STATE OF MICHIGAN

COURT OF APPEALS

NANCY ROPP, MARGY KUTZERA and DEBORAH MORGAN,	UNPUBLISHED July 20, 1999
Plaintiffs-Appellees,	
v	No. 156443 Crawford Circuit Court
WURTSMITH COMMUNITY FEDERAL CREDIT UNION,	LC No. 88-001874-NO
Defendant-Appellant.	ON REMAND

Before: Corrigan, C.J., and Murphy and Saad, JJ.

PER CURIAM.

The Supreme Court remanded this employment discrimination case for reconsideration in light of *Town v Michigan Bell*, 455 Mich 688; 568 NW2d 64 (1997), *Lytle v Malady*, 458 Mich 153; 579 NW2d 906 (1998), and *McAuley v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998). We again affirm the trial court's decisions to deny defendant's motions for summary disposition, directed verdict, and judgment notwithstanding the verdict. However, in light of *McAuley*, we vacate the trial court's award of attorney fees to plaintiffs and remand the case to the trial court to recalculate the amount awarded to avoid a double recovery.

I. Underlying Facts and Procedural History

We stated the underlying facts in our prior opinion:

> Defendant is a credit union with branches in Oscoda, Tawas City, Grayling, Mio and Au Gres, Michigan. Plaintiffs are all former employees of defendant. Plaintiffs Nancy Ropp and Margy Kutzera began working for defendant in 1966 and 1975, respectively. Plaintiff Deborah Morgan began working for defendant in 1986, after defendant merged with Morgan's former employer, Northeastern Community Credit Union. The events which serve as the predicate for this action allegedly occurred after defendant hired Terry Bigda as its new president in 1985.

Plaintiff Ropp was the assistant manager for the Oscoda branch when Bigda arrived in 1985. After Bigda's arrival, Ropp was reassigned to the position of Financial Operations Officer, and then later demoted to a position of "loan specialist," which entailed a cut in pay. Ropp was also transferred to the Tawas office and then later transferred back to the Oscoda office. In addition to these position changes, Ropp claimed that she was subjected to an ongoing course of unfair and unwarranted treatment by Bigda, including unreasonable work assignments, excessive workloads and unreasonable deadlines, and a continuing course of unfounded criticism, insults, threats, and other hostile comments. Ropp was terminated from her employment approximately one month before becoming eligible for early retirement.

Plaintiff Kutzera held the position of "head teller" when Bigda arrived. According to Kutzera, Bigda told her that she was going to head the loan department, but then ultimately gave that position to a male, David Corkery. Kutzera later received a series of reprimands from Bigda, which she claimed were unfounded. She was ultimately demoted and transferred from the Oscoda office to the Mio office, which was a significant distance from her home. Kutzera was subsequently offered a chance to return to the Oscoda office, but only in exchange for a waiver of her legal rights, which she refused to do. Kutzera was later allowed to transfer to a lower position at the Au Gres office and from there was transferred to the Tawas office, during which time she allegedly continued to be subjected to a course of unfair and unwarranted treatment. Kutzera eventually obtained another job, believing that she was being "railroaded" out of her employment with defendant.

After plaintiff Morgan began working for defendant in 1986, she progressed from the position of loan teller to loan officer and then to a "leader" position at the Tawas branch. Morgan claimed that she was interested in the Tawas branch manager position, but defendant hired a male for this position, Roger McMurray, without the position being posted. Morgan felt that she was not considered for the position because she was a woman. When McMurray quit after only three months on the job, the branch manager position was posted and Morgan applied. Morgan claimed that she was interviewed by Bigda and Robert Revenaugh, but was asked very little about her qualifications and experience. She did not receive the position. Morgan claimed that she subsequently contacted Revenaugh to let him know she was upset about not getting the position and informed him that it was her intent to respond in writing. Shortly thereafter, Morgan received a written reprimand from Revenaugh wherein Revenaugh accused Morgan of having falsified her time card, which he likened to "theft."

Plaintiffs Ropp, Kutzera, and Morgan subsequently instituted this act against defendant, alleging sex discrimination under the Civil Rights Act, MCL 37.2202(1)(a) *et seq*.; MSA 3.548(202)(1)(a) *et seq*., and intentional infliction of emotional distress. Plaintiffs' claims were predicated on the unfavorable employment decisions described above, as well as the existence of an ongoing course of allegedly unfair and unwarranted

> treatment which, according to plaintiffs, was linked to their status as females. Defendant denied any discriminatory intent and further claimed that legitimate non-discriminatory reasons existed for the various employment decisions that were made.
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> The jury found in favor of plaintiffs, awarding $700,000 to plaintiff Ropp, $245,000 to plaintiff Kutzera, and $65,000 to plaintiff Morgan. The judgment that was subsequently entered included prejudgment interest, costs, and attorney fees. Defendant's motions for directed verdict, judgment notwithstanding the verdict, new trial and remittitur were all denied by the trial court, as was a pretrial motion for summary disposition. [*Ropp v Wurtsmith Community Federal Credit Union*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 1996 (Docket No. 156443), slip op pp 1-3.]

On appeal, we held that plaintiffs presented sufficient evidence to establish a prima facie case of sex discrimination:

> The plaintiffs, because they were women, were members of a protected class under the Civil Rights Act. Plaintiffs introduced evidence that Bigda did not work well with women in positions of authority; that female employees tended to receive a disproportionate share of work in comparison to similarly situated male employees; that male employees who requested additional training or help received it, whereas similar requests from female employees were ignored or denied; and that female employees were treated more harshly, and disciplined more frequently, than male employees for similar conduct. Plaintiffs also presented evidence that defendant's hiring patterns, particularly for supervisory positions, tended to favor males. Additionally, there was evidence that Bigda complained to several women that they were overpaid, that Bigda sometimes either created a new position or downgraded an existing position in lieu of promoting a woman, allegedly to avoid paying a woman a higher rate, and that male employees were more often paid outside the pay matrix. Plaintiffs also introduced a memorandum from defendant's supervisory committee to the board of directors. The memorandum expressed concern over the appearance of discrimination stemming from recent administrative changes, the treatment of Kutzera and Ropp, the advancement of a male employee, and recent hiring patterns. Although contradictory evidence was presented by defendant with respect to some of these matters, the trial court was required to consider the evidence in the light most favorable to plaintiffs. When viewed in such a light, the evidence was sufficient to enable a reasonable jury to conclude that plaintiffs were treated differently on account of their sex. [*Ropp v Wurtsmith Community Federal Credit Union*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 1996 (Docket No. 156443), slip op pp 3-4.]

We further held that plaintiffs had presented sufficient evidence that defendant's nondiscriminatory reason for its actions was a pretext for discrimination. The evidence of pretext included testimony from a former member of defendant's supervisory committee that, when asked about

his treatment of Kutzera, Bigda had stated, "I'm getting rid of three of them and I'm starting with the toughest one first." When the committee member warned Bigda about the possibility of legal action, Bigda replied, "You win some, you lose some." Based on this and other evidence, we concluded that the trial court properly denied defendant's motions for summary disposition, directed verdict, and JNOV.

On a separate issue, we held that the trial court did not err in awarding attorney fees to plaintiffs under both the Civil Rights Act and the mediation or offer of judgment court rules, MCR 2.403(O)(1); MCR 2.405(D)(2), because "each of these provisions serve an independent policy or purpose." The remaining issues we decided are not relevant to the present remand order.[1]

Defendant then appealed to the Supreme Court, which held defendant's application in abeyance pending the decisions in *Lytle*, *Town*, and *McConnell v Rollins Burdick Hunter of Michigan, Inc* (which was ultimately decided with *Town*). All these cases involved consideration of the standards for establishing pretext in discrimination cases. Following the issuance of those opinions, the Supreme Court remanded the case to this Court for reconsideration. The Supreme Court further directed this Court to address *McAuley*, which considered whether attorney fees may be awarded under both the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*., and the mediation court rule. We must therefore consider two issues on remand: first, whether plaintiffs presented sufficient evidence of pretext for discrimination, and second, whether the trial court erred in awarding attorney fees under both the Civil Rights Act and the mediation or offer of judgment court rules.

II. Evidence of pretext for discrimination

Although our prior opinion stated a standard for proving pretext that is no longer correct under *Lytle* and *Town*, we again affirm the trial court's denial of defendant's motions for summary disposition, directed verdict, and JNOV, because plaintiffs presented sufficient evidence of a pretext for discrimination under the correct standard.

In *Town*, the Supreme Court plurality noted that discrimination may be proved by the use of direct or indirect evidence. 455 Mich 694-695. In the alternative, courts may use the prima facie test set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973) by showing

> that the employee was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct. [*Town*, *supra*, 455 Mich 695.]

[1] Although not relevant to the present issues, it should be noted that we remitted the past economic damages for Kutzera and Morgan.

Once the employee establishes a prima facie case, the employer must then produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. *Id.*; *Lytle*, *supra*, 458 Mich 173. After the employer has met this burden of production, the presumption of discrimination created by the prima facie case drops away, and the employee must "come forward with evidence, including the previously produced evidence regarding the prima facie case, sufficient to permit a reasonable factfinder to conclude that the discrimination was [the employer's] true motive in making the adverse employment decision." *Town*, *supra*, 455 Mich 696.

> [D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age and sex discrimination. [*Lytle*, *supra*, 458 Mich 175-176.]

"The proofs offered in support of the prima facie case may be sufficient to create a triable issue of fact that the employer's stated reason is a pretext, as long as the evidence would enable a reasonable factfinder to infer that the employer's decision had a discriminatory basis." *Town*, *supra*, 455 Mich 697.

The decisions in *Town* and *Lytle* do not affect the analysis in our prior opinion of plaintiff's prima facie case. Plaintiffs were members of a protected class because they were women. They presented evidence of adverse employment actions, including demotions, undesirable transfers, harsh treatment, and disciplinary actions. Moreover, plaintiffs were qualified for their positions on the basis of education (in the case of Morgan) and extensive experience (in the cases of Ropp and Kutzera). Plaintiffs also presented evidence that they were treated more harshly than similarly situated men. As noted in our prior opinion, female employees received a disproportionate share of the workload, were treated more harshly, and received less help and training in their new positions as compared to similarly situated male employees.

We acknowledge that our prior opinion stated a now incorrect standard for determining whether plaintiffs had established pretext. We stated that "[a] plaintiff may succeed in establishing that the defendant's proffered reason was a pretext either directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the proffered reason is not worthy of credence." *Lytle* and *Town* establish that disproof of an employer's stated reason is sufficient to establish pretext only if such disproof also raises a triable issue that discriminatory animus was a motivating factor in the adverse employment decision. *Lytle*, *supra*, 458 Mich 175.

Nonetheless, after considering the evidence under the correct standard, we hold that the trial court correctly denied defendant's motions. Plaintiffs presented sufficient evidence not only to disprove defendant's stated reasons, but also to raise a triable issue of discriminatory animus. A former member of defendant's supervisory committee testified that, when questioned about his treatment of Kutzera, Bigda had stated, "I'm getting rid of three of them and I'm starting with the toughest one first." When

the committee member mentioned the possibility of legal action, Bigda replied, "You win some, you lose some."

Bigda's remarks raised a triable issue of discriminatory animus. His stated intention to "get rid of three of them . . . starting with the toughest one" could reasonably be interpreted as a reference to plaintiffs. The jury could infer plaintiffs' gender to be a factor in the adverse employment decisions since Bigda said, "you win some, you lose some," when confronted with the possibility of legal action. This statement suggested that Bigda acted with knowledge of the discriminatory nature of his conduct. Moreover, the evidence in support of the prima facie case, including Bigda's differential treatment of men and women, when viewed in connection with his inculpatory statements, created a reasonable inference of discriminatory animus. Accordingly, we affirm the trial court's decisions to deny defendant's motions for summary disposition, directed verdict, and JNOV.

III. Attorney Fees Award

The trial court ruled that it could award attorney fees under the Civil Rights Act *and* award actual costs, including reasonable attorney fees, to Ropp and Kutzera under MCR 2.403(O)(1) (the mediation rule) and to Morgan under MCR 2.405(D) (the offer of judgment rule). In our prior opinion, we ruled as follows with respect to the trial court's decision:

> Defendant next argues that it was improper to award attorney fees under both the Civil Rights Act and the mediation or offer of judgment court rules. However, because each of these provisions serve an independent policy or purpose, the award of attorney fees under both was appropriate. *Howard*[2], *supra* at 441. [*Ropp v Wurtsmith Community Federal Credit Union*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 1996 (Docket No. 156443), slip op p 10.]

In its remand order, the Supreme Court instructs us to address *McAuley*. In *McAuley*, the trial court awarded the plaintiff attorney fees under the HCRA but refused to award mediation sanctions under MCR 2.403(O) because the plaintiff had already been fully compensated and an additional award would be punitive. *McAuley, supra*, 457 Mich 517. The Court of Appeals reversed, holding that the statute and the court rule served different purposes. *Id*. The Supreme Court held that attorney fees could not be awarded under both provisions. *Id*., p 519.

> The language of the statute and the court rule demonstrate that those provisions were intended to relieve prevailing parties or plaintiffs of the reasonable costs of all or part of the litigation. There is no support in either provision for the conclusion that attorney fees may be imposed as a penalty or that a party may recover an amount in excess of a reasonable attorney fee as determined by the trial court. [*Id*.]

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[2] *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 (1992).

When a party has already been awarded reasonable attorney fees under a statute such as the HCRA, "there are no 'actual costs' remaining to be reimbursed under the court rule." *Id.*, p 521. The Supreme Court did not intend to permit a double recovery when it enacted MCR 2.403. *Id.*, p 523.

The same reasoning applies here to preclude plaintiffs from obtaining a double recovery. The trial court awarded plaintiffs reasonable attorney fees under the Civil Rights Act. See MCL 37.2801(3); MSA 3.548(801)(3); MCL 37.2802; MSA 3.548(802). The trial court also awarded attorney fees to Kutzera and Ropp under the mediation court rule, and to Morgan under the offer of judgment court rule. Neither the statute nor the mediation or offer of judgment court rules express an intent to permit a double recovery of attorney fees. To the extent that plaintiffs have been awarded their reasonable attorney fees under the Civil Rights Act, there are no remaining "actual costs" to be awarded under the court rules. Accordingly, we vacate the attorney fees award and remand the case to the trial court to recalculate the amount awarded in the judgment to avoid a double recovery of attorney fees.[3] We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ William B. Murphy
/s/ Henry William Saad

[3] Although *McAuley* concerned only the mediation court rule, the reasoning in *McAuley* applies just as forcefully to the offer of judgment rule. Both provisions provide for the award of "actual costs," including reasonable attorney fees, under certain circumstances when the opposing party rejects a mediation evaluation or offer of judgment. The only difference between the two provisions is that the award of actual costs is mandatory under the mediation court rule but discretionary under the offer of judgment rule. In both cases, once a plaintiff has been awarded reasonable attorney fees under the Civil Rights Act, there are no "actual costs" left to be awarded under the court rule.