STATE OF MICHIGAN

COURT OF APPEALS

DAVID M. MICK,

Plaintiff-Appellant,

v

LAKE ORION COMMUNITY SCHOOLS, ROBERT BASS, RICHARD KAST, CRAIG A. YOUNKMAN, GLORIA ROSSI, CHRISTINE LEHMAN and DAVID BEITER,

Defendants-Appellees.

UNPUBLISHED
June 3, 2004

No. 241121
Oakland Circuit Court
LC No. 00-027577-NZ

DAVID M. MICK,

Plaintiff-Appellant,

v

ROBERT M. BASS and RICHARD KAST,

Defendants-Appellees.

No. 241122
Oakland Circuit Court
LC No. 01-033085-NZ

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals as of right the dismissal of his reverse gender discrimination and retaliation claims brought under the Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm in part and reverse in part.

A decision issued during the pendency of this appeal, *Jager v Nationwide Truck*, 252 Mich App 464; 652 NW2d 503 (2002), held that the CRA's anti-discrimination provision[1] forecloses individual liability, and allows only for employer liability. *Id.* at 484-485. Under

[1] MCL 37.2202(1).

Jager, we must affirm the dismissal of plaintiff's gender discrimination claims against the individual defendants. Not affected by *Jager, supra*, are plaintiff's gender discrimination claim against defendant employer, Lake Orion Community Schools (LOCS), and plaintiff's retaliation claims against all defendants. See n 8, *infra*. We reverse the dismissal of the gender discrimination claims against LOCS that are not barred by the statute of limitations. We also reverse in part the dismissal of plaintiff's retaliation claims.

I

Plaintiff is a teacher employed by defendant LOCS since 1974,[2] most recently at Webber Elementary School. Plaintiff's complaint alleged gender discrimination and retaliation, including that he was qualified, applied for and was denied six elementary school administrator positions during the 1991 to 1999 tenure of then-LOCS Superintendent, Robert Bass. Plaintiff alleged that defendants, particularly Bass, were predisposed to discriminate against men in filling elementary level administrator positions, and placed women less qualified than plaintiff in five of the six positions.[3] Plaintiff also alleged defendants retaliated against him after he filed a gender discrimination charge with the EEOC in July 1998, concerning which the EEOC issued a determination in February 1999 that there was reasonable cause to believe plaintiff's discrimination allegation as to the denial of the Orion Oaks elementary administrator position on July 1, 1998. Plaintiff alleged that defendants' retaliated against him by removing him from two paid school committee positions and denying him additional elementary administrator positions, among other things.

Plaintiff filed his complaint on November 21, 2000, but service on two of the six defendants, Bass and Kast, was not effected before the summons expired.[4] Plaintiff filed a second complaint on July 6, 2001, naming Bass and Kast. The circuit court consolidated the complaints for discovery purposes.

Defendants moved for summary disposition, asserting that the statute of limitations barred claims against defendants Bass and Kast that arose before July 6, 1998, and claims against the remaining defendants that arose before November 21, 1997, MCR 2.116(C)(7), and that plaintiff's remaining claims should be dismissed under MCR 2.116(C)(10). The circuit court agreed. Plaintiff's motion for reconsideration was denied. This appeal ensued.

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[2] Plaintiff testified at deposition that there was a two-year hiatus during this time in which he worked outside the LOCS.

[3] Plaintiff alleged that the sixth position was given to a male less qualified than he.

[4] See MCR 2.102(E), which provides that on the expiration of the summons, "the action is deemed dismissed without prejudice as to a defendant who has not been served with process as provided in these rules, unless the defendant has submitted to the court's jurisdiction." Plaintiff does not argue that Bass and Kast submitted to the circuit court's jurisdiction, or that he requested an extension from the court, MCR 2.102(D).

II

Plaintiff first challenges the dismissal of his reverse gender discrimination claims under MCR 2.116(C)(7). We need not consider whether the individual defendants were properly dismissed because their dismissal is mandated under *Jager, supra.* We thus address this claim only as to defendant employer, LOCS.

We review de novo the circuit court's grant of summary disposition under MCR 2.116(C)(7). *Maiden v Rozwood,* 461 Mich 109, 118; 597 NW2d 817 (1999). The period of limitations for a cause of action under the CRA is three years. MCL 600.5805(8). The three-year statute of limitations is not tolled by filing a charge with the EEOC under Title VII. *Mair v Consumers Power Co,* 419 Mich 74, 84-85; 348 NW2d 256 (1984).

The circuit court erred in dismissing plaintiff's claims against LOCS that arose after November 21, 1997, as they were not time-barred. Although the circuit court's analysis under the continuing violations doctrine[5] may have been erroneous in part, any error was harmless.[6]

III

Plaintiff argues that the circuit court erred in dismissing his gender discrimination claims under MCR 2.116(C)(10).

We review the circuit court's grant of summary disposition de novo. *Maiden, supra* at 118. A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* at 120. The

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[5] Under the continuing violations doctrine, "an exception [to the statute of limitations] exists where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern where only one of the acts occurred within the limitation period." *Meek v Michigan Bell Telephone Co,* 193 Mich App 340, 343-344; 483 NW2d 407 (1991), citing *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505, 528; 398 NW2d 368 (1986). Thus, under the doctrine "an alleged timely actionable event will allow consideration of and damages for connected conduct that would be otherwise barred" by the statute of limitations. The doctrine requires that the subject matter of the alleged acts involved be the same type of discrimination, that the acts be recurring rather than isolated, and that there not be such a degree of permanence such that the plaintiff-employee had notice that he was being discriminated against and should have known to bring suit earlier. *Sumner, supra.*

[6] Plaintiff fulfilled two of the three requisite prongs of the continuing violations theory: he presented evidence that the subject matter of the alleged acts involved was the same type of discrimination (in favor of women), and that the acts were recurring rather than isolated (females were consistently chosen for elementary administrator positions between 1991 and 1999). *Sumner, supra.* However, plaintiff did not fulfill the last prong, i.e., that there was not such a degree of permanence such that he had notice that he was being discriminated against and should have known to bring suit earlier. *Id.* Clearly, plaintiff had notice that he was being discriminated against on July 1, 1998, the date he filed a gender discrimination charge with the EEOC. Plaintiff filed his complaint more than two years later, however, on November 21, 2000. Under this circumstance, the continuing violations theory does not apply.

court considers the documentary evidence submitted in a light most favorable to the opposing party to determine whether reasonable minds could differ regarding an issue of material fact. *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 597; 593 NW2d 565 (1999). "The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion." *Maiden, supra* at 121.

The CRA prohibits employers from discriminating on the basis of prohibited considerations, including gender. MCL 37.2202(1); *DeBrow v Century 21 Great Lakes, Inc, (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001).

Absent direct evidence of discrimination, a plaintiff alleging reverse discrimination is subject to a "heightened" *McDonnell Douglas*[7] burden-shifting analysis. *Allen v Comprehensive Health Services*, 222 Mich App 426, 432; 564 NW2d 914 (1997). To establish a prima facie case of reverse gender discrimination by circumstantial evidence, a plaintiff must show

> (i) background circumstances supporting the suspicion that the defendant is that unusual employer who discriminates against men; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that, despite plaintiff's qualifications, he was not promoted; and (iv) that a female employee of similar qualifications was promoted. Upon this showing, a "presumption" of discriminatory intent is established for possible rebuttal by the employer. [*Allen, supra* at 433.]

If the employer articulates legitimate non-discriminatory reasons for the adverse employment actions, the burden shifts back to the plaintiff to show that the employer's reasons are a pretext for discrimination. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

A

Plaintiff presented evidence that between 1991 and 1999 he applied, and was qualified, for six elementary school level administrator positions, and that five of the six positions went to females. Regarding the denial of the Orion Oaks administrator position in July 1998, consideration of which is not barred by the statute of limitations, plaintiff presented evidence that he applied for and was qualified for the position, that he was not chosen for the position, and that a female less qualified than he was chosen. *Allen, supra.* At that time, plaintiff had twenty-four years of teaching experience both at elementary and middle schools in the LOCS; held two Master's Degrees in Education from Oakland University, one in Curriculum, Instruction and Leadership (1990, 3.9 gpa), and the second in Guidance and Counseling (1983, 3.8 gpa); was certified as a K-12 counselor and K-9 teacher; chaired the building School Improvement/Accreditation Steering Committee for strategic planning for ten years that achieved

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

and maintained for Webber elementary school the highest level of accreditation status from the North Central Association of Colleges and Schools, chaired the K-12 Social Studies Committee for eight years, which revised the district's curriculum to meet state standards; had received a number of teaching awards, including Lake Orion School District's finalist for the Newsweek-WDIV Outstanding Teacher Award; and received numerous letters of praise from parents of his students, school officials, and other LOCS teachers.

The woman chosen for the Orion Oaks principal position earned her Bachelor's Degree in elementary education in December 1992 (2.83 gpa), and was certified to teach in 1993. In 1994, 1995 and 1996, she took graduate level courses in administration. In the fall of 1996 she had thirty credit hours toward a Master's Degree in administration. She had approximately five years of teaching experience when she was placed in the principal position at Orion Oaks in 1998, in contrast to plaintiff's twenty-four years. Moreover, the Orion Oaks principal position was not opened to competitive process, rather, the woman chosen was placed in the principal position from an administrative assistant position she had held for only one year, purportedly because she had "proven herself."

We conclude that plaintiff presented evidence from which a reasonable fact finder could conclude that defendant LOCS chose a woman for the Orion Oaks principal position who was less qualified than plaintiff, and from which a reasonable fact finder could conclude that LOCS was the unusual employer that discriminated against men in the selection of elementary school administrators. Plaintiff presented evidence that between 1991 and 1999, the overwhelming majority of elementary administrator positions went to women within the LOCS. Plaintiff also presented evidence that the Orion Oaks principal position was not opened to the competitive process. The circuit court erred in dismissing plaintiff's gender discrimination claim relative to the Orion Oaks principal position as against defendant LOCS.

B

Plaintiff also argues on appeal that his gender discrimination claims under a disparate impact theory were improperly dismissed. We disagree.

Disparate impact discrimination is a theory under which "proof of a discriminatory motive is not required." *Smith v Consolidated Rail Corp*, 168 Mich App 773, 776; 425 NW2d 220 (1988). The disparate impact theory involves "employment practices that are facially neutral in their treatment of different groups but that, in fact, fall more harshly on one group than on another and cannot be justified by business necessity." *Id.*

The apparent foundation of plaintiff's disparate impact claim is that defendants had a policy of interpreting contractual provisions governing the posting of administrative positions and the selection process therefor such that the administration had unfettered discretion over the process and the hiring of women as elementary school principals and administrators. Plaintiff relies on Article XI of the Master Agreement between LOCS and the Lake Orion Education Association MEA/NEA (LOEA), which provides in pertinent part:

ARTICLE XI – VACANCIES, PROMOTIONS AND TRANSFERS

A. The Board recognizes that it is desirable in making assignments to consider the interest and aspirations of the teachers. Request by a teacher for a transfer to a different class within a building will be made to the building principal. Request by a teacher for a transfer to a different building or position shall be made in writing, one copy of which shall be filed with the Superintendent's Officer, or his/her designee, and one copy to the building Principal. The application shall set forth the reasons for transfer, the school, grade, or position sought, and the applicant's qualifications. Such requests may be renewed once each year to assure active consideration by the Board.

B. The Board shall, during the school year, notify the teaching staff of teaching, adult/community education and *supervisory vacancies*. The vacancies shall be posted in each building for five (5) school days during the school year. During the summer vacation, vacancies shall be posted for five (5) workdays in the central office. Teachers interested in positions may request to be placed upon a mailing list for summer postings, which the Board agrees to mail.

Vacancies in Adult/Community Education postings shall be confined to the Lake Orion School District boundaries.

The Board agrees to give preferential consideration to members of its own teaching staff in filling all vacancies, according to seniority, certification, accreditation standards and qualifications. Qualifications shall mean major, minor or graduate degree as posted.

Transfers shall be limited to those of a voluntary nature or displacement due to staff reductions, as described in Article XX of this agreement.

C. Vacancies shall be filled with voluntary transfers from an on-staff teachers [sic], a laid-off teacher, or a teacher returning from leave of absence, by seniority, qualification and accreditation requirements.

* * *

We conclude that neither the language of Article XI nor the record submitted below supports plaintiff's argument. The portions of the Master Agreement contained in the record indicate that it was the contract governing *teachers'* employment. The deposition testimony submitted below supported that this LOCS-LOEA agreement did not govern the posting of positions or selection of *administrators*. The evidence submitted below supported that the selection of candidates to fill administrator positions was a process involving discrete hiring committees assembled to fill particular positions. The hiring committees made recommendations to the administration regarding the selection of administrators, and the Board and Superintendents retained considerable discretion in that selection process.

Plaintiff's discrimination claim against LOCS on a disparate impact theory thus fails.

IV

Plaintiff also challenges the dismissal of his retaliation claim under MCR 2.116(C)(10). This Court reviews de novo the circuit court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Id.* The circuit court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Jager, *supra*, does not foreclose individual liability under the CRA's retaliation provision.[8] The CRA's anti-retaliation provision, MCL 37.2701(a), provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> > (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted or participated in an investigation, proceeding, or hearing under this act.

To establish retaliation, a plaintiff must show that: (1) he engaged in a protected activity; (2) the protected activity was known to defendants; (3) defendants took an employment action adverse to the plaintiff; and (4) there was a causal connection between the protected activity and the retaliation. *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000); *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). To establish the causation prong, the plaintiff must show that his participation in activity protected by the CRA was "a significant factor" in the employer's adverse employment action. *Barrett v Kirtland Community College*, 245 Mich App 306, 315; 628 NW2d 63 (2001). An adverse employment action must be materially adverse, i.e., more than "mere inconvenience or an alteration of job responsibilities." *Meyer*, *supra* at 569, quoting *Wilcoxon*, *supra* at 364.

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[8] *Jager* involved claims of hostile environment sexual harassment under the CRA, and interpreted the CRA's anti-discrimination provision, MCL 37.2202(1), as foreclosing individual liability, and allowing only for employer liability. *Id.* at 484-485. The language of *Jager*'s holding is such that all *discrimination claims* brought under the CRA are encompassed, not just hostile environment sexual harassment claims. See, e.g., *Poches v EDS*, 266 F Supp 2d 623, 626 (ED MI, 2003), in which the United States District Court for the Eastern District of Michigan applied Michigan's CRA in a sex harassment and retaliation case, and noted regarding *Jager*, "it is clear that *Jager* forecloses *any state-law claim of gender discrimination* against Plaintiff's former supervisor . . . ." (emphasis added). However, as noted in *Elezovic v Ford Motor Co*, 259 Mich App 187, 202 n 5; 673 NW2d 776 (2003), *Poches* also addressed whether *Jager*'s holding carried over to the CRA's anti-retaliation provision, MCL 37.2701(a), and concluded it did not, based on the retaliation provision's use of the term "person," unlike the CRA's discrimination provisions, which use the term "employer." *Poches*, *supra* at 628 (Michigan's CRA authorizes imposition of individual liability for retaliation, including individual liability for supervisor, since retaliation provision uses term "persons.")

A

Plaintiff's complaints alleged that defendants retaliated against him after he filed a discrimination charge with the EEOC in July 1998 and after the EEOC issued a preliminary determination on the merits of the charge in his favor on February 5, 1999. The EEOC's preliminary determination letter included a conciliation agreement and urged the parties to work with the EEOC in order to remedy the violation of Title VII.

Plaintiff alleged that after the EEOC's determination, defendant Gloria Rossi, the principal at plaintiff's elementary school (Webber), criticized his performance without foundation, took away a paid committee chair position plaintiff had held for ten years, and gave the position to a less qualified female. Plaintiff alleged that Rossi denied him the opportunity to serve as acting principal on occasions when she (Rossi) was out of the building, and allowed only women to act in that capacity. Plaintiff alleged further that, after the EEOC's determination, he applied for another elementary school principal position and that a female less qualified than he was hired. Finally, plaintiff alleged that defendant Beiter was critical of his work performance without basis, took away a paid committee-leadership position he had held for eight years, and that the committee position went to a female. Plaintiff alleged Bass and Kast knew of and condoned Rossi's criticism, and retaliated against him by denying him employment opportunities he should have retained or been granted.

Defendants do not dispute that plaintiff established the first three prongs of retaliation: that he engaged in protected activity, his filing of a discrimination charge with the EEOC and filing of the instant suit, that defendants knew of the activity, and that plaintiff was subject to adverse employment actions. Defendants maintained they were entitled to summary disposition of the retaliation claim because plaintiff could not demonstrate a causal connection between the filing of his EEOC charge and defendants' adverse employment actions thereafter.

B

Regarding defendants' conduct after he filed the EEOC charge on July 1, 1998, plaintiff argues on appeal that defendant Rossi unfairly criticized his performance and threatened him with disciplinary action, and forced him to resign as the chairperson of the Building School Improvement/Accreditation Steering Committee for Strategic Planning, after he had held that position for ten years. Plaintiff argues that, in contrast, female chairpersons of school improvement committees were not similarly forced to resign. Plaintiff also maintains that Rossi denied him the opportunity to assume the role of acting principal when she was absent from the building, while allowing only females to do so.

Plaintiff presented evidence that he was threatened with disciplinary measures for the first time in his lengthy teaching career by Rossi. Rossi sent plaintiff the following memo dated February 11, 1999, and carbon copied it to plaintiff's personnel file:

> The purpose of this memo is to document the events of our meeting on February 9, 1999 at 3:45 p.m. at Webber. At that meeting . . . you were reminded that I have verbally warned you that there was to be no interference by you in the school improvement process. You have been directed that there were to be "no surprises" on the school improvement agenda. In fact, you were directed in

> writing in November, 1998 to present Steering Committee agendas to all staff three days prior to a Steering Committee meeting. The "agenda" which was placed in the boxes of staff members on the morning of February 4, 1999 is not the same agenda, which had been distributed by you through email on January 29, 1999. Such actions are both deceptive and insubordinate.
>
> I have in my possession a memo from [the] School Improvement Secretary, which states ". . . the agenda I typed out was different before the changes made by Dave. I felt really funny about the changes made . . ." Please be advised that any further such interference will not be tolerated and will result in more severe actions.

Plaintiff responded in a memo, denying ever having been warned before February 9, 1999, that he should not "interfere" in the School Improvement process. Plaintiff's memo also stated that he had notified the EEOC of this unfair harassment and requested that Rossi's memo and accompanying materials be removed from his personnel file. After plaintiff's union intervened, the materials were, in fact, removed from his personnel file.

We conclude that Rossi's letter threatening plaintiff with disciplinary measures was circumstantial evidence of retaliation. Plaintiff had never before been disciplined in his twenty-five years of teaching, plaintiff presented evidence from which a reasonable factfinder could conclude that Rossi's letter was not founded in fact, and Rossi's reprimand letter was dated just days after the EEOC issued its February 5, 1999 determination[9] finding merit in plaintiff's

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[9] The dissent concludes the causation element of retaliation was not established because the alleged retaliatory acts were too remote in time from the filing of plaintiff's claim with the EEOC in July 1998. Yet, the EEOC issued its determination finding merit in plaintiff's claim (and urging the LOCS to conciliate) on February 5, 1999, seven months after plaintiff filed his claim, and Rossi's challenged conduct occurred within a few days, around February 11, 1999. Further, plaintiff wrote a memo to Rossi in response to her February 11, 1999 memo, in which plaintiff indicated that he (plaintiff) had notified the EEOC of her (Rossi's) harassment (in February 1999) of him. Under these circumstances, we do not agree that the causation element was not established sufficiently to survive summary disposition.

The dissent also rejects plaintiff's retaliation claim against Rossi on the basis that an employer's act that does not permanently affect an employee's economic or employment status does not constitute an adverse act for purposes of establishing retaliation under the CRA. We are aware of no such permanency requirement. See, e.g., *Meyer*, *supra* at 569, in which this Court explained the concept of an adverse employment action, citing *Wilcoxon*, *supra* at 364:

> [A]n adverse employment action (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.

We believe that a reasonable fact finder could conclude that it was more than "mere inconvenience" or an "alteration of job responsibilities" for plaintiff's performance to be criticized (for the first time in his 23 years of employment with the school district), by the principal at the elementary school at which he taught, in writing, and copied to plaintiff's personnel file, referring to plaintiff as "deceptive and insubordinate," and threatening

(continued…)

allegation that gender discrimination had played a role in the selection of the woman chosen for the principal position at Orion Oaks in July 1998.

Rossi also encouraged plaintiff to resign as chairperson of the building School Improvement Committee. However, plaintiff's second five-year term as chair of that committee was expiring at the end of the 1998-1999 school year, and Rossi testified that other staff at Webber Elementary had expressed an interest in chairing the committee to her. Although plaintiff argued that another School Improvement Committee chairperson, Ann Galovich, a female, was not encouraged to resign after two terms, it is clear that Galovich was at a different school than plaintiff and that principals of each respective school had authority regarding the chair positions of School Improvement committees at their own school, not that of others. Thus, this evidence did not establish that plaintiff was treated differently than women; Rossi was not the principal at Galovich's school, thus Galovich was not similarly situated to plaintiff vis a vis Rossi.

Plaintiff also presented evidence that Rossi assigned only women to fill in for her as acting principal when she was out of the building. However, deposition testimony submitted below supports that Rossi routinely asked two teachers, who did not have classrooms to supervise, to assume the role of acting principal, and that they were asked on the basis of not having classroom supervision responsibilities, and on the basis of seniority as well. Plaintiff did not present evidence to rebut these legitimate explanations for Rossi's choice of staff.

C

Although plaintiff argues that after filing his EEOC charge in July 1998, he applied for four administrator positions for which he was qualified, but not chosen, his appellate brief discusses only one of these positions, the principal position at Webber Elementary in 2001. Plaintiff argues that the affidavit he submitted below of Michael Lorts was *direct evidence* of retaliation against him as to his application for the Webber principal position. We disagree.

Direct evidence of discrimination is evidence that "if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001), quoting *Jacklyn v Schering-Plough Healthcare Products Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

Lorts, a parent of three LOCS students, was the only male member on the hiring committee for the Webber Elementary principalship in 2001. Lorts stated in his affidavit that while the hiring committee was considering extending an invitation to plaintiff for an interview, one of the committee members asked what the ramifications were if a candidate was suing the district. Lorts' affidavit states that another hiring committee member, a member of the Board of Education sitting near him, responded by saying words to the effect of, "it doesn't matter. It's a moot point. It won't go far." Lorts' affidavit states that the school board member immediately apologized to him for having said so. The affidavit states that plaintiff was interviewed for the position, performed impressively at the interview, and that Lorts ranked plaintiff as his first

(…continued)

"more severe action[]."

choice for the position. Lorts' affidavit concludes by stating he believed that the nine female committee members, with the exception of one whom he believes voted for plaintiff, wished to have a female be the ultimate recipient of the job.

Lorts' affidavit, including the school board member's statement, does not support that plaintiff was not chosen for the Webber position based on retaliation. While it may support an inference of gender discrimination, plaintiff's arguments regarding the Webber opening in 2001 are confined to his retaliation claim.

D

Plaintiff also argues that Beiter's removing him as chair of the district-level Social Studies Curriculum Committee in October 2000, was in retaliation for filing the EEOC charge. Under the circumstance that Beiter's challenged conduct occurred more than two years after plaintiff filed the EEOC charge, we conclude Beiter's conduct was too remote in time from plaintiff's protected activity to permit a finding of a causal connection between the two, *Meyer, supra,* and that Beiter was thus properly dismissed.

E

We reverse the dismissal under MCR 2.116(C)(7) and (C)(10) of plaintiff's gender discrimination claim against LOCS arising from the July 1, 1998 denial of the Orion Oaks elementary administrator position. We affirm the dismissal of the gender discrimination claims as against all the individual defendants under *Jager, supra*.

Regarding plaintiff's retaliation claim, we conclude that genuine issues of fact precluded dismissal of Rossi's threatening plaintiff with disciplinary measures. In this regard Rossi, LOCS, Bass and Kast[10] were improperly dismissed. In all other respects, we affirm.

Affirmed in part, reversed in part. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Helene N. White

[10] Bass and Kast left the LOCS in 1999 and were replaced by Younkman and Lehman, respectively. However, the conduct of Rossi's that plaintiff challenges as retaliatory occurred while Bass and Kast were still in the LOCS, in 1998 and 1999. On remand, Bass and Kast may test the extent to which plaintiff can support his claim that Bass and Kast were complicit in Rossi's conduct.