STATE OF MICHIGAN

COURT OF APPEALS

CATHY ENGEL,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
January 27, 1998

No. 189340
Genesee Circuit Court
LC No. 94-027188-CL

Before: Corrigan, C.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right the judgment for plaintiff on her claim of reverse discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. We reverse and remand for further proceedings consistent with this opinion.

I. Underlying Facts and Procedural History

On September 20, 1992, the Flint Journal published a letter to the editor from Brenda Purifoy, the president, and Doris Roberts-Henry, the vice-president of the Flint Afro-American Police League (AAPL). President Purifoy and Vice President Roberts-Henry responded particularly to a negative newspaper article about Flint Police Chief Clydell Duncan's disposition of a citizen's complaint of unfair treatment. Purifoy and Roberts-Henry supported Chief Duncan, an African-American, and criticized both an ombudsman and the president of the Flint Police Officers Association. Purifoy stated that she intended to accuse the police union and its members of racism toward Chief Duncan.

A racist parody of the AAPL letter surfaced in the police department soon after the newspaper published the letter. Printed on what appeared to be AAPL stationery, the racist flier contained derogatory "street" language and photographs of Purifoy and Roberts-Henry. Chief Duncan ordered Sergeant Linda Winfrey, the treasurer of the AAPL and a member of the internal affairs division, to investigate the flier's origins. Sergeant Winfrey learned from Tim McGarry, a white Flint police officer, about an incident involving the flier at the department communications center. Plaintiff, a white officer, allegedly obtained the flier from her car, photocopied it, furnished a copy to Officer McGarry and posted a copy on a bulletin board. Sergeant Winfrey questioned plaintiff about McGarry's accusation.

Although plaintiff admitted that she had possessed a copy of the flier, she denied posting it at the communications center. Sergeant Winfrey, however, credited Officer McGarry and not plaintiff.

Sergeant Winfrey eventually prepared a report detailing her investigation and recommending that Chief Duncan discipline plaintiff for violating departmental rules. On the issues of general conduct and respect, Sergeant Winfrey wrote:

> 77-3/003 General Conduct of Police Officers
>
> It is the determination of this investigator that by the distribution and posting of the letter Officer Cathy Engel's actions brought discredit to the Police Department. Her taking the letter outside of the Department and posting it [in] an area where it was visible to numerous other people should not be consider [sic] acceptable. "An officer must conduct himself in a matter which does not bring discredit to the Flint Police Officers, the Flint Police Department or the City of Flint. Conduct which brings the Department into disrespect or reflects discredit upon the officer as a member of the Department, or that which impairs the operation and efficiency of the Department is considered unacceptable conduct for Departmental personnel.
>
> 3/003.13 Respect
>
> It is the determination of this investigator that Officer Cathy Engel's actions in this incident not only disrespects the Chief of Police, but also the two female sergeants, whose names and pictures was [sic] on the letter. The wording, of the letter, was an obvious attempt to publicly defame the character of the members of the Department.
>
> The fact that Cathy Engel is a White, [sic] Patrol Officer and all the parties depicted in the letter are Black and of a higher rank, also indicates that Officer C. Engel neither respects the ranks nor the race of Chief Duncan and Sergeants Henry and Purifoy. Even though it cannot be shown unequivocally, that Officer Cathy Engel authored the letter, the facts shown here and later, in the findings, show that Officer Cathy Engel had no compulsions about maligning and demeaning the character and reputation of the Chief of Police and Sgts. Purifoy and Henry, and Black Americans, as a whole, by her subsequent action.

Chief Duncan decided to discharge plaintiff effective February, 1993, because she had violated departmental rules. Chief Duncan, however, did not discipline a similarly situated African-American officer, Karl Petrich, who had displayed the flier to another police officer. Chief Duncan conceded that no other officer had ever been discharged for posting racist fliers, but stated that he was not willing to tolerate such conduct in the department.

An arbitrator reinstated plaintiff approximately one year after her discharge. Plaintiff then commenced this reverse discrimination action, alleging that her race was a substantial factor in Chief Duncan's discharge decision. Defendant suspended plaintiff shortly after her reinstatement. In

response, plaintiff added a claim for retaliatory discharge, asserting that her allegations of pregnancy and race discrimination had been a substantial factor in defendant's decision. Plaintiff voluntarily dismissed this claim on the first day of the trial. At the conclusion of a four day trial, the jury returned a $950,000 verdict for plaintiff on her claim of reverse discrimination. The trial court thereafter denied defendant's motion for new trial and this appeal followed.

II. Admission of Character Evidence

Defendant argues that the trial court abused its discretion in allowing Sergeant Bruce Sepanak to testify about Officer McGarry's credibility, reputation, mental state and work history because the evidence was not relevant. We agree. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997). This Court, however, will not reverse on the basis of an evidentiary error unless the trial court's ruling affected a party's substantial rights. MCR 2.613(A); MRE 103(a); *Temple v Kelel Distributing Co*, 183 Mich App 326, 329; 454 NW2d 610 (1990). Although defendant raises numerous issues that would not result in reversal, this evidentiary error necessitates reversal for the reasons stated.

Relevant evidence is evidence that has any tendency to make the existence of a fact at issue more or less probable than it would be without the evidence. MRE 401; *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991). Here, Chief Duncan ordered Sergeant Winfrey to investigate the flier incident and then based his decision to discharge on the results of her investigation. Sergeant Winfrey, in turn, credited Officer McGarry's accusation that plaintiff posted the flier and recommended that Chief Duncan discipline plaintiff. The proffered evidence of Officer McGarry's character, however, was not probative of any fact of consequence to plaintiff's claim that defendant treated her differently because of race.

Regarding plaintiff's claim that defendant's proffered reason for discharging her was a pretext for discrimination, evidence of Officer McGarry's character is not relevant unless Sergeant Winfrey or other decisionmakers knew of McGarry's reputation for dishonesty at the time they made their decision. When an employer investigates a coemployee's accusation and then discharges an employee on the basis of that investigation, the pivotal issue is whether the employer reasonably believed the allegation and acted on it in good faith. E.g. *Waggoner v Garland*, 987 F2d 1160, 1165-1166 (CA 5, 1993); see also *Lenori v Roll Coater, Inc*, 13 F3d 1130, 1133-1134 (CA 7, 1994). Here, the character evidence is irrelevant because it concerned events that took place, and opinions formed, after plaintiff's discharge. These events are not probative of the decisionmakers' reasonable belief in McGarry's earlier accusation. Further, plaintiff proffered no evidence that Sergeant Winfrey and Chief Duncan knew of McGarry's reputation when they made their respective decisions.

The error was not harmless. Although other evidence supported plaintiff's claim, a substantial risk exists that the evidentiary error diverted the jurors' attention away from the issues and confused them by suggesting that they could find a discriminatory purpose merely because they determined that Officer McGarry lied. Plaintiff's counsel, in fact, urged the jurors to rest their decision on the improperly admitted evidence when he encouraged them to find discrimination because Chief Duncan

"took the word, he took the word of a mendacious, lying, psychologically disturbed person like McGarry over Cathy's."

Although the admission of Sergeant Sepanak's testimony alone necessitates a new trial, the trial court compounded the error by admitting Sepanak's written evaluation of Officer McGarry. The report does not fall within the hearsay exception for public records, MRE 803(8), because it is investigative or evaluative in nature. *Solomon v Shuell*, 435 Mich 104, 140; 457 NW2d 669 (1990). Plaintiff did not lay an adequate foundation for admission of the report under the business records exception, MRE 803(6). Further, plaintiff's reliance on MRE 804(b)(3) as a basis for upholding the trial court's ruling is without merit. Accordingly, the report is inadmissible even though it may contain party admissions that would otherwise be admissible under MRE 801(d)(2)(D). MRE 805.

III. Other Evidentiary Issues

We reject defendant's argument that the trial court abused its discretion in excluding evidence of plaintiff's pregnancy discrimination action in which she allegedly requested the same emotional distress damages as in the instant case. Pleadings from another action are generally admissible, *Selph v Evanoff*, 28 Mich App 201, 204; 184 NW2d 282 (1970), and statements in pleadings may constitute admissions. MRE 801(d); *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 63; 454 NW2d 188 (1990); see also *Cady v Doxtator*, 193 Mich 170; 159 NW 151 (1916). A party may also use the evidence for impeachment purposes and to show a plan to defraud by collecting exaggerated damages or the same damages a multitude of times. *DeChristofaro v Machala*, 685 A2d 258 (RI, 1996). Even if relevant, however, the trial court may exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Bartlett v Sinai Hosp*, 149 Mich App 412, 416-417; 385 NW2d 801 (1986); see generally McCormick on Evidence (2d ed), § 196, pp 466-468.

In this case, the trial court properly excluded the evidence because defendant failed to demonstrate a fraudulent claim, a plan to exaggerate damages in multiple lawsuits, or a plan to repeatedly collect the same damages. We express no opinion whether defendant could have used statements in the complaint for impeachment purposes because defendant did not make an offer of proof on this issue. *Phinney v Perlmutter*, 222 Mich App 513, 529; 564 NW2d 532 (1997). We note, however, that it is not inherently inconsistent for a plaintiff to seek emotional distress damages in two discrimination actions.

Defendant next argues that the trial court abused its discretion in admitting evidence that Officer Petrich laughed while viewing the flier the flier because Sergeant Winfrey and Chief Duncan did not learn of Petrich's conduct until after plaintiff's discharge. We disagree. The jury could infer from the evidence that Sergeant Winfrey learned of Petrich's conduct during her investigation but elected not to pursue disciplinary action. The jury could find in part on the basis of this evidence that Winfrey and Chief Duncan treated plaintiff differently than Petrich for similar conduct.

We decline to review defendant's contention that the trial court erroneously excluded evidence regarding Chief Duncan's evenhanded discipline of white and African-American officers because

defendant did not preserve the issue by making a sufficient offer of proof. MRE 103(a)(2); *Phinney, supra* at 529.

IV. Attorney Misconduct

Although our review of this issue is not necessary in light of our decision to reverse, we address defendant's argument because counsel may repeat his comments on remand. Defendant argues that the trial court abused its discretion in denying defendant's motion for new trial on the ground that the verdict resulted from plaintiff counsel's deliberate attempt to inflame the jurors' passion and prejudices. We disagree. This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Froede v Holland Ladder Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994). An attorney's comments are not cause for reversal unless they reflect a deliberate course of conduct aimed at preventing a fair and impartial trial. *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). The court may reverse a jury verdict only when the attorney's statements reflect a "studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues." *Id.*

In this case, the trial court did not abuse its discretion in denying defendant's motion because plaintiff's counsel did not engage in a deliberate course of conduct aimed at preventing defendant from obtaining a fair and impartial trial. Throughout trial, plaintiff's counsel emphasized the alleged underlying racial tension in the police department and the chain of events that culminated in the flier incident. Counsel's repetition of these egregious facts during argument reflects the inflammatory nature of the evidence in this discrimination case, not attorney misconduct. Further, the trial judge is in the best position to determine whether the jurors were motivated by improper considerations in rendering their verdict. *Phinney, supra* at 538.

V. Jury Instructions

Defendant argues that it is entitled to a new trial because the trial court improperly instructed the jury. We disagree. The trial court did not err in declining to give defendant's requested instruction on plaintiff's burden to prove pretext because the court adequately presented the applicable law to the jury by relying on the standard jury instructions. See generally *Mull v Equitable Life Assurance Society*, 196 Mich App 411, 423; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). Further, the trial court correctly refused to give defendant's requested instruction regarding its liability for its nonpolicymaking employees' actions. The requested instruction is based on governmental immunity, and defendant is not immune from claims under the Elliott-Larsen Civil Rights Act. *Manning v Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993). Finally, we note that the trial court should have either instructed the jury to reduce its award of future damages to present value or reduced the award to present value itself. *Howard v Canteen Corp*, 192 Mich App 427, 441; 481 NW2d 718 (1992); *Goins v Ford Motor Co*, 131 Mich App 185, 201; 347 NW2d 184 (1983). The issue, however, is rendered moot by our decision to reverse the jury verdict because the court erred in admitting evidence of McGarry's character.

VI. Juror Misconduct

Defendant contends that the trial court erred in denying its motion for a new trial on grounds of juror misconduct. In light of our decision to reverse the jury verdict because of the evidentiary error, we decline to address this issue.

Reversed and remanded. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Peter D. O'Connell