STATE OF MICHIGAN

COURT OF APPEALS

JOHN HODGE,

Plaintiff-Appellee,

v

GRAND VALLEY STATE UNIVERSITY,

Defendant-Appellant.

UNPUBLISHED
May 4, 1999

No. 205578
Kent Circuit Court
LC No. 94-004711 NZ

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Defendant appeals by right a jury verdict awarding plaintiff, a black, tenured full-professor at defendant's Seidman School of Business, $170,000 plus interest, costs, and attorney fees, for a total of $288,332, pursuant to his complaint alleging wage-based and non-wage-based employment discrimination on the basis of race, contrary to the Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We vacate the award and remand for a new trial.

Defendant argues that the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) or a new trial because plaintiff failed to establish a prima facie case of race discrimination, failed to rebut defendant's nondiscriminatory reasons for its conduct, and failed to instruct the jury that plaintiff's base salary as of December 5, 1991 was race neutral. We agree that because of the trial court's overbroad ruling on defendant's motion in limine to exclude evidence or consideration of any conduct, events, or level of pay before December 5, 1991, defendant is entitled to a new trial.

A

Generally, the standard of review of a ruling regarding a motion for new trial is whether the trial court committed an abuse of discretion. *People v Lemmon*, 456 Mich 625, 647 n 27; 576 NW2d 129 (1998); *McPeak v McPeak*, ___ Mich App ___; ___ NW2d ___ (Docket No. 176584, issued 1/19/99), slip op at 3. Moreover, the decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion is found only if

"an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Cleary v The Turning Point,* 203 Mich App 208, 210; 512 NW2d 9 (1994), citing *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). Questions of law are subject to de novo review, and a new trial is appropriate when an error of law has occurred in the proceedings. MCR 2.611(A)(1)(g); *Schellenberg v Rochester Michigan Lodge #2225 of the Benevolent and Protective Order of Elks of the United States of America,* 228 Mich App 20, 28; 577 NW2d 163 (1998).

B

Plaintiff's complaint alleged that defendant engaged in wage-based discrimination against him because he was the only black full professor in the Management Department of the Seidman School of Business at defendant university, and from 1991 through 1997 he was paid less than other full professors. To establish a prima facie case of race discrimination in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.;* MCL 3.548(101) *et seq.*, the plaintiff must establish either intentional discrimination or disparate treatment. *Harrison v Olde Financial Corp,* 225 Mich App 601, 606; 572 NW2d 679 (1997). To prove intentional discrimination, a plaintiff "must show that he was a member of the affected class, that he was discharged, and that the person who discharged him was predisposed to discriminate against persons in the affected class and actually acted on that disposition. *Manning v City of Hazel Park,* 202 Mich App 685, 697; 509 NW2d 874 (1993); *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 538-539; 470 NW2d 678 (1991). To prove disparate treatment, the plaintiff must show that he was a member of a class entitled to protection under the act and that he was treated differently than persons in a different class regarding the same or similar conduct. *Manning, supra*. "Similarly situated" has been defined as "'all of the relevant aspects' of his employment situation were 'nearly identical' to those of [other employees'] employment situation[s]." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 699-700; 568 NW2d 64 (1997), citing *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994). Intentional discrimination is not a separate theory but rather a different name for the disparate treatment theory. *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997).

From December 1991 through the 1996-1997 school year, the Management Department of the Seidman School of Business employed five full professors, four different department chairmen, two different department deans, and seventeen other assistant and associate professors. In addition to plaintiff, the remaining four full professors were Barry Castro, Samir IsHak, who is Egyptian, Steve Margulis, and Jitendra "Jim" Mishra, who is Asian. Earl Harper, who is also black, and Lars Larson were full professors while acting as department chairmen. At trial, plaintiff testified his annual salary from 1991 through the 1996-1997 school year was less than the salaries of other full professors that defendant employed.

Although plaintiff began teaching at defendant university in 1977 and became a full professor in 1986, plaintiff waited until December 5, 1994 to file his discrimination complaint. As a result, defendant filed a motion in limine on the eve of trial invoking the three-year statute of limitations set forth in MCL 600.5805(8); MSA 27A.5805(8) as a means of restricting plaintiff's evidence of discrimination to

events occurring and damages suffered *after* December 5, 1991. The trial court agreed and so limited plaintiff's presentation of proofs.[1] The trial court also rejected defendant's motions for directed verdict[2] and refused to instruct the jury, despite defendant's request, that plaintiff's base salary as of December 1991 was "racially neutral."[3] Rather, the court instructed the jury that "[i]n determining whether the defendant discriminated against plaintiff with respect to his compensation or work conditions, you are not to consider conduct, events, or level of pay prior to December 5, 1991."

As a result of the trial court's ruling on defendant's motion in limine, however, the parties were effectively precluded from establishing not only how plaintiff's base salary was originally established when he began teaching in 1977 but also the other full professors' initial base salaries, degrees, years of experience and other pertinent information affecting their salaries. Plaintiff presented no material evidence regarding how the "relevant aspects" of the other full professors' employment was "nearly identical" to plaintiff's employment in terms of their effective teaching performance, professional achievement and publication, unit and university service, and community service, all of which would impact a professor's base salary. *Town, supra*. Rather, plaintiff chose to focus on whether these professors were considered "doctorally qualified," a title that plaintiff claims he but no other full professor earned, for accreditation purposes. Plaintiff admitted that the same evaluation criteria (i.e., teaching performance, professional achievement, and service to the university and community) were used to judge a professor's performance regardless of his or her status, and his pay increases were based on a comparison of his performance with the entire Seidman School's faculty, but he argued that these criteria were merely a pretext for discriminating against plaintiff.[4]

Without any basis for comparing the similarities or differences among the five full professors with their unique teaching histories, however, we believe that the jury was left to engage in rank speculation regarding why plaintiff's base salary was consistently lower than the other four professors.[1] Despite the fact that all five were full professors, we do not assume that all five would receive the same starting salaries or would progress along the same salary track in the absence of evidence that, regardless of prior teaching or publishing experience predating employment with defendant, all new professors are paid the same base salary. This conclusion is supported by an attachment to defendant's motions for summary disposition. The attachment, prepared by defendant, sets forth the dates of hire, highest degree earned and year earned, rank at hire, tenure date, and full professor date for each of the five full professors in the Management Department.[5] The data reveals that (1) plaintiff was hired in 1976, as a counselor, not a teacher, after everyone except Margulis, who was hired in 1986 as a full professor, (2) the other four professors earned their PhD's four to nine years before plaintiff earned his, and (3) plaintiff and Castro received full tenure on the same date, and Margulis received full tenure at a later date, but both Castro and Margulis were given full professor rankings before plaintiff. Although he confirmed the dates of hire for all five full professors, plaintiff did not challenge the accuracy of this document in his brief in response to defendant's summary disposition motion. Plaintiff also argued to the jury that he should have received an equity increase as a result of his "doctorally qualified" status in order to bring him in line with the other full professors' base salaries, but plaintiff did not establish that any other similarly situated professors received equity increases.

We also find significant the fact that the five professors, when ranked highest to lowest in terms of salary, maintained their relative rankings from 1991 through 1997: IsHak, Mishra, Castro, Margulis, and then plaintiff. Again, without any background information regarding the relative teaching experiences of these men or when they were hired, we believe that the jury was improperly permitted to assume that the only reason plaintiff's base salary remained the lowest of the five was due to his race. Plaintiff had the burden of proving that he was similarly situated to the other full professors, but we believe that the trial court's overbroad evidentiary ruling effectively precluded plaintiff from making the requisite showing, thereby constituting an abuse of discretion. *Cleary, supra*. By remanding for a new trial, the jury will be permitted to hear, for the first time, how full professors' base salaries were established,[6] whether the five full professors are or were similarly situated, and whether accreditation qualifications affected salary determinations. We therefore vacate the jury verdict and remand this case for a new trial on plaintiff's wage-based discrimination claims.[7]

C

We limit the new trial to plaintiff's wage-based claims because we also find that plaintiff's evidence supporting his non-wage discrimination claim insufficient as a matter of law; consequently, defendant was entitled to judgment notwithstanding the verdict. A motion for JNOV should be granted only when insufficient evidence was presented to create an issue for the jury. *McPeak supra* at 3. In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences from it in the light most favorable to the nonmoving party. Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Zander v Ogihara*, 213 Mich App 438, 441; 540 NW2d 702 (1995). Questions of law are subject to review de novo. *Forge, supra*.

First, plaintiff complained that his summer school teaching assignments were inequitable because he preferred to teach the first part of the summer but was given the second part of the summer for two consecutive years. Second, he argued that he was asked to teach more courses than other professors, i.e., teaching seven different classes since 1991 while other professors taught only four or five. Third, plaintiff said that there existed a "general insensitivity within [defendant] concerning racial issues," but the example he gave to support this conclusion was unrelated to race. Finally, plaintiff again cited to Dr. Lars Larson's alleged comment that in Larson's opinion, if plaintiff were a white male, he would have better student evaluations. Larson, however, denied making the statement. Even after construing the evidence in a light most favorable to plaintiff, reasonable minds could not differ that plaintiff failed to establish that defendant treated similarly situated professors differently regarding non-wage related items. The trial court therefore erred by denying defendant's motion for JNOV on this claim.

D

In light of our rulings, we need not reach defendant's other issues on appeal.

The jury award is vacated, and this matter is remanded for a new trial solely on the issue of wage-based racial discrimination consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] At trial, the court indicated at one point on the record that "[w]hat may have happened in the past, before 1991, is simply not at issue here. I'll let certain evidence in to give some background as to the situation or to the degree it's necessary to establish certain facts after 1991, but this [testimony presented by plaintiff] goes back quite a long time ago, and we'll let in here that [Dr. Harper] recommended that plaintiff go back to school and the plaintiff did, and I think that's all we really need here." [Emphasis added.]

[2] The court opined that "I felt that he should not be allowed to go back beyond that period in [December] 1991, and so the question comes up, if he was underpaid prior to that time, and if increases were arguably not discriminatory, whether that precludes his claim. I'm not sure of the answer to that yet, and I think I will let the trial go forward and will think about it some more."

[3] In rejecting defendant's requested jury instruction, the court stated:

> The Court, at defendant's request, had kept out evidence of – well, generally, evidence of conditions, salary levels, and so forth, prior to December 5 of 1991. I did that at the request of defendant. The question is, how do we deal with the levels prior to that time, because the Court had indicated that if the plaintiff didn't exercise rights that he may have had based on discriminatory conduct, what he believed was discriminatory conduct prior to December 5, that he would be barred from raising them now. That was the subject of a motion for directed verdict, and I denied that . . . .
>
> The request, I think, specifically was that the defendant wanted a specific instruction that salaries prior to December 5, or plaintiff's salary prior to December 5, 1991, was race neutral, and to be honest with you, I don't know whether it was or it wasn't, and that's why I respectfully declined. You could have a situation where it wasn't race neutral, but he just didn't exercise his rights, and basically waived them because of that, and that's just as likely, I suppose, as saying that there wasn't any discrimination.

[4] Plaintiff testified that department chair Larson once told him that students' teaching evaluations of his performance would be higher if plaintiff were white. Larson denied this. As compared with the other four full professors (and other assistant and associate professors in the Seidman School), plaintiff's teaching performance evaluations were routinely among the lowest fifth. This evidence alone is insufficient to establish either discrimination or a pretext for discrimination because Harper, also a black full professor and who chaired the Management Department, recognized that his teaching evaluations were consistently higher than average. Moreover, the fact that defendant used student evaluations in

evaluating professors' performance has been upheld as appropriate and nondiscriminatory. *Javetz v Board of Control, Grand Valley State Univ,* 903 F Supp 1181, 1188 (1995).

[5] Pertinent information not included on the attachment includes the starting base salaries for each of these individuals, the area of their doctorate, and the wage ranges for all subsequent years.

[6] Notably, plaintiff fails to cite authority for the proposition that the mere existence of different base salaries within a department constitutes race-based wage discrimination.

[7] Defendant also contends that it is entitled to a new trial because the trial court erred in failing to instruct the jury that plaintiff's 1991 salary must be considered race-neutral. This contention is without merit. Because defendant successfully moved in limine to preclude the introduction of evidence of discrimination antedating December 5, 1991, there is no evidence regarding whether plaintiff's 1991 salary was racially neutral, and the court could not in good faith give the instruction.