STATE OF MICHIGAN

COURT OF APPEALS

ROBERT PATTISON,

Plaintiff-Appellee-Cross-Appellant,

v

CITY OF DETROIT, DETROIT FIRE DEPARTMENT, ERIC JONES, ALFIE GREEN, and CHARLES SIMMS,

Defendants-Appellants-Cross-Appellees.

UNPUBLISHED
October 22, 2020

No. 350474
Wayne Circuit Court
LC No. 18-000250-CD

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Defendants appeal by leave granted[1] the trial court's order granting in part and denying in part defendants' motion for summary disposition in this racial discrimination action. Plaintiff cross-appeals by right the same order. We affirm.

I. BACKGROUND

This proceeding arises out of plaintiff's termination as a trial firefighter[2] from the Detroit Fire Department. Plaintiff, who is Caucasian and in his early 40s, completed firefighter training and was assigned to a fire station, Engine 55, that was, unbeknownst to plaintiff, predominantly African American. The weekend before his assignment was scheduled to start, plaintiff (who was

[1] *Pattison v City of Detroit*, unpublished order of the Court of Appeals, Docket No. 350474, entered November 12, 2019.

[2] A "trial firefighter" has completed training, but is considered to hold probationary status for a year. Unlike full firefighters, who are also referred to as 'fully-badged" firefighters, trial firefighters are at-will employees and have only limited access to union benefits under the City's collective bargaining agreement.

off-duty at the time) brought to Engine 55 a large watermelon with a pink bow attached. The watermelon was poorly received, and many people present were deeply offended and hurt. Many people drew the conclusion that plaintiff had set out to be intentionally racially offensive;[3] others observed that plaintiff appeared to be confused and embarrassed by the reaction. Plaintiff maintains that he purchased the watermelon before he knew of his assignment,[4] he did not know the racial composition of Engine 55, and he intended the watermelon to be a friendly gift. Plaintiff also maintains that he was under the impression that it was traditional for newly-assigned trial firefighters to bring a gift of food to their assigned stations, and he intended the watermelon to be a healthy and nutritious alternative to the more-common gift of donuts or similar sweets.

The testimony indicates that it was essentially unanimously agreed within the Fire Department that plaintiff's choice of gift reflected a terrible misjudgment,[5] and that "something" needed to be done. There was less agreement as to plaintiff's probable motives, or as to *what* should be done. The testimony also established that it would have been possible for plaintiff to have learned the racial composition of Engine 55 ahead of time, but only if either he just happened to know the right people or he specifically made active inquiries. The individual defendants maintained that they had never heard of any tradition of bringing gifts of food to engine houses. Other firefighters explained that such a tradition did indeed exist; although they emphasized that doing so was never mandatory, expected, commonplace, or, implicitly, even encouraged. Two African American firefighters, including one of the individual defendants, admitted that they had personally brought watermelon into their engine houses, and they had suffered no reproach for doing so.

An internal investigation ensued. Unfortunately, the record makes it clear that the investigation was, at a minimum, disorganized. It was uniformly agreed that defendant Eric Jones, the Fire Commissioner for the City of Detroit Fire Department, was the ultimate decisionmaker, but he played no role whatsoever in the investigation. Testimony suggested that because plaintiff had not yet started his assignment, he was still under the jurisdiction of defendant Alfie Green, the Chief of Training for the Fire Department, who was therefore supposed to be responsible for the investigation. Green, however, did not know how the investigation was commenced, and he believed it had actually been mostly performed by Eugene Biondo, the Deputy Chief of Fire Operations.[6] Biondo, however, did nothing more than meet with plaintiff for five minutes and send an email to Green with a summary of his impression of the interview, which he believed concluded his role in the investigation. Defendant Charles Simms, the Second Deputy

[3] As defendants have pointed out, watermelon has a long and painful history of being associated with negative stereotypes regarding African Americans. A significant concern in this matter is whether plaintiff must have been aware of the connotations.

[4] Plaintiff contends that, in fact, he purchased two watermelons and ate the other one himself.

[5] We note that although plaintiff characterizes the watermelon as merely "naïve," he does not seriously dispute that it was, at a minimum, unwise. The gravamen of plaintiff's position is that although bringing the watermelon might have been stupid, it was not malicious.

[6] Because the Chief of Department, Robert Distalrath, was on vacation at all relevant times, Biondo was the acting Chief.

Commissioner for the Fire Department, merely concurred with Green's ultimate decision on the basis of what Green told him.

It is readily apparent from reading all of the deposition testimonies that *no one* believed himself to be responsible for conducting the investigation, and it appears that no single individual was ever aware of all of the evidence. For example, Biondo was aware that numerous firefighters at Engine 55 had written letters about the incident, but he did not know whether those letters had been self-initiated or requested by someone. Green and Simms both denied seeing or reviewing the letters; Jones noted that he saw a "package" of letters but did not state whether he reviewed them. Only two of the letters clearly set forth factual recitations of what occurred at the engine house, and only one of those letters reflected any meaningful interaction with plaintiff. That letter, written by an African American firefighter, stated that plaintiff "seemed to be oblivious to the fact of what [plaintiff] perceived as a gift had created so much tension." At some point, plaintiff removed the watermelon and returned with a jar of honey, at which point "he seemed to be very embarrassed and was trying to do damage control by making small talk . . ." That firefighter opined that "[plaintiff's] gesture was not well thought out and he made a very bad decision on choosing a gift." During his deposition, Green did not answer the question of whether he might have changed his mind if he had seen that letter.

It is also readily apparent that no one involved in the investigation cared about plaintiff's motives, either because they felt his motives did not matter or because they felt it was nearly impossible for plaintiff to have had any motive other than racial insensitivity. Green was of the belief that he had ordered plaintiff the previous day not to bring anything to the firehouse, although his testimony also indicated that he had merely "advised" plaintiff that bringing anything was unnecessary.[7] Green was personally offended by the watermelon, implicitly deeply so; he also did not care what anyone else might have told plaintiff, and he believed that the City's zero-tolerance policy was violated by the bare fact that people had been offended. Green reviewed Biondo's email, which he believed to constitute the results of the investigation, and he otherwise talked to no more than five people. Green believed there was no value in interviewing plaintiff and regarded it as "hard to believe that at his age he did not understand the implications of his action." Green testified that he had personally prepared watermelon for an engine house, although he emphasized that he did so as an assigned cook and thus in a different context. Green opined that in the unlikely event that plaintiff had no racist intent, bringing the watermelon was nevertheless "very poor judgment" and, in his opinion, a violation of his own direct order.[8]

[7] We note that the Fire Department has a military-style command structure, so words that have a common meaning elsewhere might be used differently internally. However, we would not understand the word "unnecessary" to be a prohibition, nor would we understand "advice" to be an order.

[8] As noted, Green seemingly believed that he had specifically ordered plaintiff not to bring anything to the engine house. Failure to obey an order was not a stated basis for plaintiff's termination.

Biondo's five-minute interview with plaintiff was, seemingly, the only effort anyone involved in the investigation made to consider plaintiff's perspective. Biondo asked plaintiff to explain the pink bow, and he opined (and emailed to Green) that plaintiff had no answer beyond the bow being a "failed attempt at humor." Plaintiff testified that the humor had actually been an intended play on firefighters possibly getting "a smirk out of" the pink bow, which, generously construed, appears to imply a play on gender-role stereotypes rather than anything racial.[9] Biondo was the only person involved in the investigation who expressed no opinion as to plaintiff's intentions, explaining that his only concern was how everyone felt about the situation. Biondo opined that plaintiff apparently did not comprehend the negative connotations of the watermelon. Simms relied entirely on Green's recommendation.

Jones affirmatively refused plaintiff's request for an interview, explaining that he did not believe plaintiff would be truthful with him. However, he also noted that his policy was to refrain from asking questions during investigations. Jones agreed that watermelon was "absolutely not" offensive under all possible circumstances, and whether it was offensive depended on context. Jones conceded that there was "a very minute possibility" that plaintiff had good intentions in bringing the watermelon, but believed that it was effectively impossible that plaintiff had not intended to make a racially insensitive joke and play upon a stereotype. However, he admitted he did not know plaintiff's life experience and made no effort to learn of plaintiff's actual intent. Jones opined that it was impossible to separate the watermelon from the bow, and it was "damning" that plaintiff had seemingly been unable to explain the joke to Biondo. Nevertheless, Jones had no actual evidence that plaintiff intended the watermelon to be racially offensive; he relied on the historical stereotype connotations and the expectation that plaintiff's age and experience should have made him aware of those connotations.

Meanwhile, Shawn McCarty, a Battalion Chief stationed at Engine 55 and not involved in the investigation, spoke to a number of people who had been present when plaintiff brought the watermelon. According to McCarty's discussions, "talk around the firehouse" varied: "[s]ome were offended, some thought it was stupid, some couldn't believe it." The "gist" of the discussion "was just a general sense of disbelief that someone of his age would do something like that. You know, there was discussion that, well, maybe he didn't know, and then the counter to that was, well, he's 40 plus years old, of course he knew." McCarty opined that probably no offense would have been taken to an African American firefighter bringing a watermelon. McCarty, who is African American, testified that he was not personally offended by plaintiff's gift of a watermelon, but he thought it was unwise and plaintiff should have known people would take offense. Nevertheless, he also reported hearing a rumor from several sources that at some point at the Training Academy, plaintiff had volunteered for a project for one of the instructors and brought a watermelon to the site, where "it was well received." McCarty opined that plaintiff had probably

[9] We are unaware of any racial connotations to bows, the color pink, or pink bows; nor have defendants offered any indication that such connotations exist. Our own independent research has only revealed some possible gender-related connotations, or possibly a breast cancer awareness campaign.

just been "incredibly[] stupid." McCarty also noted that he had, himself, brought in watermelon to share with everyone.

All trial firefighters are given a "Final Probation Report." Green did not recall how much of plaintiff's Final Probation Report he filled out, but he "wrote the charges up" and signed it. In plaintiff's Final Probation Report, Green found plaintiff's "work behavior" unsatisfactory because bringing the watermelon with a pink bow on it was racially offensive, in violation of the City's zero-tolerance policy. The Final Probation Report is dated the same day as Biondo's email. Green testified that he was the one who recommended termination, and the other signatory to the report, Simms, had no real involvement. Green testified that he considered options for plaintiff short of termination, such as moving him to a different engine house, sending him back to diversity training, counseling him, or suspending him. Simms explained that he believed that plaintiff had been "advised not to take a gift to the fire station" and that the watermelon was "poor judgment" based on "the demographics of the firehouse." Simms testified that although he gave the matter some independent consideration, he relied entirely on Green's recommendation and presentation of the facts. As noted, Green did not know about the letter opining that plaintiff did not appear to comprehend the situation. The recommendation for termination included no reference to violating an order.

Also on the same date as the Final Probation Report, plaintiff wrote a letter of apology as follows:

> To the entire crew at E-5, L-27, C-2 and Medic 5. I am not a person of hate. I do not support any such rhetoric. My gift was meant to be convivial in nature not with ridicule or ambiguity [sic]. I apologize for my ignorance in such a gift. My mind simply did not go there. I implore anyone who may have taken offense to forgive my carelessness. I hope for the opportunity to prove my intentions were good. I send this letter with the upmost respect for these are the men and women in which OUR lives rely on. I will proudly put my life on the line for the people I'm working for and with.

Simms denied having seen plaintiff's letter, but opined that it would not have made any difference to him. We have not found any clear indication in the record whether Green saw plaintiff's letter.

As noted, Jones was the ultimate decisionmaker. Jones explained that he primarily based his decision to terminate plaintiff "on the historic stereotypical nature of watermelons and African Americans back from the times of slavery," and he also noted that he felt the pink bow "reinforced the stereotypical nature of the watermelon and black people." Jones made no effort to learn of plaintiff's actual intent, but he was uncertain whether it would have affected his decision-making if he had been aware of a custom of new recruits bringing gifts of food to their newly assigned stations. Furthermore, Jones was also unaware of plaintiff's apology, but in contrast to Simms, he stated that he "would have definitely taken it into consideration." Nevertheless, Jones opined that although he did not know plaintiff's actual life experience, "by the time you reach the age of 40, you have to have had some life experiences, you have to have been aware or heard of racial animus or incidents that you do – or, you are aware of some things that are stereotypical and should not be done." Jones could not recall whether he considered any sanction less than termination for plaintiff.

McCarty testified that after plaintiff was terminated, some people thought it was "good riddance," and everyone had believed that "something should have been done," but most people felt that termination was excessive and that if plaintiff "had done his homework then he may not have done that." For unknown reasons, plaintiff's termination also generated media interest. Plaintiff denied making any posts on social media or contacting the press, and he declined a request for an interview. Biondo denied speaking to the media, explaining that he "avoid[s] the media whenever I can." McCarty did speak to the press, confirming that there was a voluntary tradition of bringing in doughnuts, agreeing that bringing a watermelon was racially insensitive "to some people," and opining that he did not think plaintiff should have lost his job.[10] On October 6, 2017, Jones issued a press release that read:

> There is zero tolerance for discriminatory behavior inside the Detroit Fire Department. On Saturday, Sept. 30, 2017, at Engine 55, a trial firefighter (probationary employee) engaged in unsatisfactory work behavior which was deemed offensive and racially insensitive to members of the Detroit Fire Department. After a thorough investigation, it was determined that the best course of action was to terminate the employment of this probationary employee.

Jones remembered generally writing a press release about plaintiff's termination, but he explained that press releases were a regular part of his job, and his testimony suggested that this press release had been essentially just pieced together from boilerplate "checkpoints."

Shortly thereafter, another cadet, Tadarius Spearman, posted on Facebook a photograph taken on the Training Academy premises of himself, plaintiff, and several other African American cadets in a show of support for plaintiff. McCarty "heard about" the showing of support but also stated that he was not on social media and did not really understand how social media worked. Simms similarly became aware of a social media post made by a number of cadets with plaintiff, but he "didn't even read the post on that" because he was not involved in social media. Simms's testimony was unclear, but apparently Spearman's post was a violation of Fire Department policy regarding posts about the Training Academy. Twelve cadets wrote letters or emails in support of plaintiff, generally attesting to his character and history of good intentions; some mentioned that he was a health advocate or vegan.

Meanwhile, plaintiff contends that another, similar incident demonstrates bias in the Fire Department. According to a complaint filed as a consequence of that other incident, Willie Bragg, an African American male EMT made a post on Facebook to the effect that " 'white men, women and children should be raped and killed,' " enslaved and beaten, and " 'used as alligator bait.' " Kimberly Asaro, a Caucasian female EMT who was "friends" with Bragg on Facebook, saw the post and took offense. Asaro complained to Jones and to her immediate supervisor, the latter of whom ordered Bragg not to have any contact with Asaro. Bragg allegedly disregarded the order and commenced a campaign of harassment and intimidation toward Asaro at work. Asaro continued to complain to her supervisors, who undertook no further disciplinary action toward Bragg, even though a Caucasian firefighter had allegedly been terminated the previous year "for

[10] McCarty was never formally disciplined for speaking to the press about plaintiff's case, but he did "informally" receive "an earful."

posting 'racist remarks' on Facebook." Asaro eventually resigned due to medical issues caused by the stress of the situation.

Although Bragg had a different immediate chain of command, Jones was again the ultimate decisionmaker regarding Bragg. Jones recalled that Bragg had "replied to a comment by – I believe her name is Stacey Dash,[11] about all white people should be eaten by alligators or something ridiculous like that, and he replied like he agrees, or 100 percent agrees." Jones could not recall whether Bragg was disciplined, but Bragg was not terminated because,

> So there were, in my mind, some significant first amendment issues. One, he was off duty, he was not acting in the capacity of a Detroit Fire Department member, he replied to a post by a celebrity, he did not direct the post at the member that was making the allegation. Mrs. Asaro – Ms. Asaro friended him and was on his page looking at – however this works, the dialogue on Facebook, and after consultation with Labor and the Law Department, it was determined that it was not a dismissible offense.

Biondo was aware of a few incidents in which a black firefighter had allegedly acted discriminatorily toward a white firefighter; in at least one of them the investigation was still ongoing, and in others "we could not determine one way or another."

Plaintiff testified that he was unaware that he could have taken his termination up with the City of Detroit's Civil Rights Inclusion Office, formerly the Human Rights Department, if he felt he had been discriminated against. Plaintiff commenced the instant action alleging eight counts: (I) violation of Michigan's Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*; (II) violation of Michigan's Bullard-Plawecki Employee Right to Know Act (ERKA), MCL 423.501 *et seq.*; (III) violation of 42 USC § 1981 through race-based discrimination; (IV) violation of 42 USC § 1983 on the basis of equal protection; (V) violation of 42 USC § 1983 on the basis of a First Amendment right to give a gift of watermelon instead of unhealthy donuts; (VI) defamation on the basis of the press release; (VII) false light invasion of privacy; and (VIII) intentional infliction of emotional distress (IIED). The trial court granted defendants' motion for summary disposition as to all but Counts I, II, and III; and we granted defendants' application for leave to appeal the trial court's partial denial. Plaintiff promptly cross-appealed the trial court's grant of summary disposition as to Counts VI and VII. Defendants subsequently withdrew their appellate challenge to plaintiff's ERKA claim, so we will not discuss that issue.

II. STANDARDS OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Courts reviewing motions for summary disposition must resolve all reasonable inferences and reasonable doubts in favor of the nonmoving party. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint,

[11] Stacey Dash is an actress. See < https://en.wikipedia.org/wiki/Stacey_Dash >.

this Court considers all evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Maiden*, 461 Mich at 120. The nonmoving party responding to a motion under MCR 2.116(C)(10) must demonstrate more than a mere possibility or promise that a claim could be supported by evidence at a trial. *Id*. at 121. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119.

In addition, the applicability of immunity or a privilege are questions of law and therefore reviewed de novo. *Denhof v Challa*, 311 Mich App 499, 510; 876 NW2d 266 (2015). The interpretation and application of statutes, rules, and legal doctrines is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Even where this Court's review is de novo, this Court will still endeavor to respect the trial court's superior ability to evaluate credibility and the context before it, to the extent possible. See *In re Loyd*, 424 Mich 514, 535-536; 384 NW2d 9 (1986). We observe that the trial court clearly gave very thorough and thoughtful consideration to this difficult matter, and we think it likely that the trial court has a better holistic comprehension of the entire context of the situation than could we. Finally, "[t]his Court reviews for an abuse of discretion a trial court's decision on a motion for reconsideration." *In re Estate of Moukalled*, 269 Mich App 708, 713; 714 NW2d 400 (2006). This Court will generally uphold a correct outcome even if it was arrived at on the basis of flawed reasoning. *Mulholland v DEC Internat'l Corp*, 432 Mich 395, 411 n 10; 443 NW2d 340 (1989).

III. PRIMA FACIE CASE OF RACIAL DISCRIMINATION

Defendants first argue that plaintiff cannot establish a prima facie case of racial discrimination, so summary disposition was improperly denied as to plaintiff's Counts I and III. We disagree.

In relevant part, MCL 37.2202(1) of the Elliott-Larsen Civil Rights Act (the ELCRA), MCL 37.2101 *et seq*., and 40 USC § 1981 of Title VII both confer protections against intentional discrimination on the basis of race. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 606-608; 886 NW2d 135 (2016); *Gen Bldg Contractors Ass'n, Inc v Pennsylvania*, 458 US 375, 390-391; 102 S Ct 3141; 73 L Ed 2d 835 (1982). Under the ELCRA and Title VII, if there is no direct evidence of racial discrimination, a plaintiff may establish such unlawful discrimination through circumstantial evidence. *Hecht*, 499 Mich at 607-608; *Amini v Oberlin College*, 440 F 3d 350, 358 (CA 6, 2006). Traditionally, any prima facie claim of racial discrimination may be established under "the *McDonnell Douglas* approach," under which a plaintiff must:

> present evidence that (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Hazle v Ford Motor Co*, 464 Mich 456, 462-463; 628 NW2d 515 (2001), citing *McDonnell Douglas Corp v Green*, 411 US 792, 802; 93 S Ct 1817; 36 L Ed 2d 668 (1973).]

"[T]he elements of the *McDonnell Douglas* prima facie case should be tailored to fit the factual situation at hand." *Hazle*, 464 Mich at 463 n 6. Defendants explicitly concede the first three elements of the above *McDonnell Douglas* test; they challenge only the fourth element.

Our Supreme Court has articulated a more applicable basis for "proving the ultimate question of discrimination in a circumstantial evidence case." *Hecht*, 499 Mich at 607-608.

> A plaintiff can attempt to prove discrimination by showing that the plaintiff was treated unequally to a similarly situated employee who did not have the protected characteristic. An employer's differing treatment of employees who were similar to the plaintiff in all relevant respects, except for their race, can give rise to an inference of unlawful discrimination. In order for this type of "similarly situated" evidence alone to give rise to such an inference, however, our cases have held that the "comparable" employees must be "nearly identical" to the plaintiff in all relevant respects. [*Id*. at 608 (footnote citations omitted).]

The gravamen of this issue—as to both claims—is what it means for employees to be "nearly identical . . . in all relevant respects."

Plaintiff asserts that he was similarly situated to Bragg, an African American employee who suffered no repercussions for engaging in racially insensitive conduct while off-duty that generated repercussions in the workplace and caused emotional stress for at least one member of a different race. The gravamen of defendants' argument is that plaintiff and Bragg are not "similarly situated," and defendants contend that the trial court erroneously construed defendants' argument as requiring plaintiff and Bragg to be identical in *all* respects. Defendants point out a lengthy list of obvious and undisputed distinctions between Bragg and Plaintiff, including: plaintiff was a probationary employee whereas Bragg was a certified employee; plaintiff was a firefighter whereas Bragg was an EMT; plaintiff and Bragg had different immediate supervisors; plaintiff and Bragg had different seniority dates and job duties; plaintiff only subjectively believes Bragg's misconduct to have been worse; and although they were both off-duty at the time, plaintiff's conduct occurred on City property, whereas Bragg's conduct did not. However, the *relevance* of those distinctions is mostly not obvious, and defendants provide little explanation of why those distinctions are relevant. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

For example, we are unable to guess why it should matter that plaintiff and Bragg were hired in different years and worked different shifts. It is not seriously disputed that plaintiff was a probationary and at-will employee, whereas Bragg was a certified and union-protected employee. Furthermore, plaintiff and Bragg had different chains of command. However, the evidence indicated that although Bragg could have gotten his union involved, the disciplinary and investigatory processes into fully-badged and trial firefighters would be essentially the same. Furthermore, those chains of command were both within the Fire Department and both stopped with Jones, who was the ultimate decisionmaker. Jones apparently believed that unlike plaintiff, Bragg could only be terminated for cause. However, defendants' zero-tolerance policy would seem to constitute cause for everyone, at-will employment does not permit discharge for unlawful reasons. Again, the evidence indicated that the disciplinary and investigatory processes *should* have been the same. Thus, we are unpersuaded that the different chains of command, or Bragg's status as a non-trial employee, are relevant distinctions.

Although the watermelon incident occurred on City property and Bragg's initial act of racial insensitivity occurred on social media, both plaintiff and Bragg were off-duty at the time, both acts profoundly affected co-workers, and Asaro's complaint indicates[12] that Bragg's social media post was essentially the "tip of the iceberg" that ultimately affected the on-the-clock work environment. Importantly, it appears that Bragg received a careful investigation and a certain amount of trust by default, whereas the evidence tends to show plaintiff's investigation to have been slipshod, hasty, and biased from the outset.[13]

Although it is clear that there are some differences between plaintiff and Bragg, the overwhelming majority of them are irrelevant to the core issue: both of them engaged in racially insensitive conduct while off-duty, which caused great offense and pain to a member of a different race, which in turn spilled over into employees' practical abilities to work comfortably with each other. In both cases, the ultimate decisionmaker was Jones. The evidence indicates that both plaintiff and Bragg should have received substantially the same kind and intensity of investigation, impartiality, and benefit of any doubt. Because a violation of the zero-tolerance policy would seem to constitute "cause," it is irrelevant that plaintiff was at-will and Bragg was not. Because the real-world effect of both plaintiff's conduct and Bragg's conduct dramatically affected working conditions, the fact that one occurred on City premises and the other occurred on social media does not seem relevant.

We recognize that defendants are not, in fact, asserting that Bragg and plaintiff must be identically situated in all aspects. However, defendants have not provided any persuasive argument tending to suggest that the distinctions between plaintiff and Bragg are relevant, and no such relevance is otherwise apparent.

Defendants also argue that although they are not protected by governmental immunity from a claim under the ELCRA, they are protected from a claim under 42 USC § 1981.[14] We cannot

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[12] We reiterate that we are reviewing a summary disposition motion, so we must construe the evidence in the light most favorable to the non-moving party. In other words, nothing in this opinion should be construed as a determination of what is true, but rather what the evidence thus far could permit a rational trier of fact to find.

[13] Generally, employers are entitled to be incompetent or unwise, so long as they do not do so on a differential basis for racially motivated reasons. See *Hazle v Ford Motor Co*, 464 Mich 456, 476; 628 NW2d 515 (2001). Thus, there is no obvious reason beyond defendants' own policies why defendants would have been *per se* obligated to provide plaintiff with a more thorough investigation; similarly, there is no obvious reason why defendants should have availed themselves of what would appear to have been a fine opportunity for teaching or learning. Providing different measures of actual, as-applied protections on the basis of race, however, would not be permissible.

[14] Defendants did not raise this argument in the trial court. Defendants argue that they may do so for the first time on appeal because "subject matter jurisdiction can be raised at any time." However, governmental immunity is distinct from subject matter jurisdiction. See *Zawadzki v Taylor*, 70 Mich App 545, 546; 246 NW2d 161 (1976). Nevertheless, because governmental immunity was generally argued below, we find value in completely addressing the issues on

find any Michigan case law supporting that proposition. However, municipalities may be liable for direct (but not vicarious) violations of 42 USC § 1983. *Mack v City of Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002); *Monell v Dep't of Social Services of City of New York*, 436 US 658, 690-695; 98 S Ct 2018; 6 L Ed 2d 611 (1978). The United States Supreme Court has explained that the purpose of 42 USC § 1981 was to prohibit racial discrimination, both private *and* public. *Runyon v McCrary*, 427 US 160, 168-170; 96 S Ct 2586; 49 L Ed 2d 415 (1976). We think it would be irrational and contrary to the purpose of Title VII if governmental immunity could be invoked to permit racial discrimination. In the absence of any clear authority to the contrary, we conclude that governmental immunity does not protect defendants from plaintiff's 42 USC § 1981 claims.

Defendants also argue that the trial court erred in denying reconsideration after it denied, in part, defendants' motion for summary disposition. Defendants' argument, however, is little more than a repackaging of the arguments it has already made. We note that defendants' motion for reconsideration also does not appear to have presented anything novel to the trial court. "As a general matter, courts are permitted to revisit issues they previously decided, even if presented with a motion for reconsideration that offers nothing new to the court." *Hill v City of Warren*, 276 Mich App 299, 307; 740 NW2d 706 (2007). However, a trial court does not abuse its discretion by denying a motion for reconsideration "resting on a legal theory and facts which could have been pled or argued prior to the trial court's original order." *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987). Even if the trial court's denial of summary disposition had been erroneous, which it was not, the trial court would not have abused its discretion by declining to accept as persuasive a mere restatement of defendants' original argument.

The trial court correctly denied summary disposition as to Counts I and III of plaintiff's complaint, and it properly denied defendants' subsequent motion for reconsideration.

IV. DEFAMATION AND FALSE LIGHT INVASION OF PRIVACY

On cross-appeal, plaintiff argues that the trial court should not have granted summary disposition as to his defamation and false light invasion of privacy claims. We disagree.

We note as an initial matter that we are skeptical of defendants' argument that Jones's press release did not identify plaintiff. A communication that does not explicitly name a plaintiff may still be defamatory and actionable if the plaintiff can be identified by inference and circumstance by readers. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 339-340; 497 NW2d 585 (1993). Furthermore, notwithstanding defendants' argument that truth is an absolute defense to defamation, we are also skeptical that the press release's description of the investigation as "thorough" is, in fact, true. Finally, defamation may be accomplished by inference and extrapolation that tends to lower an individual's reputation. See *Linebaugh*, 198 Mich App at 339-340; *Bonkowski v Arlan's Dep't Store*, 383 Mich 90, 97; 174 NW2d 76 (1970); *Kefgen v Davidson*, 241 Mich App 611, 617; 617 NW2d 351 (2000). We think plaintiff makes a reasonable argument that the real-world effect of the press release would have been to communicate that defendants had

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appeal, and this is essentially a question of law, we choose to address this issue. See *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002).

carefully and exhaustively determined that plaintiff is a belligerent racist. However, any claim based on the press release could apply only to Jones, and possibly vicariously against the City and the Fire Department.

There appears to be no dispute that Jones, as the Fire Commissioner, is a "highest appointive executive official of [a level] of government," and therefore he is entitled to absolute immunity from tort liability if he was "acting within the scope of his . . . executive authority." MCL 691.1407(5); *Odom v Wayne Co*, 482 Mich 459, 479; 760 NW2d 217 (2008). A highest appointive official is immune to liability even for intentional torts, so long as they were "committed within the scope of a governmental function" and did not constitute intentional misuse of "authority for a purpose unauthorized by law." *Marrocco v Randlett*, 431 Mich 700, 707-708; 433 NW2d 68 (1988) (quotation omitted). For immunity purposes, "executive authority" does not depend on an actor's intent, motive, or state of mind; but rather "whether the official exercised authority vested in the official by virtue of his or her role in the executive branch." *Pretipen v Jaskowski*, 494 Mich 190, 205-209; 833 NW2d 247 (2013). Thus, where the scope of authority conferred upon a particular official included the authority to conduct a press interview, the person who held that official office could not be liable for defamation committed during such a press interview. *American Transmissions, Inc v Attorney General*, 454 Mich 135, 138-139, 144; 560 NW2d 50 (1997).

It appears that the position of Fire Commissioner possesses the authority to issue press releases in response to inquiries about employee disciplinary actions. There is no specific evidence to that effect, but Jones testified that he issues press releases frequently; more commonly regarding funerals or graduations, but regularly also addressing significant disciplinary issues. Defendants assert that press releases are within the scope of the Fire Commissioner's authority. Although defendants cite no support for that proposition, the evidence strongly suggests they are correct, and plaintiff does not argue otherwise. Consequently, the evidence indicates that Jones's issuance of the press release was within the scope of his authority as Fire Commissioner. Therefore, he is entitled to absolute immunity for any defamatory (or false light invasion of privacy) content within that press release.

Plaintiff argues that an official is not entitled to immunity for an ultra vires act, defined as an act that was totally unauthorized rather than merely performed in an unauthorized manner. *Richardson v Jackson Co*, 432 Mich 377, 387; 443 NW2d 105 (1989). However, the historic concept of an ultra vires act precluding immunity seems to have been subsumed into the above "scope" analysis, merely with different phrasing. See *Pretipen*, 494 Mich at 203, 216-217. Plaintiff also argues that "[t]he commission of an intentional tort is not the exercise or discharge of a governmental function." *Margaris v Genesee Co*, 324 Mich App 111, 123; 919 NW2d 659 (2018). Although true, this latter assertion applies to claims against lower-level government employees. *Id.*; *Lockaby v Wayne Co*, 406 Mich 65, 77; 276 NW2d 1 (1979); see also *Odom*, 482 Mich at 472-476. It therefore has no bearing on Jones.

Plaintiff argues that the press release was issued in violation of the ERKA. However, even if the jury finds in plaintiff's favor as to his ERKA claim, any such violation is irrelevant. At worst, an ERKA violation would mean the press release was issued in an unauthorized manner, not that issuing a press release was inherently unauthorized. Plaintiff also argues that pursuant to Executive Order 2014-2, the City's Human Rights Department (or Civil Rights Inclusion Office)

had exclusive authority to investigate discrimination complaints, so Jones had no authority to adjudicate plaintiff's conduct as discriminatory. Presuming that to be true, it still has no bearing on whether Jones was authorized to issue a press release regarding an employee's disciplinary action. Jones engaged in an act that was within his authority, so he is (and by extension the institutional defendants are) absolutely immune to liability for any defamatory or false light invasion of privacy content in the press release. The trial court correctly granted summary disposition in favor of defendants as to Counts VI and VII.

V. CONCLUSION

Neither party has appealed the trial court's summary disposition of Counts IV and VIII, and defendants withdrew their appellate challenge to the trial court's denial of summary disposition as to Count II. The trial court correctly denied summary disposition as to Counts I and III, being plaintiff's claims for race-based discrimination under the ELCRA and 42 USC § 1981. The trial court correctly granted summary disposition as to Counts VI and VII, being plaintiff's claims for defamation and false light invasion of privacy. The trial court clearly gave careful and thoughtful consideration to this difficult matter. We reiterate that nothing in this opinion should be construed as a factual finding; rather, we agree entirely with the trial court as to what should and should not be submitted to a jury.

Affirmed. The parties shall bear their own costs in this matter. MCR 7.219(A).

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien