STATE OF MICHIGAN

COURT OF APPEALS

CAROL OUELLETTE and ANNA GUYOR,

Plaintiffs-Appellants,

v

CITY OF MARINE,

Defendant-Appellee.

and

MICHIGAN MUNICIPAL LEAGUE,

Amicus Curiae.

UNPUBLISHED
May 19, 1998

No. 199652
St. Clair Circuit Court
LC No. 95-001120-NO

Before: Young, Jr., P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition of their sex discrimination claim brought pursuant to the Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. We affirm summary disposition on the basis of MCR 2.116(C)(7) because plaintiffs' claim is barred by the statute of limitations.

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition when there was evidence of a salary discrepancy between their positions and those of male department heads, as well as evidence that the duties of each required the same degree of responsibility and the same level of skill and expertise. Also, plaintiffs claimed that they were told that they were being paid less than men because they were women.

We review a trial court's grant of summary disposition de novo. *Pinckney Community Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1996). This Court must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Phillips v Deihm*, 213 Mich App 389, 398; 541 NW2d 566 (1995). Here, it appears that summary disposition was granted under MCR 2.116(C)(8), which tests

the legal sufficiency of a claim by the pleadings alone. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992). However, because the trial court actually looked to the evidence, we will also review this decision as if the motion were granted under MCR 2.116(C)(10), which tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). Giving the benefit of reasonable doubt to the nonmovant, this Court must determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

A prima facie case of discrimination can be made by showing either intentional discrimination or disparate treatment. *Reisman v Wayne State Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). A disparate treatment prima facie case relying on indirect or circumstantial evidence requires proof of the following elements: 1. Membership in a protected group; 2. Qualification for the position 3. Adverse employment action; 4. Similarly situated employees outside the protected class who are unaffected by the employer's adverse conduct. *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695; 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

A claim of intentional discrimination may be proved by alternate methods. *Harrison v Olde Financial*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Intentional discrimination may be established either by direct or indirect evidence. *Id.* When direct evidence is used to prove discrimination, there is no need to employ the presumption based method of proof announced in *McDonnell Douglas*. *Matras v Amoco Oil Co*, 424 Mich 675, 683-684; 385 NW2d 586 (1986); *Harrison, supra* at 609. "Direct evidence" is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *Id.* at 610. In a case involving direct evidence of discrimination, the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus. *Id.* at 612. Whatever the nature of the challenged employment action, a plaintiff must establish evidence of her qualification and direct proof that the discriminatory animus was causally related to the decisionmaker's action. *Id.* at 613.

> Upon such presentation of proofs, an employer may not avoid trial by merely "articulating" a nondiscriminatory reason for its action. Under such circumstances, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. [*Id.*]

Here, plaintiffs, as women, were members of a group that enjoyed statutory protection from sex discrimination. Moreover, plaintiffs' qualifications for their respective positions as city clerk and treasurer were not disputed. Plaintiffs also provided proofs of an adverse employment action and direct evidence of discriminatory animus. Both plaintiffs testified that when they complained to a former city manager about their compensation, she replied that the commissioners did not want to pay women as much as men because they did not have families to raise. In light of this evidence, it is for the trier of fact to determine whether or not plaintiffs' allegations are true. *Harrison, supra* at 613. Therefore, the trial

court erred in granting summary disposition under MCR 2.116(C)(8) and (10). Nevertheless, summary disposition is appropriate in this case under MCR 2.116(C)(7) because plaintiffs' claim is barred by the statute of limitations.

An action alleging employment discrimination under the Civil Rights Act must be brought within three years after the cause of action accrued. *Meek v Michigan Bell*, 193 Mich App 340, 343; 483 NW2d 407 (1991). An exception exists for continuing violations. *Id.* at 344. Several factors must be considered in determining whether a continuing course of discriminatory conduct exists:

> The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (*e.g.*, a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate. [*Sumner v Goodyear Co*, 427 Mich 505, 538; 398 NW2d 368 (1986), quoting *Berry v LSU Bd of Supervisors*, 715 F2d 971, 981 (CA 5, 1983).]

Here, the discrepancy in pay between the male and female department heads had a degree of permanence that should have triggered an awareness in plaintiffs of a duty to assert their rights. Plaintiffs made repeated attempts since the early 1980s to persuade defendant to increase their salaries. Accordingly, the facts of this case do not fit within the analysis of a continuing violation, and plaintiffs action is barred by the statute of limitations.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff