaintiff may assert only that plaintiff's right to be free from discrimination that has an effect on that plaintiff and may not assert the rights of others to be free from discrimination. *Mississippi College, supra* at 482. The *Mississippi College* court then prefaced its discussion of *Trafficante* by observing that the decision in *Trafficante* "will not permit the language in *Stroud* to bar every charge of discriminatory employment practices

directed against a group of which the charging party is not a member." *Mississippi College, supra* at 482. The *Mississippi College* court concluded by returning to the theme that a complainant under title VII must show a violation of his or her *own* right to work in a racially neutral environment:

> We conclude that § 706 of Title VII permits Summers [the white female who had charged Mississippi College with discrimination that affected her working environment] to file a charge asserting that Mississippi College discriminates against blacks on the basis of race in recruitment and hiring. Our decision today does not allow Summers to assert the rights of others. We hold no more than that, provided she meets the standing requirements imposed by Article III [of the United States Constitution], Summers may charge a violation of *her own personal right to work in an environment unaffected by racial discrimination*. [*Id.* at 483 (emphasis supplied).]

This emphasis on a right that is personal to the complainant, and therefore an injury that is personal to the complainant, was also central to the two cases cited by the *Clayton I* court that did not rely explicitly on *Trafficante*. In *EEOC v T.I.M.E.—D.C. Freight*, 659 F2d 690, 692, n, 2 (CA 5, 1981), the court found that the two white complainants may be "persons aggrieved" by discrimination against African-Americans, "provided they can establish a personal injury."

The other case, *Rogers v EEOC*, 454 F2d 234 (CA 5, 1971), presents a much more complex situation. The complainant, a Spanish-surnamed woman, brought a complaint before the EEOC against a group of optometrists doing business as "Texas State Optical" and apparently seeing patients in their facility. The complainant alleged that the company discriminated against her because of her national origin by, among other things, "segregating the patients." *Id.* at 236. Two judges found the complainant to be a "person aggrieved" within the meaning of § 706(a) of title VII, although on very different grounds. Judge Goldberg favored a very broad interpretation of title VII, stating that the company's "failure to direct intentionally any discriminatory treatment toward … [the complainant] is simply not material to the finding of an unlawful employment practice." *Id*. at 239.[5] Judge Goldberg went on to say, however, that:

> … Moreover, I believe that petitioners' [the optometrists] argument [that title VII does not apply because the complaint alleged discrimination directed toward the patients and not toward any employee, *id.* at 238] does not countenance the distinct possibility that an employer's patient discrimination may constitute a subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees. As patently discriminatory practices become outlawed, those employers bent on pursuing a general policy declared illegal by Congressional mandate will undoubtedly devise more sophisticated methods to perpetuate discrimination among employees. The petitioners' alleged patient discrimination may very well be just such a sophisticated method and, if so, then ... [the complainant], as the primary object of the discriminatory treatment, suffers directly the consequences of such a practice and is entitled to protection in accordance with the provisions of Title VII. [*Id.* at 239.]

Thus, while emphasizing that title VII is an expansive concept that "sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination," *id.* at 238, Judge Goldberg's actual position may have rested as much, if not more, upon his theory that the company was actually discriminating *directly*, albeit subtly, against the complainant by "segregating the patients."

Judge Godbold, in concurring with the opinion of Judge Goldberg, seized upon this narrower ground. He noted that, at the hearing before the federal district court, the EEOC appeared to argue that the complainant "claims only that she is offended by the manner in which her former employers treated their customers." See *Rogers v EEOC*, 316 F Supp 422, 425 (ED Texas, 1970), rev'd 454 F2d 234 (CA 5, 1971). However, on appeal, the EEOC asserted an alternative, and narrower, rationale: that the charge of "segregating the patients" could also be interpreted as meaning that the company's minority group employees "are not permitted to have contact with Anglo-Saxon patients." *Rogers*, *supra* at 241. Judge Godbold saw this construction of the complaint as falling within the prohibition against discrimination in title VII because of an individual's race or national origin, etc.[6] or against a limitation, segregation or classification of an individual that adversely affected that individual's status as an employee because of that individual's race, national origin, etc.[7] *Id.* at 242. Judge Godbold concluded his discussion by noting:

> This strikes me as a much sounder judicial approach than construing the charge as asserting a type of discrimination indirect and collateral, pursuant to which ... [the complainant] was offended by segregation practices directed against others who are of another ethnic group, and who are not employees, and directed at such others because of their race, national origin, etc. [*Id.*][8]

(6) Conclusion

This mosaic of federal cases provides at least some guidance in evaluating Burkhardt's hostile work environment claim. At a minimum, we can draw from these cases, with the possible exception of Judge Goldberg's opinion in *Rogers*, the concept that the creation and maintenance of a racially hostile work environment by some act or failure to act of the employer is actionable by a non-minority plaintiff under title VII if there is an actual injury to the claimant in the form of a showing that the racially hostile work environment has actually had a deleterious effect on that claimant. By contrast, however, a generalized allegation of a racially hostile work environment, without a showing of some action or inaction by the employer, or an allegation that such an environment has damaged other minority employees or minority members of the public and without a showing of actual harm to the claimant, will not be sufficient to withstand summary disposition. With this guidance in mind, one must turn to the situation in Michigan under the Civil Rights Act.

E. The *Quinto/Radtke* Five-Element Test

(1) Overview

If it is assumed that a hostile work environment claim can include conduct of a racial, as well as a sexual, nature, *Quinto, supra* at 368-369, and *Radtke, supra* at 382-383, set out the five following elements as necessary to establish a prima facie case of discrimination:

> (1) the employee belonged to a protected group;
>
> (2) the employee was subjected to communication or conduct on the basis of [a protected status];
>
> (3) the employee was subjected to unwelcome ... conduct or communication [involving her protected status];
>
> (4) the unwelcome ... conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and
>
> (5) respondeat superior.

(2) Unwelcome Conduct or Communication;
Interference with Employment; Hostile Work Environment

Burkhardt has failed to establish the third and fourth elements of the *Quinto/Radtke* test. As the Michigan Supreme Court explained, whether a hostile work environment was created by unwelcome conduct "shall be 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." *Quinto, supra* at 369 quoting *Radtke, supra* at 394 (emphasis supplied).[9]

In this respect, the case law in Michigan correlates reasonably well with the federal precedents under title VII discussed above. The conduct upon which Burkhardt relied[10] did not establish that she was subjected to a workplace that was permeated with discriminatory intimidation, ridicule and insult sufficiently severe or pervasive to alter the conditions of *her* employment. Indeed, there was no allegation that Burkhardt, prior to her transfer, experienced *any* unwelcome conduct that substantially interfered with her employment or created a hostile work environment that, directly or indirectly, affected her.[11] Even if one assumes, as Burkhardt alleges, that there were racial problems within the FUR and if one further assumes that BC/BS took some action or failed to take an action thereby creating these racial problems, Burkhardt did not establish that these problems were either so severe or pervasive that they affected the conditions of *her* employment or that they created a hostile work environment that affected *her*.[12] In this regard, Burkhardt's generalized allegations of "loss of earnings, earning capacity, loss of dignity, and enjoyment of life, extreme harassment, mental, emotional distress,

all past and future" in her First Amended Complaint are simply insufficient to establish a prima facie case of actual harm to Burkhardt.[13]

F. Conclusion

Burkhardt's, entirely laudable, expression of a desire to work in a race neutral environment, standing alone or even when coupled with generalized allegations of racial problems, did not establish a prima facie case of a hostile work environment under the Civil Rights Act. Accordingly, the trial court properly granted summary disposition on Burkhardt's hostile work environment claim.

III. Intentional Infliction of Emotional Distress

Burkhardt also failed to establish a prima facie case of intentional infliction of emotional distress. The tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v Auto-Owners Ins, Co*, 422 Mich 594, 602; 374 NW2d 905 (1985); *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). In reviewing such a claim, it is initially for the court to determine whether the defendant's conduct reasonably may be regarded as so extreme and outrageous as to permit recovery. *Doe v Mills*, 212 Mich App 73, 91-92; 536 NW2d 824 (1995). In assessing a claim for intentional infliction of emotional distress, the Michigan Supreme Court has held that the following should be used to determine whether the alleged conduct constitutes extreme and outrageous conduct that is necessary to support an actionable claim for intentional infliction of emotional distress:

> Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, *as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.* Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> *The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.* The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. [*Roberts, supra*, quoting Restatement Torts, 2d, § 46, comment d, pp 72-73; emphasis supplied.][14]

The alleged conduct in this case, as it relates to Burkhardt, does not rise to a level of being "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Roberts, supra*. The fact

that Burkhardt sought psychological treatment does not of itself create a prima facie claim of intentional infliction of emotional distress. Accordingly, the trial court properly granted summary disposition on Burkhardt's intentional infliction of emotional distress claim.

IV. Unlawful Retaliation

A. Introduction

It is here that I part company with my colleagues, and my discussion therefore is a dissent to their majority opinion that remands for a new trial on this claim.[15] Burkhardt contends that the trial court erred in directing a verdict in favor of defendant on her unlawful retaliation claim and my colleagues agree. I respectfully disagree.

B. Section 701 of the Civil Rights Act

Section 701 of the Civil Rights Act, MCL 37.2701; MSA 3.548(701), prohibits retaliation or discrimination 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*. [Emphasis supplied.]

C. Elements of An Unlawful Retaliation

I agree with the majority that to establish a case of unlawful retaliation under § 701 of the Civil Rights Act, a plaintiff must show: (1) that she 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. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432; 566 NW2d 661 (1997); *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989).[16]

D. Protected Activity

Burkhardt contends that she engaged in protected opposition when, after some African-American employees complained to her about discrimination, she informed the four supervisors whom she managed that she would not tolerate "any kind of discrimination, be it race or sex or disabilities or age, or anything."

It is possible that an informal complaint can constitute distinct action. See, e.g., *Barber v CSX Distribution Servs*, 68 F3d 694, 702 (CA 3, 1995) (a court must "analyze the message that [the plaintiff] conveyed ... not the medium of conveyance.") However, it can certainly be contended that Burkhardt's announcement that she would not tolerate racial discrimination was not, even in the broadest reading of the terms, an informal complaint. Indeed, it can be argued, it was not a complaint of any kind. Rather, again it can be argued, it was an expression, entirely laudable, of her managerial and personal philosophy. Therefore, one can certainly contend that Burkhardt was engaged in no

protected activity, no matter how expansively that activity might be viewed. Simply put, while such an expression of philosophy is certainly appropriate and while it remains unfortunate that one might have the need to make it at all in our society, I believe that this Court could legitimately find that the making of such an expression does not trigger the protection of § 701 of the Civil Rights Act for the one who felt called upon to make it. I am, however, willing to assume without deciding that, for the purposes of this decision, Burkhardt's statement that she did not want and would not tolerate "any kind of discrimination, be it race or sex or disabilities or age, or anything" may have been sufficient to trigger the protection provided by MCL 37.2701, MSA 3548(701) to a person who "has opposed a violation of [the Civil Rights Act]."[17]

I am not willing, however, to join with my colleagues in finding that Burkhardt presented sufficient *evidence* to establish that she engaged in a protected activity. Further, I note that one aspect that differentiates the unlawful retaliation claim in this case from an ordinary claim of retaliation discrimination by an employer is that Burkhardt directed her statement at employees who were *subordinate* to her. The majority reaches the conclusion that Burkhardt's "act of instructing department supervisors [the subordinate employees] that discrimination would not be tolerated, when done in the wake of complaints regarding racial discrimination, was based on a reasonable belief that defendant [BC/BS] was engaging in an unlawful employment practice, and, therefore, qualified as a protected activity under § 701 of the CRA."

I do not believe that an organizational employer being sued by an employee (or former employee) may reasonably be held liable for employment discrimination under the Civil Rights Act based on discriminatory animus harbored by an employee who was *subordinate* to the aggrieved employee at the time of the alleged discrimination.[18] Notably, an "employer" is defined by the Civil Rights Act, as "a person who has 1 or more employees, and includes an agent of that person." MCL 37.2201(a); MSA 3.548(201)(a). In the context of an employer-employee relationship with a particular employee, a supervisor of the employee also employed by the same employer is unquestionably an agent of the employer. However, I do not believe that a subordinate employee may reasonably be regarded as an *agent of the employer* in relation to that employee's immediate supervisor. Accordingly, it seems to me that while an organizational employer is liable for discriminatory acts violative of the Civil Rights Act by a supervisory employee against a subordinate employee, the converse does not follow.

Indeed, in the analogous context of a hostile environment sexual harassment claim, by prevailing Michigan Supreme Court precedent, an employer is liable for such harassment by a supervisor of an aggrieved employee, but not for such conduct by co-workers of the employee. See *Radtke, supra* at 394-397 & n, 41. In the circumstances of this case, it appears to me that if there were arguably any retaliatory discriminatory animus, it was on the part of the subordinate employees not BC/BS (including its employees and officers at a higher level of authority than Burkhardt at the time of the incidents underlying this case).[19] In such a circumstance, I do not see how the *employer* may be said to have engaged in retaliation discrimination in violation of the Civil Rights Act. While BC/BS through decisionmaker(s) at a higher level than Burkhardt ultimately decided to demote Burkhardt, there is *no* evidence to support a finding of discriminatory animus at that higher level of organizational authority.

I fear that holding an organizational employer liable in such circumstances will largely require an employer to insure that none of its "rank and file" employees will act against a superior employee with discriminatory animus. In hiring employees who have supervisory responsibilities and/or responsibility for decisions related to hiring, firing and the like, an employer is plainly on notice that it is wise to attempt to assure that such employees will not harbor discriminatory animus that would wrongly influence personnel decisions. Further, an employer can undertake some steps to monitor the exercise of organizational authority by a supervisory level employee over subordinate employees for indications of discriminatory treatment.

I fear, however, that expecting an employer to police subordinate employees, including even employees having no supervisory responsibility whatsoever, for possible discriminatory attitudes because those employees might take some discriminatory act that would, through an attenuated chain of causation, negatively impact a superior level employee constitutes an unreasonable burden. Because subordinate employees do not ordinarily make personnel related decisions regarding superior employees, there is no conceivable way for an employer to monitor subordinate employees as to whether they are attempting to undermine superiors based on protected characteristics under the Civil Rights Act. This is akin to the doctrine of proximate causation. As this Court has thoughtfully noted:

> "[L]egal or proximate causation involves a determination that the nexus between the wrongful acts (or omissions) and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. In this sense, *proximate causation*, and hence liability, *hinges on principles of responsibility*, not physics. Thus, proximate causation is a determination that must be made in addition to a determination of cause in fact or "but for" causation." [*Adas v Ames Color-File*, 160 Mich App 297, 301; 407 NW2d 640 (1987), quoting 1 American Law of Products Liability (3d ed), § 4:2 (emphasis supplied).]

As reflected in the definition of "employer" in the Civil Rights Act and case law regarding workplace sexual harassment, an employer is considered responsible on an agency theory for the acts of supervisory employees against subordinate employees, but not vice versa.[20]

I also note the following quite recent academic commentary that tends to support my view about the legal principles that should apply to a claim of retaliation discrimination predicated on retaliatory animus by a subordinate employee:

> Despite consensus that a plaintiff alleging employment retaliation must prove causation, courts struggle, often with widely differing results, over how to determine whether a causal link exists between protected activity and an adverse employment decision. This struggle is due, in part, to the amorphous concept of "employer." Courts agree the evidence must show that the "employer" retaliated by making an adverse employment decision. *The more difficult task is identifying who, exactly, is the employer*. When the owner of a business is a sole proprietor who directly oversees a few employees, it is clear that the sole proprietor is the "employer" for purposes of establishing a causal link. But, in a large corporation or government agency employing

> many people in numerous divisions that may include layers of supervisors overseeing varying levels of employees, the concept of an employer becomes nebulous. Some employees may consider their direct supervisors to be their "employer"; others may equate "employer" with the workplace in general, encompassing co-workers within their understanding of the term.
>
> Everyone is entitled to envision his or her own notion of "employer"; *however, for purposes of assigning liability for workplace retaliation, the judicial definition of employer should be limited to the ultimate decisionmaker responsible for an adverse employment action taken against an employee.* In other words, because retaliation requires proof of a causal link between an adverse employment decision and an employee's protected activity, courts adjudicating employment suits should focus on two questions: (1) who ultimately made the adverse decision and (2) why?
>
> Narrowing the focus to the ultimate decisionmaker will limit the potential for distraction by the misconduct of employees who may harbor or even openly display ill will toward an employee who has engaged in protected activity, but who play no role in the adverse employment decision. Drawing this distinction is crucial, because ill will amongst co-workers, or even between subordinates and supervisors, is not, itself, actionable as retaliation. Unpleasantness at work is unfortunate, but not illegal. Only an adverse employment decision made because of an employee's protected activity may form the basis for a retaliation suit. That is not to say that courts should ignore claims that an employee has been subjected to hostile working conditions; such claims may be actionable, depending on the circumstances. But, absent evidence that an employer was involved in, or on notice of, retaliatory harassment, courts should not automatically infer a causal connection between that harassment and a subsequent adverse employment action. *It is unrealistic simply to assume that an employer has control over, or even knowledge of, all interactions among employees in the workplace.* Unless evidence shows that that employee alerted the employer to workplace retaliation, or indicates that the ultimate decisionmaker was driven by retaliatory motive, no basis exists to infer a connection between the adverse action and the employee's protected activity. [Snell & Eskow, *What motivates the ultimate decisionmaker? An analysis of legal standards for proving causation and malice in employment retaliation suits*, 50 Baylor L R (1998) (emphasis supplied).]

I note that my analysis would not deprive a supervisory level employee who suffered retaliation discrimination at the hands of one or more subordinate employees of any remedy. MCL 37.2701; MSA 3.548(701) prohibits any "person" from retaliating "against a person because the person has opposed a violation of this act." Under the circumstances of the case at hand, Burkhardt would have had an actionable claim against the subordinate employees as natural persons if they had retaliated against her based on a protected expression of opposition to discrimination in violation of the Civil Rights Act. However, it does not follow that Burkhardt has a claim against BC/BS as an organizational employer based on any such wrongful conduct by the subordinate employees. Rather, it seems to me

desirable that liability for any such retaliation discrimination by subordinate employees be placed on those employees themselves, not on employers who will generally lack substantial capacity to monitor and prevent such wrongful discrimination.[21]

E. Causal Connection[22]

In analyzing this issue, it is important to bear in mind three critical sets of circumstances and, as I will develop, the lack of evidence of a causal relationship between the first set of circumstances and the latter two. At the risk of repetition, these circumstances are: (1) Burkhardt's alleged actions in opposition to discrimination; (2) complaints made to Wisgerhof about Burkhardt's conduct as the manager of the FUR by three supervisors, all white females, who reported to Burkhardt; and (3) Wisgerhof's ultimate decision to remove Burkhardt as manager of the FUR.

Burkhardt testified that, during a discussion in which Wisgerhof essentially first confronted Burkhardt about problems in the FUR, the following transpired:

> And [Wisgerhof] said that people were complaining to her and she said I was dividing the area racially. [Wisgerhof] said I was giving preferential treatment to minorities.

Burkhardt also said that Wisgerhof "almost accused me of taking a minority to lunch and paying for it." Also, Burkhardt testified that she asked Wisgerhof if "minority employees" were complaining and that Wisgerhof replied, "no, white employees are complaining." Wisgerhof's comments do not reflect that, in removing Burkhardt from her position as manager of the FUR, Wisgerhof was motivated by a desire to retaliate against Burkhardt for opposing a violation of the Civil Rights Act. Rather, they, reflect that Wisgerhof may have been concerned that Burkhardt was engaging in racially discriminatory treatment in favor of non-white employees.[23] The Civil Rights Act, MCL 37.2202(1); MSA 3.548(202)(1), of course, by its plain language prohibits racial discrimination against any employee, of whatever race. See *Laitinen v Saginaw*, 213 Mich App 130; 539 NW2d 515 (1995) (holding that the trial court erred in granting summary disposition on a white employee's claim of "reverse discrimination in employment").

Burkhardt did not present any other evidence in her case-in-chief to support a determination that, in deciding to remove Burkhardt as the manager of the FUR, Wisgerhof harbored a motive to retaliate against Burkhardt for opposing discrimination prohibited by the Civil Rights Act. On the contrary, there was substantial evidence that Wisgerhof's decision was motivated by the complaints made by three of the four supervisors in the FUR about Burkhardt's conduct as their supervisor. Accordingly, to draw a causal connection between Burkhardt's alleged conduct in opposition to discrimination, one must conclude that such opposition to discrimination by Burkhardt was a causal factor of the supervisors' complaints to Wisgerhof that resulted in Wisgerhof ultimately removing Burkhardt as manager of the FUR. In my opinion, Burkhardt did not offer evidence at trial to support such a conclusion.

During her trial testimony, Burkhardt replied affirmatively when asked if some employees came to her because they had concerns "that they were being treated unfairly because of either race or racial favoritism." Burkhardt also testified that, in a telephone conversation with BC/BS Vice President

Charles Boyer, she asked him about a meeting that he had with the three complaining supervisors and Wisgerhof. Burkhardt said that Boyer told her "they had complained about the work environment, the charges of I believe of racial disharmony and that's what he said." From Boyer's testimony, one could well infer that the three complaining supervisors, who were all white, expressed a belief that Burkhardt was treating people differently based on race. However, there is no evidence to support a finding that these three supervisors expressed this belief in retaliation for opposition by Burkhardt to actual or perceived racial discrimination or other discrimination prohibited by the Civil Rights Act.

Citing *McLemore v Detroit Receiving Hospital*, 196 Mich App 391; 493 NW2d 441 (1992), the majority notes that circumstantial evidence is oftentimes the only evidence available to show that a defendant was motivated by a desire to retaliate. I agree. However, the circumstantial evidence of unlawful retaliation presented by Burkhardt falls far short of the circumstantial evidence in *McLemore*. There, the female plaintiff was employed as a clinical instructor at the defendant hospital's school of radiologic technology. *Id.* at 393. Two male individual defendants in that case, at different times, appraised her work in that position as "effective." *Id.* Later, the plaintiff applied for a vacant educational coordinator position, but the two individual male defendants and another person chose a male for the position. *Id.* at 393-394. Thereafter, the plaintiff filed a complaint with the hospital expressing concern that the hiring decision may have resulted from bias and requesting an explanation to avoid litigation. *Id.* at 394. In reaction to the complaint, the two male defendants sent the plaintiff memoranda critical of her job performance. *Id.* Eventually, after the male who was first hired resigned and the plaintiff was again rejected for the educational coordinator position in favor of another male, she "filed a complaint with the EEOC [the federal Equal Employment Opportunity Commission]." *Id.* Within two months thereafter, the two male defendants recommended eliminating the plaintiff's position as part of a hospital-wide staff reduction, and the plaintiff was laid off. *Id.* The jury in *McLemore* found that the defendants terminated the plaintiff's employment in retaliation for her filing a charge of sex discrimination with the EEOC and awarded damages. *Id.* at 393. This Court found sufficient circumstantial evidence to support the jury's verdict in light of the positive job evaluations of the plaintiff by the defendants who "suddenly viewed [her job performance] as unsatisfactory after she raised the issue of bias" and the "evidence that defendants had begun to compile a paper record that would support [the plaintiff's] discharge long before the layoff." *Id.* at 396-397.

In contrast, in the situation at hand, Burkhardt never brought a formal complaint of discrimination against the three supervisors that would give rise to a readily apparent motive for retaliation. In *McLemore*, therefore, the plaintiff came much closer to accusing the individual defendants who acted against her of discrimination than did Burkhardt. Here, Burkhardt essentially stated that she would not tolerate discrimination, without accusing the complaining supervisors of committing discrimination. Indeed, Burkhardt offered no evidence to reasonably support a conclusion that any of the three supervisors who complained to Wisgerhof and others about Burkhardt engaged in, or desired to engage in, racial discrimination or other discrimination prohibited by the Civil Rights Act.

Thus, there is no reasonable basis upon which one could conclude that the complaining supervisors reacted negatively to Burkhardt's original – and arguably protected – expressions of opposition to prohibited discrimination, as opposed to her later statements and conduct. Accordingly,

the circumstances of *McLemore* evinced a greater motive for retaliatory discrimination by the defendants in that case than by the three complaining supervisors in this case. In *McLemore*, the same individuals who once provided positive evaluations of the plaintiff's job performance later acted to effectively discharge her after she alleged discrimination. In contrast, the complaints against Burkhardt in her capacity as the manager of the FUR were made by three supervisors who did not have prior contact with her. There simply was *no* evidence in Burkhardt's case-in-chief from which a reasonable factfinder could find sufficient circumstantial evidence to support her retaliation claim.

I conclude that, while there was evidence that Burkhardt expressed opposition to prohibited discrimination in the presence of the three complaining supervisors and that the supervisors complained to higher levels of management about Burkhardt, there was simply no evidence presented to reasonably support a finding that the supervisors' complaints were motivated by Burkhardt's original expression of opposition to prohibited discrimination. Burkhardt offered no evidence showing that any of the three complaining supervisors engaged or desired to engage in discrimination based on race or any other protected characteristic under the Civil Rights Act. One might, perhaps, speculate regarding whether there was a relationship between Burkhardt's expression of opposition to discrimination and the three supervisors' complaints about her. However, mere speculation does not create a factual issue for the jury. *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

V. Abuse of Discretion

Burkhardt claims that she is entitled to a new trial because the trial court abused its discretion in excluding BC/BS's HR investigation file relating to charges brought against Burkhardt. Burkhardt contends that the file is admissible under the business records exception to the hearsay rule. MRE 803(6).

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion. *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). Error requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected. MRE 103(a).

Although the trial court may have erred in failing to ascertain whether the investigation and creation of the HR file was done in the course of a regularly conducted business activity and, if so, whether the file was trustworthy,[24] any error was harmless and is not sufficient to set aside the verdict. MCR 2.613(A); *Price v Long Realty, Inc*, 199 Mich App 461; 502 NW2d 337 (1993).

The record indicates that BC/BS's HR manager testified independently about much of the information contained in the HR investigation file. Moreover, several witnesses offered independent testimony that supported Burkhardt's claim that racial discrimination existed in the FUR before she became manager. Burkhardt does not explain the significance of the file as it relates to her being "unable to give the jury a roadmap of what she thought the evidence would show." While the trial court

generally held that the file was inadmissible, it did allow Burkhardt to lay a proper foundation to admit certain documents as it became necessary. Accordingly, the trial court did not commit error requiring reversal.

VI. Judicial Bias

Burkhardt claims that she was denied a fair trial because of judicial bias and prejudice. However, Burkhardt did not preserve this issue for appellate review by filing a motion to disqualify the trial judge below. MCR 2.003; *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989). Further, Burkhardt has not shown, nor does the record reveal, actual bias or prejudice. *Wayne Co Prosecutor v Parole Bd*, 210 Mich App 148, 155; 532 NW2d 899 (1995); *Elsasser v American Motors Corp*, 81 Mich App 379, 388; 265 NW2d 339 (1978).

I would therefore affirm as to all counts, including—unlike my colleagues—unlawful retaliation.

/s/ William C. Whitbeck

[1] Although BC/BS moved for summary disposition *prior* to Burkhardt's filing of her First Amended Complaint, the trial court actually granted summary disposition *after* that filing. However, the trial court and the parties have apparently proceeded on the assumption that that summary disposition was granted as to the First Amended Complaint and we adopt that assumption.

[2] One may note, however, that if the Legislature had meant to include a hostile work environment as such among the chargeable offenses under § 202, it could certainly have done so in 1980 when it added the bar against sexual harassment. However, the Legislature in 1980 chose instead to amend a definitional section, § 103, MCL 37.2103; MSA 3.458(103), to include a definition of discrimination *because of sex* that included verbal or physical conduct or communication *of a sexual nature* that has the purpose or effect of substantially interfering with an individual's employment, public accommodations, or public services, education or housing *or* creating an intimidating, hostile or offensive employment, public accommodations, public services, education or housing environment. Thus, not only is the "hostile work environment" category a subset of the more general definitional category of verbal or physical conduct of a sexual nature, that more general category is itself a subset of the even broader definitional category of discrimination because of sex. As the Michigan Supreme Court recognized in *Quinto, supra* at 368, n, 4, federal courts have held that harassing behavior based on ethnicity is violative of title VII of the Civil Rights Act of 1964. See *Boutros v Canton Regional Transit Authority*, 997 F2d 198, 202-203 (CA 6, 1993) (national origin harassment actionable under title VII.) In the Michigan Supreme Court's recent opinion in *Koester v Novi*, 458 Mich 1, 11, n, 3; 580 NW2d 835 (1998), the Court, when dealing with a sexual harassment case under the Civil Rights Act, stated that:

> Under the dissent's reasoning claims of racial harassment would also fail (despite being recognized by the federal courts) because [the Civil Rights Act] prohibits racial

> "discrimination" not "racial harassment." This interpretation defies logic. See *Harrison v Metropolitan Government of Nashville & Davidson Co,* Tennessee, 80 F3d 1107 (CA 6, 1996), and *Snell v Suffolk Co,* 782 F2d 1094 (CA 2, 1986) (allowing a claim for racial harassment.)

Under such circumstances, it is certainly questionable whether the Legislature intended the hostile work environment subset to extend to conduct involving race or national origin.

[3] The court went on to find, however, that Clayton's single allegation of discrimination was insufficient, as a matter of law and that the district court should have granted summary judgment in favor of the White Hall School District on Clayton's hostile working environment claim. *Id.*

[4] For example, it would generally appear much easier for a landlord simply to treat potential tenants in a race neutral manner than for an employer to monitor pervasively its employees for their commitment to racial integration and harmony.

[5] Judge Goldberg interpreted the charge that the company "segregated the patients" as meaning that the company afforded its patients different treatment depending on their ethnic origins. *Rogers, supra* at 237.

[6] 42 USC 2000e-2(a)(1).

[7] 42 USC 2000e-2(a)(2).

[8] Judge Roney dissented, arguing that the words "segregating the patients" did not, and were not intended to, constitute an allegation that the complainant was permitted to have contact with only one group of patients. *Id*. at 244. Judge Roney thus would not have adopted the narrower ground referred to by Judge Goldberg and explicitly adopted by Judge Godbold. Judge Roney dismissed the more expansive ground out of hand:

> There is no indication in the Act [the Civil Rights Act of 1964] or in the legislative history that Congress in passing Title VII was concerned about whether an employer's business presents conditions for employment that are environmentally attractive to all, whether the manner of his operation suits everyone, or whether a particular individual might be uncomfortable or have feelings of unhappiness in his employment. The merit of this kind of approach is not up for decision. Congress has simply not given this scope to its legislation. [*Id.* at 246.]

[9] See also *Radtke, supra* at 398:

> A hostile work environment claim is actionable only when, in the totality of the circumstances, the work environment is so tainted by harassment that a reasonable person would have understood that the defendant's conduct or communication had either the purpose or effect of substantially interfering with *the plaintiff's* employment, or subjecting *the plaintiff* to an intimidating, hostile or offensive work environment. [Emphasis supplied.]

[10] Indeed, other than alleging in Count II of her First Amended Complaint that she was "subjected to" a racially hostile, intimidating and abusive working environment for attempting to manage the FUR without regard to race, Burkhardt failed in Count II to allege *any* action or inaction by BC/BS leading to the creation or maintenance of such a hostile work environment. Contrast *Bryant v Automatic Data Processing, Inc*, 151 Mich App 424; 390 NW2d 732 (1986). There, the plaintiff, a white female married to an African-American male, asserted that the defendant had discriminated against her by refusing to maintain an employment relationship with her "because of the race or color of her spouse" and that the defendant engaged in a pattern or practice of discriminating against African-Americans that served to deny the plaintiff her "rights to equal employment opportunities free from discrimination as proscribed under the Elliot-Larsen Civil Rights Act." The *Bryant* panel held that claims of racial discrimination based on alleged interracial marriage discrimination are cognizable under § 202 of the Civil Rights Act. Without really dealing with the plaintiff's "associational" theory, the panel went on to say:

> Plaintiff was only required to allege that racial considerations motivated the defendant's conduct. Her complaint clearly states that she was a victim of discrimination based on her interracial marriage. Thus, it can be inferred that plaintiff's race, as well as her husband's race, motivated the defendant's conduct. While defendant correctly points out that plaintiff states in her brief that she is not complaining of discrimination based on her own race, that statement must be read in context with the type of action the plaintiff has asserted. Therefore, we believe that plaintiff has properly stated a claim for racial discrimination. [*Id.* at 430-431.]

[11] See *Vermont v Hough*, 627 F Supp 587, 605-606 (WD Mich, 1986) (isolated incident ordinarily not enough to sustain a cause of action for a hostile work environment).

[12] Clearly, and axiomatically, Wisgerhof's transfer of Burkhardt affected Burkhardt. However this transfer, discussed below under § 701 of the Civil Rights Act, is not a part of Burkhardt's hostile work environment claim.

[13] Burkhardt's "associational" claim was actually contained in Count I and therefore went to the jury and was rejected by it. However, since Burkhardt reasserted this claim in Count II, it is discussed here.

[14] See also *Ledl v Quik Pik Food Stores, Inc*, 133 Mich App 583, 591; 349 NW2d 529 (1984) (liability may exist only where one's intended conduct has been so outrageous in character or extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society). See also *Novosel v Sears, Roebuck & Co*, 495 F Supp 344, 347 (ED Mich, 1980) (wrongful discharge of long-time employee does not constitute intentional infliction of emotional distress) and *Hetes v Schefman & Miller Law Office*, 152 Mich App 117, 393 NW2d 577 (1986) (as a matter of law, allegations of malicious termination were insufficient to state a cause of action).

[15] My colleagues, as they note in their separate opinion, concur in the other aspects of this opinion. We therefore unanimously affirm the trial court on all other points.

[16] See also *Booker v Brown & Williamson Tobacco Co*, 879 F2d 1304, 1310 (CA 6, 1989): to establish a case of unlawful retaliation under the Act, a plaintiff must establish (1) the he or she opposed violations of the Act or participated in activities protected by the Act and (2) that the opposition or participation was a significant factor in an adverse employment decision. The significant factor standard requires more than the showing of a casual link. A factor can be a cause without being significant, and only the latter is sufficient to show retaliatory discharge.

[17] I note that Melinda Ross, one of the supervisors who complained to Wisgerhof about Burkhardt, testified that after Burkhardt came to the FUR:

> [Burkhardt] called me into her office and told me that everyone on my [work] team was white and I didn't know where that was even coming from and I didn't understand what she meant, and I said no I have a Filipino on my team. And she said that's not what I mean. Everyone on your team is white and we have to do something about it. And that bothered me.

Ross further said, "I felt that if you concentrated on the team being white that that was a racist attitude." These alleged comments by Burkhardt cannot reasonably be considered activity in opposition to a violation or suspected violation of the Civil Rights Act, nor can any action taken by Ross as a negative reaction to them reasonably be considered retaliation for action in opposition to racial discrimination. Obviously that a particular "team" or relatively small unit in a workplace happens to consist entirely or predominantly of members of one race is not in itself racial discrimination. Indeed, if Ross' testimony on this point is accurate, far from opposing a violation of the Civil Rights Act, Burkhardt was advocating conduct violative of the Act by proposing to consider race in making assignments of employees to a "team." MCL 37.2202(1)(b); MSA 3.548(202)(1)(b) (an employer shall not classify an employee in a way that deprives or tends to deprive the employee of "an employment opportunity" because of race) Clearly, ad hoc considerations of race by a supervisor with regard to a particular "team" in a department of an organization cannot constitute an acceptable "affirmative action" *plan* that might permit limited consideration of the race of employees for the purpose of eliminating present effects of past discrimination. See *Victorson v Dep't of Treasury*, 439 Mich 131, 143-146; 482 NW2d 685 (1992); MCL 37.2210; MSA 3.548(210).

[18] Neither *Sumner v United States Postal Serv*, 899 F2d 203, 209 (CA 2, 1990), nor *EEOC v Crown Zellerbach Corp*, 720 F2d 1008, 1013 (CA 9, 1983), cited by the majority, deals with discriminatory animus by a *subordinate* employee.

[19] The majority states that the discriminatory animus underlying the decision of BC/BS lies with plaintiff's supervisor and not with her subordinates. I am constrained to note, however, that plaintiff presented no evidence whatever of discriminatory animus on the part of her supervisor or indeed, and more generally, on the part of BC/BS.

[20] Of course, I do not suggest that an employer could never be held liable for retaliation discrimination in the context of a demotion or discharge initially triggered by the animus of subordinate employees. For example, if prejudiced subordinate employees told the CEO of an employer that they disliked a

supervisor specifically because of the supervisor's protected opposition to discrimination prohibited by the Civil Rights Act and this led the CEO to discharge or demote the supervisor, the employer would be liable for retaliation discrimination based on the CEO's *knowing* participation in retaliation discrimination. However, from my review of the record, there is no such evidence of retaliation discrimination by the higher level supervisors in this case.

[21] I also note that I remain unconvinced that plaintiff's actions in this case constituted "opposition" to a "violation" of the Civil Rights Act. In this regard, see *Cremonte v Michigan State Police*, ____ Mich App ____; ____ NW2d ____, slip op, p 7, n, 4 (Docket Nos. 195669, 195670, released October 20, 1998):

> The Civil Rights Act protects those who seek redress for civil rights violations. Pursuant to the Act, an employer may not "[r]etaliate or discriminate against a person because the person has opposed a violation of this act." MCL 37.2701(a); MSA 3.548(701)(a). In reviewing the record, we found no evidence that plaintiff "opposed a violation" of the Civil Rights Act. Plaintiff's writings to his superiors did not raise the spectre [sic] of a discrimination complaint, nor did they contain any hint of any illegality on the part of defendant. Indeed, the writings can, at best, be interpreted as plaintiff's expression of disagreement with defendant's employment practices. We do not believe that the protections of the Civil Rights Act extend to such statements. Compare *McLemore v Detroit Receiving Hosp,* 196 Mich App 391, 396; 493 NW2d 441 (1992). See also *Booker*[, *supra* at 1311-1314].

[22] It is fairly clear that BC/BS was aware of Burkhardt's statements and that Burkhardt suffered an adverse employment decision when Wisgerhof removed her from the FUR. Thus, I am willing to assume that the second and third elements of the four part test in MCL 37.2701; MSA 3.548(701) were satisfied.

[23] Of course, it is not our role to make any such factual determination. Thus, my comment here should certainly not be taken as any type of belief that Burkhardt, a white woman, actually engaged in any "reverse discrimination" in favor of non-white employees.

[24] See MRE 803(6); *Solomon v Shuell*, 435 Mich 104, 115; 457 NW2d 669 (1990); see also *Crimm v Missouri Pacific R Co*, 750 F2d 703 (CA 8, 1984).