# STATE OF MICHIGAN

# COURT OF APPEALS

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ERNEST WINGATE, III,

Plaintiff-Appellee,

v

COUNTY OF GENESEE and GENESEE COUNTY PROSECUTOR,

Defendants-Appellants.

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UNPUBLISHED

No. 175590
LC No. 92-012391

Before: White, P.J., and Smolenski and R.R. Lamb,* JJ.

WHITE, P.J. (dissenting)

I respectfully dissent. Viewing the evidence presented at trial in a light most favorable to plaintiff, as we are obliged to do, I conclude that a reasonable juror could have found that race was a factor in one or more of the alleged adverse employment actions of defendants toward plaintiff and therefore defendants' motions were properly denied.

Plaintiff's complaint alleged intentional discrimination on the basis of race.

The affirmative action officer for Genesee County, Gregory Averyhardt, testified that Genesee County had adopted an affirmative action plan in 1976 and that defendant Weiss was uncooperative regarding enforcement of the plan.[1] Averyhardt testified that the affirmative action policy applied to the prosecutor's office, but that he understood Weiss' position to be that the prosecutor's office was not bound by the policy.

Averyhardt testified that the county's affirmative action plan did not require that unqualified persons be hired, and that to hire an unqualified minority was against the principles of the plan. Averyhardt testified that he had never encountered a county department that hired an African-American employee because of their race without regard to their qualifications. When asked what he believed to be the long term effect on the overall effectiveness of an affirmative action program if African-Americans are brought in with deficiencies and steps are not taken to make a real effort to have them succeed, Averyhardt responded:

> . . . you hire unqualified people on the basis of just race you're going to set yourself up for circumstances, a failed program, you're gonna hurt the individual when you have to let them go. You're, you're gonna cost money to, to the County because you're wasting dollars, training money and time. You're not able to properly train the individual or it's just gonna, it's not gonna work out. You just can't do it and, and say you're doing Affirmative Action, you really are not doing Affirmative Action. You're doing no justice to a person when you hire them in those circumstances.

Averyhardt further testified, regarding another African-American male who had been terminated during his probationary period, prior to plaintiff's termination, that Weiss would not acknowledge Averyhardt's authority to hold a hearing after the employee filed a complaint with Averyhardt's office and with the Michigan Department of Civil Rights. Averyhardt testified about several other instances where Weiss did not acknowledge Averyhardt's authority as affirmative action officer. One involved an African-American female who sought and applied for a promotion. The prosecutor's office used as a selection device a document which had not been approved by the personnel department or by the Affirmative Action office. The document probed into security and confidentiality matters and included some questions relating to finances and banking. Use of the document was reported to Averyhardt, and when he requested the document, the prosecutor's office would not release it to him. Averyhardt then contacted the personnel director and the document was finally released.

Averyhardt testified that he was not consulted by the prosecutor's office or anyone else relative to plaintiff's being hired, and was unaware plaintiff had been hired until after the fact. In January or February 1988, he ran into plaintiff and asked him to come by and speak to him; plaintiff did so and complained that he was not getting training, both as to his specific job and generally. Averyhardt testified he was not notified about plaintiff's termination, but learned about it through forms the departments turn in. After plaintiff's termination, plaintiff asked him to file a formal complaint, and it was filed. Averyhardt then began an investigation of plaintiff's complaint, but the prosecutor's office prevented him from setting up a hearing. Averyhardt further testified that there was a past practice of employees taking special classes to maintain positions or to qualify for a promotion, although he was unsure if any of them were probationary employees.

Weiss testified that, other than at clerical levels, minorities were under-represented in the prosecutor's office, and in the Victim's Assistance Program specifically. Weiss testified that plaintiff's race was one of the reasons he hired him and that plaintiff's hiring was part of an affirmative action goal. Plaintiff presented evidence that at the time Weiss hired him, Weiss was aware of the deficiencies plaintiff would bring to the job, and when plaintiff's deficiencies became apparent on the job, Weiss ignored the situation, failed to take any action, and then terminated plaintiff without warning or discussion, or notifying or consulting plaintiff's superior, Lucille Bigelow. Regarding the termination, Weiss testified that a probationary employee could be terminated at-will, but not because of his race.

Lucille Bigelow testified that she administered the Victim's Assistance Program and had worked at the prosecutor's office since November 1985. She testified that plaintiff met the job qualifications as posted. She and two other persons comprised the hiring committee and interviewed nine candidates that

met the qualifications, including plaintiff. Bigelow testified that plaintiff presented very well at the interview in terms of appearance and demeanor, but that his demonstrated abilities during the interview were "very poor," in that he did not address the questions being asked, which were the same questions asked of all other candidates. She testified that it was not plaintiff's use of the language that was troubling, it was that he did not seem to comprehend the questions. She also noted a number of misspellings on his application. She communicated her concerns about plaintiff having deficient skills to Weiss before plaintiff was hired. Soon after plaintiff was hired, Bigelow communicated her concerns to Weiss through Bob Pickell. However, Bigelow did not look into what might be done to help plaintiff, or discuss the problems with the affirmative action officer. Bigelow testified that she was not told plaintiff was terminated until the morning after Weiss did so, and that her opinion was not sought regarding whether to terminate him.

Plaintiff testified that when he was hired at the prosecutor's office in 1987 he was given a booklet about the Victims Assistance Program but was never given a description of his job duties. Plaintiff's superior, Bigelow, told plaintiff that students would be training him, and he was trained by some college student interns in sending out subpoenas by mail to victims to notify them of court dates. Plaintiff testified that he was disciplined on a number of occasions by Bigelow, once about having spoken to a juror, when he had never been told to avoid the area of the building where the jurors were or that he could not speak to them. Plaintiff also testified that he was sent to court without training and was reprimanded when he once held a victim's hand, pursuant to her request, after she gave testimony.

Plaintiff testified he was unaware he was an affirmative action hiree and was unaware that Bigelow had opposed his hiring. He felt intimidated by Bigelow and felt threatened going to work every day. Plaintiff testified that had he received proper training by the staff, maybe he could have done the job. He testified that as a result of being terminated by the prosecutor's office he saw a psychiatrist and had marital problems.

While the evidence is certainly susceptible of a more benign interpretation, and I do not intend to convey that I would have interpreted the evidence in the same manner as did the jury, when the evidence is viewed in a light most favorable to plaintiff, as is required, a reasonable jury could have concluded that Weiss was predisposed to discriminate on the basis of race and acted on that disposition.[2] I would therefore affirm.[3]

/s/ Helene N. White

[1] The affirmative action plan was admitted as an exhibit at trial, but is not before us.

[2] The parties agreed to a general verdict form as to liability and damages. The $25,000 jury verdict, which was less than the amount of plaintiff's wage loss at the time of trial, is some indication that the jury rejected plaintiff's claim of entitlement to damages for failure to train and wrongful termination, but concluded that he had suffered intentional race discrimination while employed and was entitled to mental distress damages.

[3] To the extent the majority concludes that *Long v Ford Motor Co*, 352 F Supp 135 (ED Mich 1972), aff'd in part and rev'd in part, 496 F2d 500 (CA 6 1974), compels rejection of plaintiff's intentional discrimination/predisposition claim, as distinguished from a disparate treatment claim that relies on unequal treatment rather than intentional discrimination, I disagree and conclude that *Civil Rights Comm v Chyrsler Corp*, 80 Mich App 368, 373-374, n 3; 263 NW2d 376 (1977), and subsequent cases, including *Brewster v Martin Marietta Aluminum Sales, Inc*, 145 Mich App 641, 654; 378 NW2d 558 (1985), recognize the two distinct methods of establishing a prima facie case of discrimination under the ELCRA, as do *Kroll v Disney Store*, 899 F Supp 344, 347 (ED Mich 1995), and *Thomas V Autumn Woods Residential Health Care Facility*, 905 F Supp 414, 420 (ED Mich 1995). See also *Rasheed v Chrysler Corp*, 445 Mich 109, 135; 517 NW2d 19 (1994)(" . . . a claimant asserting an intentional discrimination claim must establish a discriminatory predisposition of the discharging party and an act in furtherance of this predisposition as part of a prima facie case.")