STATE OF MICHIGAN

COURT OF APPEALS

GERALD ROBINSON,

Plaintiff-Appellant,

v

LARRY FORD and DEPARTMENT OF CORRECTIONS,

Defendants-Appellees.

UNPUBLISHED
April 13, 2004

No. 239642
Ionia Circuit Court
LC No. 97-018284-NO

MAXIM GRAHAM, DARTHULA GRAHAM, WILLIAM E. ENGLAND, GAYLE E. ENGLAND, TIMOTHY M. TRAVIS, and CAROL FREDERICK,

Plaintiffs,

and

ANTHONY M. BRANDON and BARBARA BRANDON,

Plaintiffs-Appellees,

v

LARRY FORD and DEPARTMENT OF CORRECTIONS,

Defendants-Appellants.

No. 239881
Ionia Circuit Court
LC No. 96-017488-NO

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

These cases, consolidated both at trial and on appeal, involve claims of employment discrimination under the Civil Rights Act, MCL 37.2101 *et seq*. In Docket No. 239881, defendants appeal by right from a judgment following a jury verdict awarding the eight plaintiffs

damages in excess of $4 million. We affirm. In Docket No. 239642, plaintiff appeals by right from an order granting summary disposition to defendants. We reverse.

I. Docket No. 239881

Several employees of the state Department of Corrections (DOC) brought suit against the DOC and Larry Ford, a deputy assistant warden, alleging that Ford, a black man, used his authority to discriminate against both white employees and black employees whom he regarded as too friendly with whites. The trial court initially granted defendants' motion for summary disposition, but this Court reversed partially and reinstated plaintiffs' discrimination claims. *Graham v Ford*, 237 Mich App 670; 604 NW2d 713 (1999). On remand, the jury awarded damages in excess of $4 million. Plaintiffs Anthony and Barbara Brandon were awarded damages and interest totaling $613,562.24 and $70,091.77, respectively. Defendants only appeal in connection with those awards.

Defendants assert that the trial court erred by admitting evidence of certain statements because they were compound hearsay, irrelevant, and unfairly prejudicial. We disagree. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993).

At issue is whether the trial court abused its discretion by admitting nearly identical testimony by plaintiffs Graham and Brandon concerning a statement of Captain Pamela Duncan made, who supervised an eight-hour shift of the uniformed prison staff. Thus, Duncan was an intermediate-level supervisor above plaintiffs and below defendant deputy warden Ford. According to both Graham and Brandon, after her car was "egged" and "keyed," Duncan called Graham and Brandon into her office and ordered them to retaliate against white corrections officers she believed responsible and specifically ordered them to "slash all the white boy's tires," or "cut all them honkie's tires." When Graham and Brandon resisted, Duncan purportedly said, "Ford was right, you two are some weak niggers."

In April 1995, after Graham was transferred off the third shift, Brandon went to see Ford concerning racial tension on that shift. Brandon testified that Ford's statements clearly implied that Ford bore race-based animus against Graham for associating with "white folks." Brandon also testified that he confronted Ford regarding Duncan's statement that Ford had referred to Brandon and Graham as "weak niggers." According to Brandon, Ford did not deny making the statement but "began to laugh real loud and real hysterically." Brandon also testified that Ford said he had assigned Duncan to the third shift "to shake things up" and that Brandon and Graham "were supposed to be watching out for [Duncan] and we let those white folks mess her car up."

Plaintiffs offered several theories under which the testimony at issue was properly admitted. Under Michigan's rules of evidence, only one theory is required for the evidence to be properly admitted. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 1998). "That our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes. Rather, the evidence is admissible for a proper purpose, subject to a limiting instruction under MRE 105." *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000).

Moreover, where evidence is admissible under one theory but not another, the trial court need not select the correct theory on peril of reversal. Instead, it is well settled that where the trial court reaches the correct result, albeit for a wrong reason, this Court will not reverse. *People v Watson*, 245 Mich App 572, 582; 629 NW2d 411 (2001); *Ellsworth v Hotel Corp,* 236 Mich App 185, 190; 600 NW2d 129 (1999).

First, plaintiffs argue the evidence was not hearsay as defined in MRE 801(c) because it was not offered to prove of the matter asserted, i.e. that either that Brandon and Graham are "weak niggers," or that Ford made such a statement. Rather, plaintiffs contend the evidence was admitted to show the effect the statement had on Brandon and Graham when they heard it. "An utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant. The policies underlying the hearsay rule do not apply because the utterance is not being offered to prove the truth or falsity of the matter asserted." *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). Here, plaintiffs Brandon and Graham claimed that the stress of a hostile work environment ultimately caused them severe psychological problems and forced them to leave their employment. Thus, the evidence was relevant, not hearsay, and properly admitted as making more probable plaintiffs' hostile work environment theory. Plaintiff also argues that the evidence was properly admitted not for the truth of the assertion but to show the context of his April 1995 meeting with Ford, whom he confronted with Duncan's statement. We agree the testimony was properly permitted for these non-hearsay purposes.

Plaintiffs also argue that in a discrimination lawsuit based on the theory of a hostile work environment, the statement of a supervisor may be admitted as an admission of a party opponent. "'A statement is not hearsay if . . . The statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . .'" *McCallum v Dep't of Corrections*, 197 Mich App 589, 598-599; 496 NW2d 361 (1992), quoting MRE 803(d)(2)(D). Plaintiff relies on a trio of federal cases: *White v Honeywell, Inc*, 141 F3d 1270 (CA 8, 1998); *Zipf v American Telephone & Telegraph Co*, 799 F2d 889, 895 (CA 3, 1986), and *Moore v Kuka Welding Systems*, 171 F3d 1073 (CA 6, 1999). Each of these cases applies FRE 801(d)(2)(D) to unique facts and are of little help in determining whether Michigan's identical rule of evidence permits the admission of the evidence here at issue under the unique circumstances of this case.

MRE 801(d)(2)(D) plainly requires more than a statement by an agent or servant during the time period of the employment. The statement must also be "within the scope of [the declarant's] agency or employment." While there is no dispute that Duncan was both the agent of the DOC and under the command of deputy warden Ford, the statement at issue was made during a discussion in which Duncan attempted to convince Graham and Brandon to "slash all the white boy's [sic] tires." Although the DOC is in the business of housing criminals, it hardly can be asserted that its business includes the type of criminal activity being discussed at the time Duncan made the alleged statements here. Accordingly, the agency principles of MRE 801(d)(2)(D) do not apply.

Defendants argue that because Duncan was not a party and plaintiffs' theory of recovery did not include any conduct by Captain Duncan, whatever she did or did not do was irrelevant. But defendants' premise is contrary to plaintiffs' argument and the evidence presented. Plaintiffs argued that Duncan's actions and statements helped create a hostile work environment that injured them. Plaintiffs presented abundant evidence that Ford bore racial animus toward

Graham and Brandon and acted on that animus both directly and indirectly through subordinate intermediate supervisors such as Duncan. Brandon testified that Duncan's actions created racial tension on the shift he worked. Brandon also testified that during a critical April 1995 meeting concerning this racial tension Ford told him that he had assigned Duncan to that shift to "shake things up." Further, Brandon testified that Ford told him that Brandon and Graham were, in essence, not supposed to "let those white folks mess [Duncan's] car up."

In addition, plaintiff presented other evidence that Ford carried out racially motivated actions through intermediate supervisors. For example, Captain William England testified that Ford directed him to break up plaintiff Timothy Travis' "white boy clique." England also testified that Ford ordered him to transfer Gerald Robinson, plaintiff in the companion case, to a remote assignment because "I don't like the boy. I don't want to see him." England testified Ford's use of the term "boy" had clear racial overtones to him, and he concluded Ford was using him [England] to carry out a racial agenda.

Even a defense witness, African-American Sergeant Ronald Jones, testified that he had the impression that Ford wanted him to take race into account, and that Ford had a hidden agenda with respect to several white officers.

Against this background, whether Duncan had the state of mind receptive to carrying out Ford's racial animus was relevant because it made more likely that Ford created a hostile work environment based on racial animus. MRE 803(3) excepts from the rule against hearsay "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed . . . ." See *McCallum, supra* at 604-605. The testimony here was evidence of Duncan's state of mind, i.e., that she bore racial animus making it more probable that she acted to carry out Ford's racial agenda.

In summary, the evidence at issue was admissible because it was relevant for the non-hearsay purpose of showing its affect on Graham and Brandon, and to show Duncan's state of mind. MRE 401, 402, and 803(3). Because the evidence was highly relevant, the trial court did not abuse its discretion by failing to exclude it under MRE 403. Unfair prejudice under that rule does not mean "damaging" but rather evidence should be excluded only "'when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.'" *Waknin v Chamberlien*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Even if the question were close, defendant has not demonstrated that the trial court abused its discretion in admitting the evidence. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 303; 660 NW2d 351 (2003).

But MRE 803(3), in general,[1] disallows "a statement of memory or belief to prove the fact remembered or believed . . . ." Thus, that part of Duncan's statement that is an assertion that Ford made the derogatory racial comment at some point in the past is not admissible under MRE 803(3). A limiting instruction under MRE 105 would have been appropriate but defendants did

[1] The only exception being statements concerning the declarant's will.

not request one. Moreover, error in admitting evidence will not merit reversal unless a substantial right of a party is affected, MRE 103(a), and it affirmatively appears that failure to grant relief is inconsistent with substantial justice, MCR 2.613(A). See *Chastain v General Motors Corp*, 467 Mich. 888, 654 N.W.2d 326 (2002), and *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Because there exists so much other evidence[2] of defendant Ford's racial discrimination, any error in admission of Duncan's statement without a limiting instruction was harmless.

II. Docket No. 239642

Plaintiff Robinson, a white man employed by the DOC as a corrections officer, filed this discrimination lawsuit on May 19, 1997, alleging a pattern of race-based hostility on defendant Ford's part going back to 1989. The trial court initially granted defendants' motion for summary disposition, but this Court reversed, holding that the trial court should have allowed Robinson to amend his pleadings to allege facts that were sufficiently specific and timely as to satisfy the applicable statute of limitations. *Robinson v Ford*, unpublished opinion per curiam of the Court of Appeals, issued September 10, 1999 (Docket No. 207241).

On remand, plaintiff was permitted to file a third amended complaint, which included the following instances of alleged misconduct by defendant Ford: (1) a May 1994 biased investigation;[3] (2) an unjustified, harassing and degrading memoranda about Robinson sent to the prison chain of command regarding incidents on January 6 and 10, 1995; (3) a December 31, 1996 memorandum evidencing disparate treatment regarding Robison's facial hair; (4) a May 5, 1997 unjustified, harassing memorandum regarding Robinson's absence from work on May 2, 1997 because of illness; and (5) statements by Ford in June 1997 that as long as Ford was the deputy warden at the prison, Robison would never see daylight, referring to Robison's third shift assignment.

Robinson asserts this last statement by Ford was made to Robinson's supervisor, Captain Ronald Overton.[4] Defendant argues the statement is inadmissible hearsay and not evidence of discrimination. But the claim is similar to Robinson's first allegation of race-based harassment which occurred in March or April 1989. At that time, Robinson was working first shift and declined Ford's offer of a promotion to lieutenant because it would require a transfer to second shift and spending less time with his children. Robinson testified that Ford became enraged and stated, "you people are all alike" and, "a few white boys should grow up not knowing their father." Ford transferred Robinson to second shift two weeks later. Shortly thereafter, Ford ordered Robison's supervisor, Captain England, to transfer Robinson to the remote, undesirable "pole barn." Sometime in 1993 Robinson returned to the day (first) shift but in September of

---

[2] For a summary of additional evidence of Ford's racial animus, see this Court's prior opinion in *Graham v Ford*, 237 Mich App 670, 678-681; 604 NW2d 713 (1999).

[3] After a hearing on June 24, 1994, this investigation resulted in plaintiff receiving a two-day suspension later reduced to one day on administrative appeal.

[4] The record is unclear whether Overton confirms Ford made the statement.

that year, Robinson claims Ford again became enraged at him. Robinson testified that Ford informed him that he was being assigned to the Midnight (third) shift, and "every time you see the black of night you'll think of me."

Robinson's complaint alleges that Ford's abusive treatment created a hostile work environment and constituted discrimination based on race with respect to terms and conditions of employment contrary to MCL 37.2202(1)(a). Thus, plaintiff alleges two causes of action: one for disparate treatment based at least in part on racial animus and the other a hostile work environment based on race motivated harassment. Each action has different elements.

Section 202 of Michigan's Civil Rights Act, MCL 37.2202, provides in relevant part:

> (1) 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. [Emphasis added.]

Unlawful discrimination under subsection (1)(a), in this case, disparate treatment because of race, may be proved by direct or indirect evidence. *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001); *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999). Direct evidence is "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle, supra* at 462, quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999). "For example, racial slurs by a decisionmaker constitute direct evidence of racial discrimination that is sufficient to allow a plaintiff's case to proceed to the jury." *Graham, supra* at 677, citing *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997), citing *Kresnak v Muskegon Heights*, 956 F Supp 1327 (WD Mich, 1997).[5]

Where there is direct evidence of discrimination, the case is often called "intentional discrimination" or a "mixed-motive" case. *Wilcoxon, supra* at 360; *Harrison, supra* at 611. In such a case, "a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision," but the defendant "may avoid a finding of liability by proving that it would have made the same decision even if the impermissible consideration had not played a role in the decision." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003).

The elements of a mixed-motive discrimination case are:

---

[5] Although not binding precedent, Michigan courts have consistently looked to federal courts' interpretations of Title VII of the Civil Rights Act of 1964, 42 USC 2000e et seq., for guidance in interpreting this state's parallel legislation. See, e.g., *Wilcoxon, supra* at 364 n 8, and *Graham, supra* at 676.

> (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. [*Wilcoxon, supra* at 360-361.]

A discrimination case may alternatively be proved by circumstantial evidence employing the burden-shifting framework adopted in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). Under the *McDonnell Douglas* approach, a prima facie case consists of evidence that the plaintiff (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the adverse employment action was taken under circumstances giving rise to an inference of unlawful discrimination. See, *Hazle, supra* at 462-463, and *Wilcoxon, supra* at 359. If a plaintiff produces evidence of a prima-facie case under *McDonnell Douglas*, the burden shifts to the employer to come forward with a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the burden again returns to the plaintiff to establish that the employer's stated legitimate reason is merely a pretext for discrimination. *Sniecinski, supra* at 134; *Wilcoxon, supra.*

Using either direct evidence or the *McDonnell Douglas* approach, an element of plaintiff's discrimination claim is an adverse employment action. *Sniecinski, supra* at 134-135; *Wilcoxon, supra* at 362. An "adverse employment action" for the purposes of proving unlawful discrimination "(1) must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff." *Meyer v City of Centerline*, 242 Mich App 560, 569; 619 NW2d 182 (2000), citing *Wilcoxon, supra* at 364. On this element the trial court found there was no dispute as to material facts and granted defendants' motion for summary disposition. MCR 2.116(C)(10).

Plaintiff argued Ford's racial animus caused him to suffer two adverse employment actions: (1) being relegated to the midnight (third) shift for the duration of Ford's tenure as deputy warden of the Michigan Training Unit (MTU), and (2) being subjected to harassing criticisms and biased disciplinary actions, one of which resulted in a two-day, reduced to a one-day suspension. The trial court rejected plaintiff's arguments relying on *Wilcoxon* and reasoned "[t]here must be some objective basis for demonstrating that the change is adverse because a plaintiff's subjective impressions as to the desirability of one's position over another are not controlling." The trial court noted that in *Wilcoxon* this Court did not find that an employee's transfer without loss of pay or benefits was an adverse employment action for purposes of a discrimination claim and concluded, as to the case at bar, "I just don't see the adverse employment action." The trial court viewed the evidence as demonstrating "a clash of personalities" rather than a "materially adverse" employment action. The trial court thought the incidents plaintiff alleged seemed unusual but "very possibly had a reasonable explanation" and were "probably not that different from what happens already within the Department of Corrections with other . . . employees." Thus, although Ford's racial comments and slurs are sufficient to create triable issues of fact, *Graham, supra* at 677, the court nevertheless granted defendants' motion for summary disposition because the evidence did not demonstrate plaintiff suffered an adverse employment action. The trial court did not specifically address plaintiff's

hostile work environment claim but did cite *Crawford v Media General Hosp*, 96 F3d 830, 834 (CA 6, 1996), a hostile work environment case based on alleged age discrimination.

"We review a trial court's decision with regard to a motion for summary disposition de novo as a question of law." *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Decker v Flood*, 248 Mich App 75, 81; 638 NW2d 163 (2001). "The reviewing court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the nonmoving party. The court should grant the motion only if the affidavits or other documentary evidence show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citations omitted). We conclude that the trial court erred by not viewing the evidence in a light most favorable to plaintiff, by applying *Wilcoxon* too narrowly, and by finding that plaintiff had not submitted sufficient evidence to raise material fact questions under a hostile work environment theory.

This Court has noted that "adverse employment actions [are] not limited 'to strictly monetary considerations. One does not have to be an employment expert to know that an employer can make an employee's job undesirable or even unbearable without money or benefits ever entering into the picture.'" *Wilcoxon, supra* at 364, quoting *Collins v Illinois*, 830 F2d 692, 703 (CA 7, 1987). In *Collins*, the Seventh Circuit Court of Appeals opined that "adverse job action . . . can encompass other forms of adversity . . . [f]or example, . . . where there was no reduction in salary or benefits, in an employer's moving an employee's office to an undesirable location, transferring an employee to an isolated corner of the workplace, and requiring an employee to relocate her personal files while forbidding her to use the firm's stationary and support services." *Id*. at 703 (footnotes and citations omitted).

The *Wilcoxon* Court relied heavily on *Crady v Liberty National Bank & Trust Co*, 993 F2d 132 (CA 7, 1993) in developing its two criteria to determine whether an employment action in a discrimination case is "materially adverse." The court in *Crady* opined:

> [A] materially adverse change in the terms and conditions of employment *must be more disruptive than a mere inconvenience or an alteration of job responsibilities*. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or *other indices that might be unique to a particular situation*. [*Id*. at 136 (emphasis added).]

Thus, while mere inconvenience or altered job responsibilities are insufficient, what constitutes a materially adverse action will depend on the particular facts and circumstances involved. There is "no exhaustive list of adverse employment actions." *Peña, supra* at 312.

Here, plaintiff presented abundant evidence that Ford's actions were motivated at least in part by racial animus. There was documentary evidence indicating that plaintiff was reassigned from the first shift to second shift because of racial discrimination where he had been working the first shift. Also, there was documentary evidence that plaintiff was assigned to pole barn duty, which allegedly was an undesirable assignment at a remote part of the facility and that,

subsequently, after an altercation with defendant, plaintiff was indefinitely assigned, very much contrary to his desire, to third shift (otherwise known as the graveyard shift). All along, it was well known that plaintiff preferred the first shift for family reasons. Moreover, plaintiff alleged he suffered unjustified harassment, and a biased discipline of a two-day suspension (reduced to one day). Ford's assigning plaintiff to different shifts, to a remote undesirable work area, and unjustified disciplinary action, could be deemed "materially adverse." See *Wilcoxon, supra* at 364 n 8, citing *De La Cruz v New York City Human Resources Dep't*, 82 F3d 16 (CA 2, 1996), holding that the plaintiff's transfer from an "elite" adoption care unit to a foster care unit with less prestige was a "quite thin" but "the transfer arguably altered the terms and conditions of his employment in a negative way" and was sufficient to establish an adverse employment action. *Id*. at 21.

Reasonable jurors could conclude defendants' actions in this case were more than "mere inconvenience." Further, although plaintiff's subjective impressions are not controlling, reasonable jurors could find an objective basis to conclude that Ford's actions against plaintiff were adverse employment actions. *Wilcoxon, supra* at 364. Using an objective basis, reasonable jurors could conclude that being forced to go from a day shift to the graveyard shift, with its enormous impact on one's life (changing sleep patterns, less family interaction, etc.), is an adverse employment action. Similarly, reasonable jurors could objectively find an adverse employment action in biased, unjustified disciplinary proceedings. In sum, the evidence plaintiff produced, viewed in a light most favorable to him, established that material issues of fact remained for trial to determine whether plaintiff suffered an adverse employment action, as defined in *Wilcoxon,* which was racially motivated. *Hazle, supra* at 465.

That disputed material fact issues remain for trial is not altered by the trail court's observation that there might be a reasonable explanation for defendants' actions and that other employees probably had similar experiences. This reasoning applies more to a defense allegation that there were legitimate, nondiscriminatory reasons for the reassignments and disciplinary action notwithstanding plaintiff's prima facie case of discrimination. As this Court stated in *Wilcoxon*:

> [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. [*Id*. at 359.]

Of course, that plaintiff has established a prima facie case of discrimination does not necessarily preclude summary disposition in defendants' favor. *Hazle, supra* at 464. But here, with the abundant evidence of Ford's racial animus, a factual issue with respect to "pretext" would remain. Not only has plaintiff raised a triable issue that any proffered reason was pretextual, but also that reasonable jurors could conclude that it was a pretext for unlawful discrimination. *Id.,* at 465-466. The trial court erred by granting defendants summary disposition.

The trial court also erred because plaintiff produced sufficient evidence to create a jury question on his hostile work environment theory. Harassment based on membership in any one of the protected groups under MCL 37.2202(1)(a) is actionable. *Malan v General Dynamics Land Systems, Inc*, 212 Mich App 585, 586-587; 538 NW2d 76 (1995). Plaintiff's third amended complaint alleges that "[d]efendant Ford's treatment of Mr. Robinson . . . created a hostile work environment, and was motivated in a substantial and significant manner by the fact that Mr. Robinson is white." To establish a prima facie hostile work environment claim, plaintiff must show: (1) he belonged to a protected group; (2) he was subjected to communication or conduct on the basis of the protected status; (3) the communication or conduct he received based on the protected status was unwelcome; (4) the unwelcome communication or conduct was intended to or in fact did substantially interfere with his employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 627 n 3; 576 NW2d 712 (1998). See also, *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), and *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). Under this theory, "whether a hostile work environment was created by the 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.

Moreover, under a hostile work environment theory of discrimination, proving a specific adverse employment action is unnecessary. Under MCL 37.2202(1)(a), "the phrase 'terms, conditions or privileges of employment' evinces a legislative intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Downey, supra* at 628, adopting the reasoning of *Harris v Forklift Systems, Inc*, 510 US 17, 21; 114 S Ct 367; 126 L Ed 2d 295 (1993)(sexual harassment case under 42 USC 2000e-2(a)(1)). Just as the Supreme Court explained with respect to Title VII, Michigan's Civil Rights Act is not limited to "to 'economic' or 'tangible' discrimination." *Harris, supra* at 21, citing *Meritor Savings Bank, FSB* v *Vinson*, 477 US 57, 64; 106 S Ct 2399; 91 L Ed 2d 49 (1986). The *Harris* Court explained:

> A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. [*Harris, supra* at 23.]

Under a hostile work environment theory, "to survive summary disposition, plaintiff had to present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances, [Ford's comments and actions] were sufficiently severe or pervasive to create a hostile work environment." *Quinto, supra* at 369. Plaintiff presented sufficient evidence that reasonable jurors could find under this standard that defendant Ford's comments and actions were sufficiently severe or pervasive to

have created an intimidating, hostile, or offensive work environment predicated on plaintiff's protected status such that summary disposition was improper.

Defendants' claim that plaintiff failed to preserve his hostile work environment theory is without merit. Although plaintiff in opposing defendants' motion for summary disposition did not strenuously argue this theory, he alluded in his written response to defendants' motion that Ford's conduct exhibited a "consistent pattern of discrimination" and "ongoing harassment over many years." At oral argument on defendants' motion, plaintiff's counsel argued that "Ford was discriminating against . . . plaintiff[] in the terms, conditions and privileges of [his] employment; that [Ford] sought to intimidate and harass . . . through the things that he had authority over as assistant deputy warden of custody." Further, MCR 2.116(G)(4) requires that a party opposing a motion for summary disposition under subsection (C)(10) "must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." Plaintiff did so in this case. Plaintiff was not required to take specific exception to the trial court's ruling to preserve this issue for appeal. "No exception need be taken to a finding or decision." MCR 2.517(A)(7).

Finally, defendants attempt unsuccessfully to revive the argument that plaintiff's case is barred by the statute of limitations as an alternative ground to affirm the trial court. Application of the statute of limitations is a question of law reviewed de novo on appeal. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003).

An action under the Civil Rights Act must be brought within three years after the cause of action accrued. MCL 600.5805(10);[6] *Sumner v Goodyear Tire & Robber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343; 483 NW2d 407 (1992). Plaintiff filed this action on May 19, 1997. To the extent defendants' argument relates to plaintiff's allegations of conduct that transpired after May 19, 1994, it must fail. This Court held in its prior decision that the trial court abused its discretion by not permitting plaintiff to amend his complaint, and that "plaintiff alleged instances of actionable misconduct that occurred in May 1994, January 1995, December 1996, May 1997, and June 1997." *Robinson, supra*, slip op at 1, 3. "Under the law of the case doctrine, 'if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.'" *Grievance Administrator v Lopatin*, 462 Mich 235, 259; 612 NW2d 120 (2000), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).

As to defendant's conduct before May 19, 1994, an exception to the limitations period exists for continuing violations. *Meek, supra* at 343-344. "The mere existence of continuing harassment is insufficient if none of the relevant conduct occurred within the limitation period." *Id.* at 344, citing *Sumner, supra* at 359. But this Court has already held that conduct occurring

---

[6] The applicable subsection provides in part: "The period of limitations is 3 years after the . . . injury for all other actions to recover damages . . . for injury to a person or property." This subsection has been renumbered several times in recent years by amendments to § 5805.

within the limitations period is actionable. Plaintiff's evidence, if believed, showed an intrinsically interwoven pattern of racially biased harassment before and after May 19, 1994. *Sumner, supra* at 359; *Meek, supra* at 345. Accordingly, we hold the continuing violation exception applies to the case at bar, and "that once jurisdiction is attained through the continuing violations doctrine, the remedy should be designed to make the plaintiff whole for the entire injury he has suffered." *Sumner, supra* at 542 n 15.

Conclusion.

In Docket No. 239881, we affirm. In Docket No. 239642, we reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot