STATE OF MICHIGAN

COURT OF APPEALS

ROBERT L. BREWER,

Plaintiff-Appellant,

v

J. MICHAEL HILL and J. MICHAEL HILL, P.C.,

Defendants-Appellees.

UNPUBLISHED
September 15, 2000

No. 208872
Wayne Circuit Court
LC No. 95-529717-NZ

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for directed verdict and reversing a jury's verdict in plaintiff's favor as to his claims for breach of employment contract, as well as sexual and racial harassment.[1] We affirm.

Evidence at trial showed that defendant law firm hired plaintiff as a "gopher" in 1987. After an extended absence, he was rehired in October 1992, and by 1995, plaintiff was working for defendants as a paralegal. Plaintiff testified that defendant J. Michael Hill[2] told him "as long as I didn't do anything grossly wrong that he would pay me $5 an hour, and I could have the job for as long as I wanted." Subsequently, defendant assured plaintiff "that I had a job as long as he was a lawyer or until he died or retired." Defendant also introduced plaintiff to another attorney, calling him his paralegal that would be with him until he retired or died.

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[1] The jury awarded plaintiff economic damages of $16,560 for breach of employment contract and non-economic damages of $18,000 for sexual and racial harassment. The jury also awarded plaintiff $2,000 to compensate him for future emotional damages. Although defendants motioned for directed verdict at the close of plaintiff's proofs, the trial court deferred its decision on this motion until after the jury rendered its verdict.

[2] The singular term "defendant" shall be used to refer to defendant J. Michael Hill, individually.

Nonetheless, defendants terminated plaintiff in 1995, based on plaintiff's absolute refusal to sign a memorandum detailing an office policy requiring all of defendants' employees to ensure the proper notarization and service of documents upon which they worked. Plaintiff testified that he did not believe it to be his responsibility to ensure that either was done.

Other evidence adduced at trial showed that defendant repeatedly and derogatorily referred to plaintiff as a homosexual in the presence of coworkers and clients. Plaintiff also claimed that he was of American Indian heritage. Defendant was aware of this and, according to plaintiff, often referred to him as a "half-breed" in the presence of coworkers and clients.

We first address plaintiff's argument that the trial court erred in granting a directed verdict in favor of defendant on his claim for breach of employment contract.

This Court reviews de novo a trial court's decision with regard to a directed verdict. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). When evaluating a motion for directed verdict, we must consider the evidence and all legitimate inferences arising from the evidence in a light most favorable to the moving party. A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ. *Id.* at 71-72. Whether the facts result in the creation of a contract is an issue of law, also to be reviewed de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991); *Bracco v Michigan Technological University*, 231 Mich App 578, 585; 588 NW2d 467 (1998).

Plaintiff argues that Hill's statements created a reasonable expectation of just-cause employment and that defendants' reason for firing plaintiff, i.e., his refusal to sign defendants' "solitary and illegal and/or unethical memo," was pretextual. Plaintiff contends that evidence established that he and defendant Hill negotiated the terms and conditions of plaintiff's employment, and that defendants expressly accepted the term requiring just-cause for plaintiff's termination.

As a general rule, contracts of employment for an indefinite term are terminable at will by either party. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 596; 292 NW2d 880 (1980); *Bracco, supra* at 598. However, a party may overcome the presumption of at-will employment by submitting proof of an express contract for a definite term or by a provision forbidding discharge without just cause. *Id.*

A party may prove the existence of a just-cause employment contract by traditional contract analysis, as described below:

> [I]f an employee "negotiates" with a prospective employer for job security, and the prospective employer agrees to terminate only for cause, they form an agreement for just-cause employment. The test for whether there was mutual assent to a just-cause provision is an objective one, looking at the express words of the parties and their visible acts. [*Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 640; 473 NW2d 268 (1991) (Riley, J).] The oral statements of job security must be clear and

> unequivocal. [*Id.* at 645.] A statement that a newly hired employee would "be there for retirement" unless "something really was wrong" ordinarily does not constitute assent to a just-cause employment contract. *Rood*, [*v General Dynamics Corp*, 444 Mich 107, 122-123; 507 NW2d 591 (1993).] The courts should not lightly infer a finding of a policy of discharge only for cause. [*Bracco*, *supra* at 598-599 (footnote omitted).]

Under this theory, a mere expression of hope of a long employment relationship is not sufficient evidence of an actual just-cause employment contract. *Bracco*, *supra* at 602. Moreover, to show mutual assent to a contract term in the absence of a written agreement, there generally must be some evidence that the employee and the employer actually negotiated job security. *Id.* "[T]he fact that [an employee] may have raised the issue of job security does not, standing alone or even when combined with . . . other circumstances, constitute 'negotiations.'" *Id.*; see also *Rood*, *supra* at 122-126; *Rowe*, *supra* at 643 (Riley, J).

Plaintiff has shown nothing more than a mere hope of job security. Plaintiff asked about his wages upon being given additional responsibilities. According to plaintiff, Hill told him, "as long as I didn't do anything grossly wrong that he would pay me $5 an hour, and I could have the job for as long as I wanted." Plaintiff's inquiry and Hill's reply do not constitute negotiation and are insufficient to establish assent to a just-cause employment relationship. The trial court did not err in granting defendants' motion for directed verdict on plaintiff's just-cause employment claim.

The court also properly directed a verdict in favor of defendants on plaintiff's claim based on breach of legitimate expectations. "[A] claim based on legitimate expectations rests on the employer's promises to the work force in general -- for example, promises contained in a company handbook -- rather than on promises made to an individual employee." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 682-683; 599 NW2d 546 (1999). Plaintiff made no claim that defendants promised just-cause employment to the work force in general. Hill's alleged statements, which were made to plaintiff alone, were insufficient to create legitimate expectations of just-cause employment.

Next, we address plaintiff's claims for sex and race discrimination. Plaintiff argues that the trial court erred in granting a directed verdict as to his employment discrimination and harassment claims under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*[3] Plaintiff argues that he presented evidence showing that defendants discriminated against him on the basis of his race and that defendants' reason for terminating plaintiff was pretextual. Further, plaintiff argues that he submitted evidence from which the jury could determine that he was subjected to sexual harassment in violation of the act, and that the jury properly awarded him non-economic damages for the suffering

[3] Defendant removed the action to federal district court, but the matter was remanded, in part, because plaintiff alleged discrimination claims under Michigan law only.

resulting from this harassment, even if he failed to prove that his termination was not related to his objections to the harassment he endured.[4]

The purpose of the Civil Rights Act, is to prevent discrimination against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases. *Noecker v Department of Corrections*, 203 Mich App 43, 46; 512 NW2d 44 (1993). The act is remedial and must be liberally construed to effectuate its ends. *Reed v Michigan Metro Girl Scout Council*, 201 Mich App 10, 15; 506 NW2d 231 (1993).

MCL 27.2202(1)(a); MSA 3.548(202)(1)(a) provides:

> (1) An employer shall not do any of the following:
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> (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.

In turn, MCL 37.2103(i); MSA 3.548(103)(i) declares that sexual harassment is a form of sex discrimination. As pertinent, section 103 of the Civil Rights Act provides:

> (i) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:
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> (*i*) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment . . . .
>
> (*ii*) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment . . . .
>
> (*iii*) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . , or creating an intimidating, hostile, or offensive employment . . . environment.

A plaintiff claiming a hostile work environment based on sex must meet five criteria: (1) that he belonged to a protected group; (2) that he was subjected to communication or conduct on the basis of sex; (3) that he was subjected to unwelcome sexual conduct or communication; (4) the unwelcome

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[4] Plaintiff claimed sexual harassment based on hostile environment and did not allege quid pro quo harassment. Plaintiff did not state any related tort claims, such as assault, intentional infliction of emotional distress, or defamation.

sexual conduct or communication was intended to or in fact did substantially interfere with plaintiff's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). A plaintiff claiming a hostile environment must also show that the work environment was so tainted by the harassment that it altered the terms and conditions of employment. *Id.* at 372. Whether a hostile work environment exists is determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff. *Id.* at 388.

We acknowledge that plaintiff was a member of a protected class. "[A]ll employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex." *Radtke, supra* at 383. Therefore, plaintiff submitted evidence to establish the first element of his hostile workplace harassment claim.

The more difficult questions are whether plaintiff was discriminated against because of his sex and whether the harassment was so objectively offensive that it altered the conditions of employment. We find that, although the name calling may have been hurtful or offensive, it did not amount to discrimination because of sex.

Plaintiff urges this Court to consider federal decisions interpreting analogous provisions of title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.* in deciding what plaintiff describes as an evolving area of the law. The Michigan Civil Rights Act is modeled after title VII, and Michigan courts have regularly looked to title VII for guidance, *Radtke, supra* at 381-382.[5]

The Civil Rights Act expressly prohibits sexual harassment, and defines two types of prohibited discrimination: "quid pro quo," which "occurs only where an individual is in a position to offer tangible job benefits in exchange for sexual favors or, alternatively, threaten job injury for a failure to submit," *Champion v Nation Wide Security, Inc*, 450 Mich 702, 713; 545 NW2d 596 (1996), and "hostile work environment." The terms "sexual harassment," "quid pro quo" and "hostile work environment" are not found in title VII. This Court has held that under the Civil Rights Act, a gender-based discrimination claim may be based on incidents of homosexual advances that directly relate to the employee's gender. *Barbour v Dep't of Social Servs*, 198 Mich App 183, 185; 497 NW2d 216 (1993). The *Barbour* Court also held that harassment or discrimination based on a person's sexual orientation is not an activity proscribed by the Civil Rights Act. *Id.* The *Barbour* Court reached its conclusion after consideration of federal precedent, which held that title VII's protections were aimed at gender discrimination, not discrimination based on sexual orientation. *Id.*

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[5] Our Supreme Court, in a case addressing vicarious liability in sexual harassment claims, recently held that we may not consider interpretations of title VII where state law dictates a different result, and we may not defer to federal interpretations if doing so would nullify a portion of the Michigan law. *Chambers v Trettco, Inc*, ___ Mich ___; ___ NW2d ___ (2000). The Court acknowledged, however, that "there will often be good reasons to look for guidance in federal interpretations of similar laws."

Since this Court decided *Barbour*, the United States Supreme Court has held that "sex discrimination consisting of same-sex sexual harassment is actionable under title VII." *Oncale v Sundowner Offshore Services, Inc*, 523 US 75, 79, 82; 118 S Ct 998; 140 L Ed 2d 201 (1998). In an effort to reconcile differing decisions from the various circuits interpreting title VII, the Supreme Court held that title VII's prohibition against sexual discrimination included sexual harassment of any kind that meets the statutory requirements. *Id.* at 79-80. The Supreme Court also held that discrimination on the basis of sex can be inferred in cases where there is "credible evidence that the harasser was homosexual." *Id.* at 80. The Supreme Court did not address the issue of the victim's sexual orientation or perceived sexual orientation.

The *Oncale* Court further noted, "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at 'discriminat[ion] . . . because of . . . sex.'" *Id.* at 80. Moreover, harassing conduct "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." *Id.* The Court continued, "We have never held that workplace harassment, even harassment between men or women, is automatically discrimination because of sex merely because the words used have sexual content or sexual connotations. 'The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Id.*, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 21; 114 S Ct 367; 126 L Ed 2d 295 (1993). We find these principles to be congruous with the legal principles that control this Court's review of sex discrimination claims under Michigan law.

Both plaintiff and defendants have taken great pains to point out, in the trial court and on appeal, that neither plaintiff nor defendant Hill is homosexual. As noted, plaintiff does not argue that defendant Hill actually made sexual advances toward him, but, rather, argues that defendant Hill's comments concerning his sexual orientation created an intimidating, hostile, or offensive work environment.[6]

The derogatory names used by defendant are, by their common meaning, gender specific. Nonetheless, contrary to plaintiff's argument, the mere fact that defendant Hill did not demean the women in his office by questioning their sexuality does not establish that, *but for* the fact of plaintiff's sex, plaintiff would not have been the object of harassment. See *Radtke, supra* at 383. As distasteful as defendant Hill's language may have been, plaintiff did not submit any further evidence to show that his sex as a male precipitated and caused defendant Hill to refer to him derogatorily. As the *Oncale* Court noted, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of. . . sex.'" *Oncale, supra* at 81.

In the absence of additional evidence, plaintiff failed to substantiate a triable issue as to the second element of sexual harassment under the Civil Rights Act. Moreover, there was no evidence that defendant's comments were sexual or sexually motivated and, consequently, plaintiff did not prove the

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[6] Plaintiff alleges that defendant Hill called him "gay," a "faggot" and a "fairy," and referred to him as "president of the Downriver Fairies Club."

third element of a sexual harassment claim. Therefore, we find that the trial court did not err in granting defendants' motion for directed verdict as to this claim.

We also affirm the trial court's order granting defendants' motion for directed verdict as to the claim for racial harassment. Harassment on the basis of race or national origin is actionable under the Elliot-Larsen Civil Rights Act. See *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995). To establish his claim for racial harassment, plaintiff was required to prove (1) that he was a member of a protected group; (2) that he was subjected to communication or conduct on the basis of race or ethnicity; (3) that he was subjected to unwelcome racial conduct or communication; (4) that the unwelcome racially-motivated conduct or communication was intended to or in fact did substantially interfere with plaintiff's employment or created an intimidating, hostile or offense work environment; and (5) respondeat superior. See *Radtke, supra* at 382-383.

This Court has stated, "Obviously, whether a person is a member of a protected class for racial, sexual, or religious discrimination is easily identified by a person's race, sex, or religion." *Zoppi v Chrysler Corp*, 206 Mich App 172, 175; 520 NW2d 378 (1994) overruled on other grounds by *Zanni v Medaphis Physician Servs Corp*, 240 Mich App 472; ___ NW2d ___ (2000). In this case, however, we are not convinced that plaintiff proved that he was of Native American descent and, hence, a member of the protected class to which he claimed to belong.

There was no documentary evidence or other tangible proof that plaintiff was part American Indian. Defendant testified that he had spoken to plaintiff's uncle who claimed that his great-grandmother was known to be part Indian.[7] Plaintiff also testified that his great, great-grandmother was "predominantly" Indian. However, plaintiff made no effort to verify his heritage through tribal registration records, birth records, or any other method that would support his allegation.[8] Still, plaintiff testified that he felt defendant was making a mockery of his heritage and of his family background, though he offered no concrete evidence that he had ancestors of American Indian blood. Although we question whether plaintiff satisfied the first element of a claim under the Civil Rights Act, we need not decide the issue because we agree with the trial court that plaintiff did not establish that he was discriminated against because of his race.

In ruling on defendants' motion for directed verdict, the trial court found that plaintiff was not treated differently because of his race.

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[7] The uncle signed an affidavit to that effect, which was submitted to the court as an exhibit to plaintiff's supplemental brief in support of his answer to defendants' motion for summary disposition. The record does not show that the affidavit was admitted at trial.

[8] Plaintiff attempted to present a handwritten "family tree" that he had drafted from memory of conversations he had with two aunts when he was thirteen years old, some twenty-nine years earlier, and that was not supported by any county records. The court refused to admit the document.

> It was done by, if at all, that words were used, the same as this Deadwood Bob and these others words. They were words that were used. And they certainly can be said to be negative, as I indicated, mean-spirited, obnoxious, one could go though all of those words and one could understand how if believing this Mr. Brewer would have been upset.

Hill's name-calling was in bad taste. In our opinion, however, plaintiff's evidence was not sufficient to cause reasonable minds to differ on the issue whether he was racially harassed. He presented no evidence that the conduct was racially motivated or because of racial animus. The evidence showed that the name calling was part of a generally hostile work environment that was attributable to defendant Hill's personality, his management style and personal conflicts rather than any unlawful discrimination. The comments amounted to no more than offensive remarks or "simple teasing" that is insufficient to prove discriminatory changes in the "terms and conditions of employment." See *Faragher v City of Boca Raton*, 524 US 775, 787-788; 118 S Ct 2275; 141 L Ed 2d 662 (1998) (quoting *Harris*, *supra* at 23).

Although we agree that a reasonable person would find this work environment hostile or abusive, the overall circumstances show that it was because of an absence of professionalism, not because of plaintiff's race or sex. Like title VII, the Michigan Civil Rights Act is not a "general civility code," and we agree with the trial court that categorizing this employment relationship as one falling under the Civil Rights Act would be erroneous. See *Faragher*, *supra* at 788, quoting *Oncale*, *supra* at 80. The trial court correctly granted plaintiff's motion for directed verdict.

We decline to address the parties' remaining arguments, which either have been inadequately briefed or were not submitted to the jury. See *Forge v Smith*, 458 Mich 198, 211; 580 NW2d 876 (1998) (only theory presented to jury preserved for review); *McPeak v McPeak (On Remand)*, 233 Mich App 483, 495-496; 593 NW2d 180 (1999) (party may not leave it to this Court to search for authority); *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993) (issue deemed abandoned by party's failure to argue merits in appellate brief).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins