STATE OF MICHIGAN

COURT OF APPEALS

GAIL ROBINSON, Plaintiff-Appellee,	UNPUBLISHED October 3, 2000
v	No. 207973 Genesee Circuit Court
WAL-MART STORES, INC., Defendant-Appellant.	LC No. 96-042994-CL

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

PER CURIAM.

Following a jury trial, plaintiff was awarded judgment of $25,000, plus statutory interest, on her claim for race discrimination under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*., against her employer, defendant Wal-Mart Stores, Inc. The trial court also awarded plaintiff $47,621 in attorney fees and $2,236.20 in costs under MCL 37.2802; MSA 3.548(802) and as sanctions under the mediation rule, MCR 2.403(O). Defendant appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence to support plaintiff's claim for race discrimination. Defendant challenged the sufficiency of plaintiff's evidence below by moving for a directed verdict at the close of plaintiff's proofs. This Court reviews a trial court's decision on a motion for a directed verdict de novo. *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998), citing *Berryman v K mart Corp*, 193 Mich App 88, 91; 483 NW2d 642 (1992). We are required to examine the evidence, including all legitimate inferences that may be drawn therefrom, in the light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998).[1] A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Braun*, *supra* at 141.[2]

[1] Because defendant did not challenge the sufficiency of the evidence post-trial by way of a motion for judgment notwithstanding the verdict or a motion for new trial, we limit our review to whether the evidence introduced by plaintiff was sufficient to send the case to the jury. See *Napier v Jacobs*, 429 (continued...)

The CRA prohibits racial discrimination in employment discharge decisions, providing, in part:

> (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. [MCL 37.2202(1)(a); MSA 3.548(202)(1)(a).]

Plaintiff relied on a disparate treatment theory at trial to establish her claim of racial discrimination.[3] Discrimination can be established by direct or indirect evidence. *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997).[4] Plaintiff did not present any direct evidence that racial discrimination was a factor in defendant's decision to terminate her employment. Therefore, plaintiff must establish a prima facie case under the burden-shifting analysis adapted from *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). See *Harrison, supra* at 609.

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Mich 222, 230; 414 NW2d 862 (1987); *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

[2] To the extent defendant claims the finding that plaintiff was treated disparately was clearly erroneous, that claim lacks merit because this case was decided by a jury which does not render findings. Insofar as defendant's argument as to factual findings can be said to challenge the verdict on the basis that it is against the great weight of the evidence, we need not review the claim because defendant did not bring a post-trial motion for new trial. See *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993).

[3] Although plaintiff distinguishes between a claim of intentional discrimination and a claim based on disparate treatment in her brief on appeal, we do not consider the distinction determinative of the present issue. "Disparate treatment" and "intentional discrimination" have been advanced as two different theories of proving discrimination. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 181 n 31; 579 NW2d 906 (1998); *Schellenberg v Rochester Michigan Lodge No 2225 of Benev Protected Order of Elks of US*, 228 Mich App 20, 33; 577 NW2d 163 (1998). However, this Court has made clear that the two theories do not necessarily involve mutually exclusive considerations. *Schellenberg, supra* at 32; *Meagher v Wayne State University*, 222 Mich App 700, 709; 565 NW2d 401 (1997) (stating that the two approaches are not separate theories of liability). Even in a case in which a defendant is alleged to have engaged in disparate treatment, the plaintiff must show that the defendant intended to discriminate. *Meagher, supra* at 709-710. Furthermore, plaintiff acknowledged during trial that she was relying on a disparate treatment theory.

[4] Direct evidence is evidence that, if believed, requires the conclusion that discriminatory animus was a motivating factor in the employment decision. *Harrison, supra* at 610, quoting *Kresnak v Muskegon Heights*, 956 F Supp 1327, 1335 (WD Mich, 1997).

Typically, a plaintiff must demonstrate that he or she is a member of a minority group that is protected under the Civil Rights Act. *Allen v Comprehensive Health Services*, 222 Mich App 426, 430; 564 NW2d 914 (1997). However, in the context of reverse discrimination, where a majority plaintiff brings an action for discrimination, the *McDonnell Douglas* analysis is modified, so that the majority plaintiff must present evidence of background circumstances that demonstrates "'that the defendant is that unusual employer who discriminates against the majority.'" *Id*. at 432, quoting *Parker v Baltimore & O R Co*, 209 US App DC 215, 220; 652 F2d 1012 (1981). Accordingly, a prima facie case of disparate treatment reverse race discrimination requires proof that the defendant is an unusual employer who discriminates against the majority and that, for the same or similar conduct, the plaintiff was treated differently than one who was a member of a different race. See *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994); *Allen, supra*.

If the plaintiff establishes a prima facie case, a presumption of discrimination arises that the defendant may rebut by articulating a legitimate, nondiscriminatory reason for the employment decision. *Lytle, supra* at 173; *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695-696; 568 NW2d 64 (1997). If the employer rebuts the presumption of discrimination, the plaintiff must then raise a triable issue that the stated reason for the adverse employment decision was merely pretext for discriminatory animus. *Lytle, supra* at 175-176; *Town, supra* at 696-697. Evidence relied upon in proving a prima facie case of discrimination may also be used to satisfy the final burden regarding pretext. *Lytle, supra* at 174; *Town, supra* at 696.

Here, defendant argues that the Caucasian plaintiff failed to introduce credible evidence that defendant treated her differently than the African American coworkers plaintiff claimed engaged in conduct similar to that which resulted in plaintiff's termination. We disagree and conclude that plaintiff produced sufficient evidence for the jury to decide whether defendant engaged in racial discrimination.

Plaintiff's trial testimony suggested she was hired by defendant in June 1995 and worked the third shift in defendant's receiving department. Plaintiff estimated there were twelve employees working in defendant's store on the third shift, approximately two-thirds of whom were African American and one-third Caucasian. In or about September or early October 1995, plaintiff noticed tension developing between herself and several African American employees.[5] Plaintiff claimed she was called a "white bitch" by three African American employees, including a coworker identified as Elita, on several separate occasions. According to plaintiff, she informed two of her supervisors of approximately four incidents of the name-calling.[6] She specifically recalled telling the supervisors that

[5] It is not clear from the testimony at trial what caused the tension, but plaintiff explained that it started when Caucasian employee Dawn Gass transferred to the third shift, befriended several African American coworkers, and became antagonistic toward plaintiff.

[6] Defendant's assertion within its brief on appeal that plaintiff failed to report the "white bitch" comments until after she was terminated is not supported by the record. At trial, plaintiff acknowledged that she did not inform store manager Erick Wickland of the "white bitch" comments until after her employment was terminated; however, plaintiff also testified that she told two of defendant's supervisors approximately four times that coworkers had called her "white bitch."

the individuals used the term "white bitch."[7] The record does not indicate whether Elita was disciplined as a result of those statements. Plaintiff further testified that, on another occasion in early October 1995, Elita again called her "white bitch," shoved her into a large machine in the store's receiving room, pointed a finger in her face, and threatened "you better shut you mouth or I'm gonna kick your ass." Plaintiff also reported that incident to supervisors. According to plaintiff, each time she reported the incidents, managers told her they would take care of the problem. Plaintiff acknowledged during trial that she was not aware of any discipline Elita may have received as a result of the shoving incident. Several coworkers testified on plaintiff's behalf that they saw Elita shove and threaten plaintiff and also observed other incidents where African American employees acted hostile toward plaintiff.

Michael Kinney, a former manager for defendant and third shift employee, testified that he observed racial tension among the third shift employees. Kinney observed African American employees antagonize certain coworkers, including plaintiff. Kinney reported the incidents to managers and believed that the African American employees involved were given oral warnings by management as a disciplinary measure.

Sometime after those incidents, plaintiff was accused by an African American coworker of using racial slurs. Plaintiff acknowledged that managers told her if similar incidents occur in the future, her employment would be terminated. Plaintiff testified that, on October 27, 1995, she became frustrated while waiting for two coworkers to assist her in loading merchandise and stated loudly, "we have a bunch of lazy coon dogs working here." According to plaintiff, she did not intend the comment as a racial insult. She denied stating "we have a bunch of lazy coons working here." Plaintiff's statement was reported to defendant's managers and plaintiff was suspended by management at the end of her shift. Plaintiff testified that, on November 1, 1995, managers met with the third shift employees and informed plaintiff her employment was terminated because she had made a racial comment in derogation of defendant's policy against harassment. Plaintiff testified that she believed she was fired because she complained about African American employees' conduct. She contended that defendant fired her because it was easier than disciplining African American employees who engaged in similar conduct.

On appeal, defendant claims that, because plaintiff admitted that she did not know whether defendant took any disciplinary action with respect to Elita or other African American employees who were alleged to have made racial comments, there was insufficient evidence plaintiff was subject to disparate treatment. Considering the evidence in a light most favorable to plaintiff, see *Kubczak*, *supra*, we conclude that plaintiff presented sufficient evidence to create a presumption of discrimination. There was testimony that the racial makeup of the employees working the third shift was two-thirds African American and one-third Caucasian. There was also evidence that there was significant racial tension among those employees. Given the setting that two-thirds of third shift employees consisted of minority (African American) employees and considering the evidence of disparate discipline imposed upon

[7] Although plaintiff did not specifically testify that Elita was involved in those initial incidents she reported to her supervisors, jurors could reasonably infer from plaintiff's testimony regarding the incidents that plaintiff indeed reported Elita. Plaintiff testified that she was called "white bitch" almost every night, most often by Elita.

plaintiff and similarly situated African American employees, reasonable jurors could have inferred that defendant elected to resolve internal racial conflict by terminating the employment of the majority (Caucasian) employee. Consequently, there was sufficient evidence from which the jury could conclude that defendant was the unusual employer that discriminated against the majority. See *Allen, supra*. Plaintiff's testimony suggested she and Elita, an African American coworker, were similarly situated employees and that she was treated differently from Elita, who engaged in similar conduct. See *Betty, supra*. There was testimony that plaintiff and Elita both worked the third shift in the receiving department of defendant's store. Plaintiff's evidence suggested that, like plaintiff, Elita was reported to management on at least two occasions for allegedly making racial remarks. There was testimony suggesting that, before plaintiff was accused of making any racial slur, Elita was reported to supervisors between one and four times for calling plaintiff "white bitch." According to plaintiff, supervisors assured plaintiff they would take care of the situation. There was also substantial testimony that Elita was later reported for assaulting plaintiff and making a racial remark to plaintiff. Although defendant claims on appeal that several African American employees received some level of discipline in regard to the reported incidents, defendant does not dispute that only plaintiff was discharged in connection with the incidents.[8] While plaintiff was unaware of any specific discipline of the African American coworkers that allegedly harassed her,[9] the evidence establishes that the similarly situated African American coworkers were not discharged in connection with the acts of harassment in which they were alleged to have engaged.[10]

Furthermore, plaintiff presented sufficient evidence that defendant's proffered reason for her discharge was pretext for racial discrimination. Although defendant's managers claimed they discharged plaintiff for making racial slurs that constituted harassment, plaintiff contended defendant terminated her employment because it was easier to resolve the racial tension on the third shift by terminating her rather than disciplining the African American employees on the third shift who first engaged in similar conduct.[11] Given the testimony regarding the fact that the third shift consisted of a majority of African

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[8] Moreover, the evidence supports the conclusion that whatever the discipline implemented by defendant, it failed to effect an end to the hostile environment in which plaintiff worked.

[9] It was defendant's policy not to publicly disclose the results of disciplinary action taken against its employees.

[10] It became apparent during the presentation of defendant's case that the African American coworkers who were accused of making racial comments and of harassing plaintiff were not discharged. In particular, Elita was not fired despite allegations that she called plaintiff a "white bitch" on several occasions and, on the one specific occasion, allegedly shoved her, called her a "white bitch," and threatened her. We further note that assistant manager for the third shift Patrick Tierney testified for defendant that pushing a coworker was sufficiently egregious conduct to merit immediate discharge. Wickland testified that he investigated the shoving incident, stating that he understood that "[Elita] shook her finger at [plaintiff] and said she would get [plaintiff] or something to that effect." Wickland acknowledged that incident was an "extremely serious incident."

[11] The testimony of Kinney, a former third shift manager for defendant, substantially corroborates plaintiff's claim of pretext. Kinney observed on-going racial animus on the third shift directed, at least in part, at plaintiff. Furthermore, it is reasonable to infer from Kinney's testimony that at least one of the

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American employees, the racial tension among African American and Caucasian employees, defendant's managers' desire to quell the tension, as well as testimony that a number of African American employees on the third shift were involved in racial antagonism toward plaintiff, there was sufficient evidence that defendant's proffered reason for discharging plaintiff was pretextual. Therefore, there was sufficient evidence of animus to allow the case to go to the jury. See *Lytle*, *supra* at 175-176; *Town*, *supra* at 696-697. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict.

Next, defendant challenges the trial court's order awarding plaintiff attorney fees.[12] Defendant does not claim that plaintiff was not entitled to mediation sanctions under MCR 2.403(O) when she prevailed at trial, but instead argues that the trial court should not have awarded fees at an hourly rate, multiplied by the number of hours spent on the case, because plaintiff had a contingency fee agreement with her attorney. We disagree that the trial court erred in awarding attorney fees under MCR 2.403(O).

A trial court's decision to award mediation sanctions involves a question of law that is reviewed de novo. *Marketos v American Employers Ins Co*, __ Mich App __; __ NW2d __ (Docket No. 211775, issued 4/28/00), slip op p 6, citing *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 129; 573 NW2d 61 (1997). However, we review a trial court's decision regarding the amount of an award of mediation sanctions for an abuse of discretion. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 158; 536 NW2d 851 (1995); see *Giannetti Bros Construction Co v Pontiac*, 175 Mich App 442, 450; 438 NW2d 313 (1989).

Under MCR 2.403(O)(6)(b), plaintiff was entitled a reasonable attorney fee based on a reasonable hourly or daily rate. See *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 67; 597 NW2d 534 (1999); *Cleary v The Turning Point*, 203 Mich App 208, 212; 512 NW2d 9 (1994). The existence of a contingency fee agreement is but one of several factors to consider in evaluating a reasonable fee; it is not by itself determinative. *RCO Engineering, Inc*, *supra*. Thus, the trial court did not err in awarding attorney fees as a mediation sanction based on its determination of a reasonable hourly rate.

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incidents that he reported involved harassment of plaintiff. None of the alleged disciplinary actions implemented by defendant as a result of Kinney's reporting put an end to this conduct.

[12] Plaintiff was awarded attorney fees and costs pursuant to MCL 37.2802; MSA 3.548(802) and MCR 2.403. On appeal, defendant only challenges the imposition of sanctions under MCR 2.403. The trial court's order does not indicate what portion of the attorney fees and costs was awarded under the CRA or what portion was awarded as sanctions under the court rule. However, plaintiff's motion for attorney fees and costs requested $27,621 in attorney fees and $2,236.20 in costs under the CRA and $20,000 in attorney fees under MCR 2.403. Given that the trial court awarded plaintiff the full amount requested, we approach this issue as challenging the imposition of sanctions in the amount of $20,000.

Insofar as defendant asserts a constitutional challenge to MCR 2.403(O), defendant has failed to properly present the issue for our review. Defendant has not cited any authority to support its position, but instead vaguely argues that the court rule punishes parties that exercise their right to a trial by jury. An appellant may not merely announce its position and leave it to this Court to discover or rationalize the basis for its claims, *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), nor may the appellant give issues cursory treatment with little or no citation of supporting authority. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984); *Community National Bank v Michigan Basic Property Ins Ass'n*, 159 Mich App 510, 520-521; 407 NW2d 31 (1987); see MCR 7.212(C)(7). As such, we decline to consider that final argument.[13]

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra

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[13] Furthermore, we note that, in *Haberkorn v Chrysler Corp*, 210 Mich App 354, 381-382; 533 NW2d 373 (1995), this Court rejected the argument that the mediation rule violates the standards for due process and equal protection, stating:

> The test to determine whether legislation and court rules comport with due process and equal protection is essentially the same. *Shavers v Attorney General*, 402 Mich 554, 612-613; 267 NW2d 72 (1978). Where no suspect classification is involved, legislation must be sustained if it is rationally related to a legitimate government purpose. *Id.* at 613. Here, no suspect classification is involved, a legitimate government purpose exists (expediting litigation), and the court rule is rationally related to that purpose. The court rule placed both plaintiffs and defendant at risk when they rejected the mediation evaluation.

See also *Troyanowski v Kent City*, 175 Mich App 217, 226; 437 NW2d 266 (1988).