STATE OF MICHIGAN

COURT OF APPEALS

MERRIANNE WEBERG, DOUGLAS WILFRED WEBERG, DOUGLAS EDWARD WEBERG, DARRELL JAMES WEBERG, and BRANDON GEORGE WEBERG, Plaintiffs-Appellants,	UNPUBLISHED January 12, 2001
v	No. 217671 Ingham Circuit Court
STATE OF MICHIGAN and MICHIGAN DEPARTMENT OF CORRECTIONS, Defendants-Appellees.	LC No. 96-085041-NO

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this race discrimination case, plaintiffs appeal by right from the trial court's orders granting defendants' motions for summary disposition and denying plaintiffs' motions for reconsideration. We affirm in part, reverse in part, and remand.

This case arises out of defendant Michigan Department of Corrections' ("MDOC") employment and subsequent suspension of plaintiff Merrianne Weberg (hereinafter "plaintiff Weberg"), a white female corrections sergeant, from the Western Wayne Correctional Facility, where plaintiff Weberg alleged that she was subjected to numerous incidents of racial discrimination. In the present action, plaintiffs alleged nine counts against defendants in their amended complaint. The trial court subsequently dismissed all nine counts after it granted defendants' motions for summary disposition. On appeal, plaintiffs assert that the trial court erred in dismissing five of the nine counts: (1) Count III (disparate treatment race discrimination in violation of the Elliott Larsen Civil Rights Act ("ELCRA"), (2) Count IV (disparate impact race discrimination in violation of ELCRA), (3) Count V (intentional race discrimination in violation of ELCRA), (4) Count VI (hostile work environment based on race in violation of ELCRA), and (5) Count IX (loss of consortium as a derivative claim). Plaintiffs do not take issue with the trial court's grant of summary disposition to defendants on Counts I, II, VII, and VIII.

With respect to plaintiffs' disparate treatment, disparate impact, and hostile work environment claims, the trial court granted summary disposition to defendants pursuant to MCR 2.116(C)(10) (no genuine issue of material fact) and dismissed the claims. Initially, the trial court denied defendants' motion for summary disposition with respect to plaintiffs' intentional discrimination and loss of consortium claims, but later granted summary disposition to defendants after concluding that plaintiffs were collaterally estopped from pursuing these two claims because of the dismissal of a federal court action[1] that plaintiffs had filed.[2] Plaintiffs' factual allegations in this state action are identical to those pleaded in plaintiffs' federal action. However, the federal court action also alleged a federal racial discrimination claim premised on 42 USC § 1983 and several pendant state claims including: racial discrimination based on the Michigan constitution and ELCRA, loss of consortium, retaliation, and intentional interference with an advantageous business relationship. The federal action was brought against the State of Michigan, MDOC, and four MDOC officials: Randy Franks, Sharon Lauderdale, Kenny Robinson, and Willis Chapman. The parties later stipulated to dismiss the State and MDOC. The federal district court dismissed plaintiffs' federal action after the individual defendants moved for summary disposition. The federal district court declined to exercise jurisdiction over plaintiffs' state law claims, but concluded that plaintiffs had failed to state a race discrimination claim under 43 USC § 1983. On the basis of the federal district court's dismissal of plaintiffs' federal race discrimination claim, the state trial court dismissed plaintiffs' intentional discrimination and loss of consortium claims on the doctrine of collateral estoppel.

Since then, however, the Sixth Circuit of the United States Court of Appeals reversed the federal district court on appeal with respect to plaintiffs' claim of disparate treatment.[3] The Sixth Circuit held that genuine issues of material fact existed regarding whether Warden Kenny Robinson made an adverse employment decision against plaintiff Weberg for racially discriminatory reasons and whether other MDOC officials conspired with Warden Robinson to racially discriminate against plaintiff Weberg. The Sixth Circuit affirmed the federal district court's grant of summary disposition to defendant on plaintiffs' disparate impact claim.

We are now asked to decide whether the state trial court erred as a matter of law in granting defendants' motions for summary disposition with respect to plaintiffs' disparate treatment, disparate impact, intentional discrimination, hostile work environment, and loss of consortium claims. This Court reviews the trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Plaintiffs first contend that the trial court erred in granting summary disposition on their claim of hostile work environment. We agree. We note that although plaintiffs assert that the trial court granted summary disposition on the hostile work environment claim on the basis of collateral estoppel, this is not the case. The hostile work environment claim was never presented or decided in federal court. *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988)

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[1] *Weberg v Franks*, Case No. 96-CV-74635-DT (ED Mich, 1998).

[2] The trial court subsequently denied plaintiffs' motions for reconsideration on Counts V (intentional discrimination), VI (hostile work environment), and IX (loss of consortium).

[3] *Weberg v Franks*, 229 F3d 514 (CA 6, 2000).

(collateral estoppel is inapplicable if the issue has not been litigated). The issue litigated in federal district court, and later reversed by the Sixth Circuit, was whether plaintiffs established a genuine issue of material fact regarding their claim under 42 USC § 1983. A claim under § 1983 requires proof of intentional discrimination, *Copeland v Machulis*, 57 F3d 476, 481 (CA 6, 1995), while a hostile work environment claim does not require intent, *Quinto v Cross & Peters Co*, 451 Mich 358, 368; 547 NW2d 314 (1996). Thus, a dismissal on this claim on the basis of collateral estoppel would be inappropriate. Here, the state trial court dismissed plaintiff's hostile work environment claim not on the basis of collateral estoppel, but rather on the basis that no genuine issue of material fact existed.

The ELCRA prohibits harassment based on any of the enumerated classifications contained in MCL 37.2202(1)(a); MSA 3.548(202)(1)(a); *Malan v Gen'l Dynamics Land Systems, Inc*, 212 Mich App 585, 587; 538 NW2d 76 (1995). Among the classifications listed is race. MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). Further, the ELCRA prohibits discrimination against individual with respect to a "term, condition, or privilege of employment." MCL 37.2202(1)(a); MSA 3.548(202)(1)(a). The phrase "term, condition, or privilege of employment" has been interpreted to include "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 v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 628; 576 NW2d 712 (1998).

To establish a prima facie case of hostile environment, a plaintiff must demonstrate that the employee belonged to a protected group, the employee was subjected to communication or conduct on the basis of race, the employee was subjected to unwelcome racial conduct or communication, the unwelcome conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and respondeat superior. *Quinto*, *supra* at 368-369, quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). The test for whether a hostile work environment existed is "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." *Radtke*, *supra* at 394. Further, although generally, a single incident will not create a hostile work environment, a single "extremely traumatic experience" may satisfy the statutory requirement of a complaint for hostile work environment. *Id*. at 394-395.

Here, plaintiffs rely on numerous alleged incidents to make their claim of hostile work environment[4]: Warden Robinson's admission in disciplining plaintiff Weberg "simply because she was white in a black housing unit," Sergeant Sharon Lauderdale's alleged racist remarks, Officer Debra Neal's racist comments to another officer (e.g., that he was a "stinkin ass white sons a bitch"), Officer Field's written statement in a log book that "whites need to be killed off one by one," and Captain Anna Austin making job assignments based on race. After reviewing the record, we do not conclude that the allegations with regard to Lauderdale, Neal, Field, and Austin are sufficient to create a hostile work environment because the remarks were isolated, not

[4] Plaintiffs' complaint contained more alleged instances; however, on appeal, plaintiffs are relying on only a few of those instances included in their complaint.

substantiated by the evidence plaintiffs presented, or not made in plaintiff Weberg's presence such that she was personally subjected to the communication or conduct.

However, we do conclude that the comments and conduct of Warden Robinson provided evidence of a hostile work environment, thereby creating a genuine issue of material fact. A warden in the prison system sets the tone for the entire institution. Here, Warden Robinson's persecution of plaintiff Weberg, which had little basis in fact, and his testimony that he felt "strongly" that plaintiff should be terminated "[s]imply because she was white" were so "extreme" that a jury should be allowed to determine whether Robinson's conduct and comments were sufficient to have created a hostile work environment. *Radtke*, *supra* at 395-396. Plaintiffs have presented evidence that a supervisor (Warden Robinson) "create[d] an atmosphere so infused with hostility" that the conditions of plaintiff Weberg's employment were altered. *Id*. at 385, quoting *Lipsett v Univ of Puerto Rico*, 864 F2d 881, 897 (CA 1, 1988). Plaintiffs have satisfied the necessary elements to establish a prima facie case of a hostile work environment claim in that plaintiff Weberg has demonstrated that she belonged to a protected group, she was subjected to unwelcome communication or conduct on the basis of race, the conduct interfered with her employment or created a hostile work environment, and respondeat superior. *Quinto*, *supra*. Although defendants assert that plaintiffs have not established the respondeat superior element, we disagree. Warden Robinson was not merely plaintiff Weberg's co-worker, but was her employer who had the ability to discipline plaintiff Weberg, control her working conditions, and investigate her. *Radtke*, *supra* at 396-397. The trial court erred in granting summary disposition to defendants on plaintiffs' hostile work environment claim because a genuine issue of material fact existed.

Plaintiffs next contend that the state trial court erred in granting summary disposition on plaintiffs' intentional discrimination claim and their derivative loss of consortium claim on the basis of collateral estoppel. We agree. Here, the trial court initially denied defendants' motion for summary disposition with respect to these claims because it apparently believed that a genuine issue of material fact existed with respect to the intentional discrimination claim. Subsequently, as previously stated *supra*, after the United States District Court for the Eastern District of Michigan dismissed plaintiffs' claims, the state trial court concluded that plaintiffs were collaterally estopped from pursuing their intentional discrimination and loss of consortium claims because of the decision reached by the federal district court. However, this federal district court decision has recently been reversed by the Sixth Circuit of the United States Court of Appeals with respect to the dismissal of plaintiffs' disparate treatment reverse race discrimination claim. *Weberg v Franks*, 229 F3d 514 (CA 6, 2000). Hence, the federal defendants, on which the state defendants could be found liable on the basis of respondeat superior, have not been exonerated. See *Couch v Schultz*, 176 Mich App 167, 170-171; 439 NW2d 296 (1989). Because the doctrine of collateral estoppel on which the state trial court based its dismissal of plaintiffs' intentional discrimination and loss of consortium claims is no longer applicable, the trial court's order dismissing plaintiffs' claims on this doctrine must be reversed.

Plaintiffs also argue that the trial court erred in granting summary disposition to defendants because plaintiffs presented sufficient evidence to establish a disparate treatment reverse race discrimination claim against defendants. We agree. First, we note that plaintiffs

have raised disparate treatment (Count III) and intentional discrimination (Count V) as separate claims. The state trial court also treated the theories as separate claims and dismissed them on different grounds. The disparate treatment claim was dismissed under MCR 2.116(C)(10), and the intentional discrimination claim was dismissed on the basis of collateral estoppel. However, "[i]ntentional discrimination is not a separate theory, but rather another name for the disparate treatment theory." *Meagher v Wayne State Univ*, 222 Mich App 700, 709; 565 NW2d 401 (1997). Thus, in addressing this issue, disparate treatment is synonymous with intentional discrimination.

Under § 202 of the ELCRA, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a), an employer or its agent cannot discriminate "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . ." See, also, *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). "Disparate treatment claims may be established 'under ordinary principles of proof by the use of direct or indirect evidence.'" *Id*. at 359, quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695 (Brickley, J.), 707 (Riley, J., concurring in part); 568 NW2d 64 (1997). Two alternative methods are available to establish a disparate treatment claim. *Wilcoxen, supra*. Under the first method, i.e., the "mixed motive" method, the plaintiff can establish a disparate treatment claim by using ordinary principles of evidence, e.g., by presenting direct evidence. *Id*. Alternatively, under the second method, i.e., the "pretextual" method, the plaintiff can establish a disparate treatment claim by using the *McDonnell Douglas*[5] burden-shifting method. *Id.* at 359-360.

In the present case, we agree with the Sixth Circuit of the United States Court of Appeals that plaintiffs have presented "direct evidence" under the "mixed motive" method to support their disparate treatment claim. *Weberg, supra* at 523; see, also, *Downey, supra* at 633. "Direct evidence" is "evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor." *Downey, supra*. "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." *Wilcoxon, supra* at 360-361; see, also, *Downey, supra* at 632. "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." *Wilcoxen, supra* at 360.

Here, the parties do not dispute the first two elements of a mixed motive case, i.e., plaintiff Weberg's membership in a protected class and an adverse employment action. With regard to the other elements, the evidence presented by plaintiffs indicates that Warden Kenny Robinson's primary reason for his adverse employment actions against plaintiff Weberg was race. For example, in a June, 1996, report regarding plaintiff Weberg and an alleged assault on an inmate, Robinson stated: "Here we have three white employees and one black inmate. The wrong message is thus sent to other inmates in the unit who are watching the incident." Moreover, Robinson stated in his deposition that he would terminate an employee because of the perceptions of inmates and that he felt "strongly" that plaintiff Weberg should be terminated

[5] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

"[s]imply because she was white and she was in a black housing unit." Although Robinson's explanation for his adverse employment action against plaintiff Weberg was that he believed that she kicked the inmate and that he was concerned with race relations in the prison, the evidence adduced in the investigation of plaintiff Weberg's alleged excessive use of force on the inmate revealed that the charge against plaintiff Weberg was unsupported. Plaintiffs' direct evidence of racial discrimination with regard to Warden Robinson created a genuine issue of material fact; consequently, the trial court erred in granting summary disposition to defendants.

With respect to the plaintiffs' evidence against other MDOC employees, we conclude that plaintiffs presented no direct evidence that plaintiff Weberg was discriminated against because she was white. Thus, the "mixed motive" method to prove disparate treatment fails with respect to the other MDOC employees.

Further, with regard to the other MDOC employees, plaintiffs have also failed to establish disparate treatment under the "pretextual" method. To establish a pretextual *McDonnell-Douglas* type prima face case of discrimination, the plaintiff must demonstrate that "(1) she was a member of the protected class; (2) she suffered an adverse employment action . . . ; (3) she was qualified for the position; but (4) she [suffered the adverse employment action] under circumstances that give rise to an inference of unlawful discrimination." *Wilcoxen, supra* at 361, quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173 (Weaver, J.); 579 NW2d 906 (1998). "Circumstances give rise to an inference of discrimination when the plaintiff 'was treated differently than persons of a different class for the same or similar conduct.'" *Wilcoxen, supra*, quoting *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991).

Here, plaintiffs have failed to establish that plaintiff Weberg and the other MDOC employees to whom she refers were "similarly situated, i.e., 'all of the relevant aspects' of [her] employment situation were 'nearly identical' to those of [the other employees'] employment situation." *Town, supra* at 699-700 (Brickley, J.), quoting *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 802 (CA 6, 1994); see, also, *Schellenberg v Rochester Elks Lodge No 2225*, 228 Mich App 20, 34; 577 NW2d 163 (1998); *Schultes v Naylor*, 195 Mich App 640, 645; 491 NW2d 240 (1992) (to establish a prima facie case of discrimination, the plaintiff must show that "similarly situated individuals" were treated differently because of their status). Plaintiffs have not produced admissible evidence to show that other MDOC employees of a different class were treated differently for the same or similar conduct. Further, the alleged conduct by Lauderdale, the only sergeant to whom plaintiff Weberg compares herself, is not "nearly identical" to the alleged conduct for which she was disciplined. In addition, with respect to some of the MDOC employees plaintiffs referred to, the differences in employment positions and conduct are not "nearly identical" as required to support a pretextual claim.

Next, plaintiffs argue that the trial court erred in ruling that they failed to establish a genuine issue of fact regarding their disparate impact race discrimination claim[6]. To establish a prima facie case of disparate impact discrimination under the ELCRA, a plaintiff must show that

[6] We note that the Sixth Circuit upheld the dismissal of this claim by the Federal District Court stating, "mere disparate impact is not sufficient to state an equal protection claim under §1983." *Weberg, supra* at 528. Thus, arguably, plaintiff is collaterally estopped as to this claim.

she was a member of a protected class and that "a facially neutral employment practice burden[ed] a protected class of persons more harshly than others." *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 329-330; 559 NW2d 86 (1996), quoting *Reisman, supra* at 538-539. Proof of discriminatory motive is not required. *Dep't of Civil Rights ex rel Peterson v Brighton Area Schools*, 171 Mich App 428, 438; 431 NW2d 65 (1988), quoting *Smith v Consolidated Rail Corp*, 168 Mich App 773, 776; 425 NW2d 220 (1988). However, "a completely neutral practice will always have a disparate impact on some group, and discrimination need not always be inferred from such consequences." *Smith, supra*, quoting *Farmington Ed Ass'n v Farmington School Dist*, 133 Mich App 566, 575; 351 NW2d 242 (1984).

Here, plaintiffs presented no evidence beyond mere conclusory allegations that defendants' investigatory policies or "last chance agreements" were a pretext for discrimination and therefore had a disparate impact on white employees. First, plaintiffs failed to show that personnel director Randy Franks' participation in an investigation of plaintiff Weberg's alleged misconduct was part of a facially neutral policy. Next, plaintiffs' argument that defendant MDOC does not investigate grievances against African-American employees as expediently or thoroughly as it investigates grievances against white employees is without factual support and insufficient to establish that the policy burdens white employees more harshly than others. *Roberson, supra* at 330. Moreover, implicit in plaintiffs' argument that defendant MDOC offers the "last chance agreements" solely to African-American employees is an admission that defendant disciplines African-American employees nearly to the point of dismissal. Further, plaintiffs produced no evidence that the "last chance agreements" are given to only African-American employees other than Warden Kenny Robinson's deposition statement that he was unaware of the number of white employees to whom the agreements were offered. Speculation and conjecture are insufficient to avoid summary disposition. *City of Detroit v Gen'l Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998), quoting *Libralter Plastics, Inc v Chubb Group of Ins Cos*, 199 Mich App 482, 486; 502 NW2d 742 (1993).

In summary, we hold that plaintiffs have presented sufficient evidence with respect to their hostile work environment, disparate treatment (i.e., intentional discrimination), and the derivative loss of consortium claims to survive defendants' motions for summary disposition. The trial court's orders regarding these claims are reversed; however, the trial court's order granting summary disposition to defendants on plaintiffs' disparate impact claim is affirmed.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Joel P. Hoekstra
/s/ Jane E. Markey