

STATE OF MICHIGAN
COURT OF APPEALS

JAMES FUESTER,

Plaintiff-Appellee,

v

ETHAN ALLEN, INC.,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 219673

Washtenaw Circuit Court

LC No. 96-003785-NO

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered on a jury verdict in favor of plaintiff on his reverse gender discrimination claim. We affirm the verdict and judgment in favor of plaintiff, but vacate the portion of the judgment granting plaintiff attorney fees pursuant to MCR 2.403(O).

Defendant first argues that a directed verdict should have been granted in its favor because plaintiff failed to make a prima facie case under the burden-shifting analysis set out in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). We disagree. Defendant's argument lacks merit because plaintiff was not required to establish a prima facie case under the *McDonnell Douglas* analysis. In *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 359-361; 597 NW2d 250 (1999), this Court recently stated that the *McDonnell Douglas* burden-shifting analysis is one method of establishing discrimination, but need not be used in every case:

Disparate treatment claims may be established "under ordinary principles of proof by the use of direct or indirect evidence." "Alternatively, [courts may use] the prima facie test articulated . . . in *McDonnell Douglas Corp v Green* as a framework for evaluating [discrimination] claims." Under that test, as applied in this state, a plaintiff may establish a prima facie case of prohibited discrimination by demonstrating that the plaintiff suffered an adverse employment action under circumstances giving rise to an inference of discrimination. After the prima facie case is established, the employer has the burden of coming forward with a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the plaintiff has the burden of proving that the stated reason is

merely a pretext for discrimination, and this burden then merges with the plaintiff's overall burden of proving the claim.

Courts often categorize disparate treatment cases by the alternative evidentiary methods used to establish them. We may label such cases as "mixed motive" (i.e., established by ordinary principles of evidence) and "pretextual" (i.e., established by using *McDonnell Douglas* burden-shifting) cases. . . . *Where a plaintiff can present ordinary evidence that, if believed, would require the conclusion that discrimination was at least a factor in the adverse employment action, the McDonnell-Douglas burden-shifting framework is not applicable.* Rather, a defendant's articulation of a nondiscriminatory purpose creates a "mixed motive" case.

* * *

The elements of a mixed motive case are (1) the plaintiff's membership in a protected class, (2) an adverse employment action, (3) the defendant was predisposed to discriminating against members of the plaintiff's protected class, and (4) the defendant actually acted on that predisposition in visiting the adverse employment action on the plaintiff. "[O]nce the plaintiff has met the initial burden of proving that the illegal conduct . . . was more likely than not a 'substantial' or 'motivating' factor in the defendant's decision, the defendant has the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of the protected characteristic." [Citations omitted; emphasis added.]

Similarly, in *Harrison v Olde Financial Corp*, 225 Mich App 601, 609; 572 NW2d 679 (1997), this Court instructed that the "*McDonnell Douglas* evidentiary framework does not apply when a plaintiff presents direct evidence of discriminatory animus."

Direct evidence and the *McDonnell Douglas* formulation are simply different evidentiary paths by which to resolve the ultimate issue of [the] defendant's discriminatory intent."

"Direct evidence" has been defined in the Sixth Circuit Court of Appeals as evidence that, if believed, " ' requires the conclusion that unlawful discrimination was at least a motivating factor.' " For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination that is " 'sufficient to get the plaintiff's case to the jury.' " Thus, when direct evidence of discrimination is involved, we believe that federal case law provides appropriate guidance for analyzing discrimination claims arising under the Michigan Civil Rights Act.

In the instant case, plaintiff testified in her deposition that defendant's employees made derogatory comments about her race. Because of plaintiff's direct evidence of discrimination, this case presents a question of mixed motives,

one in which defendant's decision not to hire plaintiff could have been based on several factors, legitimate ones as well as legally impermissible ones.

In federal cases involving mixed or dual motives, once the plaintiff has met the initial burden of proving that the illegal conduct (in this case, race discrimination) was more likely than not a "substantial" or "motivating" factor in the defendant's decision, the defendant has the opportunity to show by a preponderance of the evidence that it would have reached the same decision without consideration of the protected characteristic. [*Harrison, supra* at 610-611; citations omitted.¹]

In this case, as in *Harrison*, there was testimony from plaintiff and numerous others that plaintiff's supervisor made derogatory comments about men in general and that she had a genuine dislike of men.² There was also testimony that plaintiff, the only male employee at defendant's Ann Arbor store, was treated less favorably by the supervisor than all the other employees, that plaintiff was treated differently because of his gender, and that the supervisor was "out" to fire plaintiff. Because there was direct evidence of a discriminatory animus and unfavorable treatment by the supervisor who made the decision to terminate plaintiff,³ the *McDonnell Douglas* analysis does not apply. Thus, defendant's arguments that plaintiff did not prove the *McDonnell Douglas* factors is misplaced.

Instead, we apply the mixed motive test set forth above, *Wilcoxon, supra* at 360-361, to determine whether the trial court properly denied defendant's motion for a directed verdict. We review de novo a trial court's ruling on a motion for directed verdict. *Candelaria v BC General Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999).

When evaluating a motion for a directed verdict, a court must consider the evidence and all legitimate inferences arising from the evidence in a light most favorable to the nonmoving party. A directed verdict is appropriate only when no

¹ Though not binding on this Court, federal precedent is generally considered highly persuasive, and is often consulted for guidance, in the context of discrimination cases. *Wilcoxon, supra* at 360, n 5.

² Contrary to defendant's contention, the derogatory comments demonstrating gender bias by plaintiff's direct supervisor were not "isolated" or "stray." Plaintiff, as well as a number of other witnesses, testified that the discriminatory comments occurred on several occasions and to such a degree that numerous employees concluded that plaintiff's direct supervisor genuinely disliked men.

³ We reject as wholly unsupported by the record defendant's argument that plaintiff's immediate supervisor was not responsible for the decision to terminate, and that defendant's district manager, who had no discriminatory animus, made the decision. However, even if the district manager had made the decision to terminate plaintiff, discriminatory animus of a plaintiff's supervisor may be imputed to company officials who ultimately make the decision to terminate. *Rasheed v Chrysler Corp*, 445 Mich 109, 135-136; 517 NW2d 19 (1994). In this case, the district manager received all of her information about plaintiff from plaintiff's direct supervisor.

material factual question exists upon which reasonable minds could differ. [*Id.* at 71-72, citing *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975).]

Here, viewing the evidence in a light most favorable to plaintiff, we conclude that defendant was not entitled to a directed verdict. First, plaintiff was a member of a protected class. Second, plaintiff was subject to an adverse employment action because he was terminated. Third, evidence at trial establishing the supervisor's dislike of men, conflict with men, and disfavorable treatment of plaintiff, her only male employee, was sufficient to create a material question of fact, on which reasonable minds could differ, about whether plaintiff's immediate supervisor was predisposed to discriminate. Finally, sufficient evidence was presented to create a question of fact about whether the supervisor acted on her predisposition when she terminated plaintiff, including, evidence that the supervisor was looking for an excuse to terminate plaintiff, made derogatory comments about plaintiff to his customers, wanted plaintiff to fail to meet the sales quota while he was on probation; and ultimately terminated plaintiff because of his alleged defiance of orders, without ever speaking with plaintiff before drawing the conclusion that he had defied her orders. In addition, one of plaintiff's coworkers testified that the incident over which plaintiff was terminated was not the real reason for termination, but that his gender was a motivating factor for the employment decision. Other coworkers similarly testified that they believed that plaintiff's gender was a motivating factor in plaintiff's termination. Thus, viewing this evidence in a light most favorable to plaintiff, there was evidence upon which reasonable minds could differ with respect to whether the supervisor was predisposed to discriminate and, in fact, discriminated against plaintiff because of his gender. Accordingly, the trial court properly denied defendant's motion for a directed verdict.⁴

Defendant next argues that the trial court erred in refusing to instruct the jury as requested. Specifically, defendant contends that the trial court erred in refusing to instruct the jury that plaintiff was required to prove that defendant was "similarly situated" to female employees who were not terminated for the same or similar conduct, and that defendant was an "unusual" employer that discriminated against men. Defendant also asserts that the trial court erred in refusing to instruct the jury not to afford any weight to statements of sexual stereotype unless those statements were directly related to the adverse employment decision. We disagree.

This Court reviews jury instructions in their entirety and there is no error requiring reversal if, on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Central Cartage Co v Fewless*, 232 Mich App 517, 528; 591

⁴ We further reject defendant's argument that plaintiff was not qualified for his position. The record reveals that every one of plaintiff's supervisors, including the supervisor who terminated him, testified that he had good skills as a designer. Plaintiff's problem in the area of tardiness was resolved well in advance of his termination and could not provide a basis for termination. In addition, while there was evidence that plaintiff struggled to consistently meet defendant's imposed sales quotas, there was also evidence that most of defendant's employees failed to consistently meet the quota or struggled with it from time to time. Therefore, plaintiff presented sufficient evidence to rebut defendant's argument that plaintiff was not qualified.

NW2d 422 (1998). A trial court may generally give an instruction not covered by the standard instructions as long as the instruction accurately states the law and is “understandable, concise, conversational, and nonargumentative.” *Id.* Supplemental instructions need not be given, however, if they add nothing to an otherwise balanced and accurate jury charge. *Id.* Moreover, it is error to instruct a jury with regard to a matter not sustained by the evidence or the pleadings. *Id.*

Here, the trial court properly declined to give the requested instructions because they were not accurate statements of the law. *Central Cartage Co, supra* at 528. As noted above, the elements on which defendant sought to have the jury instructed are only proper where the plaintiff utilizes the *McDonnell Douglas* analysis to prove its case. Because plaintiff introduced direct evidence of gender discrimination, the *McDonnell Douglas* analysis was not used, and plaintiff was not required to prove that he was “similarly situated” to other female employees or that defendant was an “unusual” employer that discriminated against men. Further, defendant’s request that the jury be instructed not to afford any weight to statements of sexual stereotype unless those statements were directly related to the adverse employment decision was also properly denied because plaintiff was entitled to rely on his supervisor’s discriminatory remarks, as well as any other direct evidence, to prove his case. See *Harrison, supra* at 610 (direct evidence, such as racial slurs by a decisionmaker, is sufficient to take a case to the jury where the plaintiff is relying on a direct approach to prove his discrimination case). Therefore, because the requested instructions did not accurately reflect the law and were not supported by the evidence in the case, the trial court properly denied defendant’s request. *Central Cartage, supra*.

Finally, defendant argues that the trial court erred in awarding attorney fees to plaintiff under both the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* and the mediation sanction rule, MCR 2.403(O). We agree. A plaintiff who is fully compensated for his reasonable attorney fees under the Civil Rights Act, MCL 37.2802; MSA 3.548(802), is not entitled to receive additional compensation for attorney fees under MCR 2.403(O). *Rafferty v Markovitz*, 461 Mich 265, 272; 602 NW2d 367 (1999). Thus, because plaintiff in this case was fully compensated for his reasonable attorney fees under the Civil Rights Act, he was not entitled to attorney fees under MCR 2.403(O). Accordingly, we vacate the portion of the judgment that granted plaintiff attorney fees pursuant to MCR 2.403(O).

Affirmed in part and vacated in part.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck