STATE OF MICHIGAN

COURT OF APPEALS

LINDA MACK,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

FOR PUBLICATION
October 27, 2000

No. 214448
Wayne Circuit Court
LC No. 98-803967-CZ

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

SAWYER, J. (dissenting).

I respectfully dissent.

The resolution of this case hinges on the question whether the Supreme Court's holding in *Pompey v General Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971), can be extended to city charter provisions. Unlike the majority, I am unwilling to make such an extension.

In *Pompey, supra* at 552-553, the Court recognized the general rule followed in Michigan:

> The general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive. *Thurston* v. *Prentiss* (1849), 1 Mich 193; *In re Quinney's Estate* (1939), 287 Mich 329; *Lafayette Transfer & Storage Co*. v. *Michigan Public Utilities Commission* (1939), 287 Mich 488. Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative.

The Court, *id.* at 553, went on to recognize that exceptions have been recognized in the civil rights area:

> But courts have forged exceptions to these general rules when the statutory rights infringed were civil rights. Although there is some authority to the contrary most decisions have held that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or

> relieve him from violation of the statute, notwithstanding the statute did not expressly give him such right or remedy.

Thus, the *Pompey* Court ultimately concluded that the plaintiff could maintain a civil damage action for violation of his statutorily created right to be free from employment discrimination. *Id.* at 560.

However, before even reaching the question whether *Pompey* should be extended to rights created under a city charter, plaintiff and the majority base their positions on an unsupported assumption: that a city charter can even create a private cause of action. Neither plaintiff's brief nor the majority's opinion points to any authority for the proposition that a city charter (or ordinance for that matter) can even explicitly create a right to a private cause of action,[1] much less an implicit one under an extension of *Pompey*.

The Court in *Bivens v Grand Rapids*, 443 Mich 391, 396; 505 NW2d 239 (1993), commented on that question, though ultimately concluding that it need not address it. In *Bivens*, the plaintiff was injured while riding her bicycle on a city sidewalk. She sued the city and the owner of the property which adjoined the allegedly defective sidewalk. The trial court dismissed the suit against the property owner, concluding it had no duty of care to an individual user of the public sidewalk. Thereafter, the city filed a third-party complaint against the property owner seeking indemnification for any damages it might have to pay the plaintiff, alleging that the property owner breached its duty under the city ordinance to maintain the sidewalk. The trial court again granted summary disposition in favor of the landowner, concluding that the ordinance did not create a private right to recover against the landowner. *Id.* at 394.

Ultimately, the Court ruled in favor of the landowner because it found that the city lacked the authority under its charter to impose by ordinance an obligation on abutting landowners to indemnify the city. However, the Court did comment that there was a more general underlying question to the case, but one that it need not address:

> Notwithstanding the final sentence of ordinance 4.84, which purports to allow any person injured on a defective sidewalk to bring a civil action against the abutting property owner, the trial court ruled, as already noted, that plaintiff's complaint failed to state a cause of action against the [property owner]. *Because that decision was not appealed, the question whether a city may create such a private cause of action is not squarely before us.* [Emphasis added.]

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[1] The majority's opinion suggests that *Lane v KinderCare Learning Centers, Inc*, stands for the proposition that it is a question of statutory interpretation whether plaintiff has a cause of action under defendant's charter. In fact, *Lane* involved the question whether a cause of action existed under a state statute, specifically the child care organizations act, MCL 722.111 *et seq.*; MSA 25.358(11) *et seq.* *Lane, supra* at 695.

Furthermore, plaintiff's reliance on *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629; 537 NW2d 436 (1995), is similarly misplaced. *Detroit Fire Fighters* did not involve a question whether the Detroit city charter created a private cause of action for damages. Rather, it was a mandamus action seeking to compel the city's mayor to take action.

I do not believe that this statement in *Bivens* "strongly implied" that a city does not have such power as defendant argues in its brief. However, I do believe that it indicates that it is hardly obvious that a city possesses such power and that it suggests that the Supreme Court is not willing to simply assume that such power exists.

This is a key point because the majority's conclusions rest on the assumption that such power exists. However, if a city cannot explicitly create a private cause of action, then it cannot do it implicitly either. I am unwilling to make the assumption that a city possesses the power to create a private cause of action. Therefore, absent a showing that a city possesses such a power, I am also unwilling to conclude that defendant's city charter creates a private cause of action for employment discrimination by defendant.

Furthermore, even assuming that a city possesses the authority to create a cause of action by charter or ordinance, I am unwilling to extend *Pompey* from state statutes to city charters and ordinances. As discussed above, *Pompey* recognized that the general rule is that, where no right existed at common law, a statutory right has only those remedies provided for in the statute which created the right. *Pompey* crafted a narrow exception to that rule where state civil rights statutes are concerned. I see nothing in the *Pompey* decision which suggests an intent by the Supreme Court to apply that exception more broadly so as to encompass city charters and ordinances. It is one thing to say that our state courts will imply a remedy for a state statute of general applicability. It is quite another thing to imply a remedy for a city charter or ordinance with limited applicability, particularly when it deals with a right that the state had the opportunity to create, but chose not to adopt. I would leave it to the Supreme Court to extend *Pompey* if they so choose.

Additionally, we must tread carefully before creating remedies that may not have been intended or envisioned by the drafters of the city charter or ordinance. Implying unintended remedies may well have the effect of chilling attempts by a city to assume duties beyond that imposed by the state. That is, defendant may have been willing to impose upon itself a duty not to discriminate based upon sexual orientation, establishing a mechanism to ensure that it does not so discriminate and administrative remedies in the event that such discrimination occurs. However, we should not assume that it would have been willing to impose such a duty upon itself if it also had to allow the remedy of financial damages. While a city may be willing to assume a duty if it merely has to provide administrative remedies for a violation of that duty, it may be unwilling to voluntarily assume that duty if it is required to also provide financial remedies for a violation.

What the majority is essentially telling cities is, "We applaud you for extending civil rights beyond the state statute. However, we are going to make you subject to financial damages for violating that self-imposed duty. So, if you want to avoid exposure to financial remedies, you better not extend civil rights protections beyond that provided for by statute." Discouraging, rather than encouraging, cities to embrace civil rights protections represents, I think, poor public policy. But more to the point, it is not the proper role of this Court to make such a public policy determination.

Accordingly, I would uphold that grant of summary disposition for defendant for the following reasons: (1) it has not been established that a city possesses the authority to create a

private cause of action, (2) I would leave it to the Supreme Court to decide if *Pompey* should be extended to city charters and ordinances, and (3) this Court should not require cities to impose a financial remedy upon themselves for assuming a duty not required by statute, rather than just imposing other, administrative remedies.

For these reasons, I would affirm the decision of the trial court.

/s/ David H. Sawyer