

STATE OF MICHIGAN
COURT OF APPEALS

LINDA MACK,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

FOR PUBLICATION

October 27, 2000

9:10 a.m.

No. 214448

Wayne Circuit Court

LC No. 98-803967-CZ

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

CAVANAGH, J.

Plaintiff, Linda Mack, a police lieutenant with defendant, City of Detroit's police department, brought a claim against her employer for discrimination under defendant's city charter. Defendant moved for summary disposition pursuant to MCR 2.116(C)(8), for failure to state a claim upon which relief could be granted. The trial court granted defendant's motion and plaintiff now appeals as of right. We reverse and remand.

Plaintiff, a single, white female, was hired by defendant as a police officer in 1974. In 1987, plaintiff was promoted to the rank of lieutenant. At one time, plaintiff held the position of Acting Inspector of the Sex Crimes Unit of the police department. On February 6, 1998, plaintiff filed a complaint against defendant. Plaintiff alleged that she had been subjected to the romantic advances of male supervisors, but rebuffed those advances because she was a lesbian. Plaintiff further alleged that although plaintiff filed complaints with her superiors regarding the harassment, defendant failed to take any action.

In the complaint, plaintiff alleged that despite the fact that she had never been subject to disciplinary action, she was reassigned from serving as an officer in charge of a squad to desk duty and answering telephones on the afternoon shift. As a result of the reassignment, plaintiff was no longer allowed to participate in investigations or otherwise be involved in cases. Plaintiff claimed that this reassignment of duties was discriminatory and a form of harassment, which had not occurred in the past with any other officer at the rank of lieutenant. Plaintiff also alleged that she was the only supervisor in her section limited to taking two weekends off per month, which she argued was also a discriminatory policy directed only at her.

Plaintiff's cause of action against defendant included two counts: (1) intentional infliction of emotional distress,¹ and (2) violation of defendant's city charter. In the latter count, plaintiff alleged that defendant's city charter prohibited discrimination based upon both gender and sexual orientation. Plaintiff claimed that she was discriminated against contrary to the city charter for being a woman and a lesbian. Plaintiff did not allege that her rights were violated under the Elliott-Larsen Civil Rights Act ("ELCRA"), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8), for the failure to state a claim upon which relief could be granted. With regard to plaintiff's discrimination claim, defendant argued that its city charter did not provide plaintiff with a cause of action. In response, plaintiff argued that the Declaration of Rights section of defendant's charter specifically prohibited discrimination based on "sex or sexual orientation." She further argued that, under the city charter, she had a private cause of action.

The court granted defendant's motion on the record for the following reasons:

THE COURT: Well, in looking at this, we are going to grant the motion for summary disposition. . . .

* * *

With regard to the charter, the charter violation with regard to sexual orientation, this isn't the first time I've heard this issue come up and I have ruled in the past and am ruling now that the City charter does not create the cause of action.

Until the Appeals Court gives us some guidance on the issue, then that will be the position of the court. Right now there hasn't been an appellate ruling on the issue and in looking at the language in the charter, it doesn't appear to this court to create a separate cause of action apart from or over and above what's contained in the Elliott Larsen Act.

Therefore we will grant defendant's motion.

The issue before this Court is whether the trial court erred in granting defendant's motion for summary disposition after holding that defendant's city charter did not provide plaintiff with a cause of action to recover for defendant's alleged discrimination. A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews *de novo* a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. All factual allegations supporting the claim, and any reasonable inferences or conclusions that can be drawn from the facts, are accepted as true. *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

¹ The trial court dismissed plaintiff's claim for intentional infliction of emotional distress on summary disposition and plaintiff has not challenged that portion of the trial court's ruling.

Plaintiff's claim is based upon the following provision in defendant's city charter:

DECLARATION OF RIGHTS

* * *

2. The city has an affirmative duty to secure the equal protection of the law for each person and to insure equality of opportunity for all persons. No person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation. [Detroit Charter, Declaration of Rights, ¶ 2.]

At the present time, the ELCRA does not protect citizens from discrimination based upon sexual orientation, although it does provide protection from discrimination based on sex. *Barbour v Dep't of Social Services*, 198 Mich App 183, 185; 497 NW2d 216 (1993); MCL 37.2102(1); MSA 3.548(102)(1). Therefore, plaintiff does not have an available remedy under state law for alleged discrimination based on sexual orientation. However, through the above provision of defendant's charter, defendant adopted an additional category for protection from discrimination not found in the ELCRA, that being protection against discrimination based upon sexual orientation. While defendant adopted a policy against discrimination based on sex or sexual orientation, it did not clearly adopt any ordinances or code provisions expressly allowing for a civil action or an award for damages based on a violation of the charter.

Whether plaintiff has a private cause of action under defendant's charter is a question of statutory interpretation. See *Lane v KinderCare, Inc*, 231 Mich App 689, 695; 588 NW2d 715 (1998). Statutory interpretation is a question of law that is reviewed de novo on appeal. *Oakland County Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). "The prevailing rules regarding statutory construction . . . extend to the construction of home rule charters." *Detroit v Walker*, 445 Mich 682, 691; 520 NW2d 135 (1994). "When the language of a charter provision is unambiguous and specific it is controlling. . . . If a charter provision is ambiguous it must still be interpreted in a manner consistent with reason and with the goal of determining the purpose and intent of the framers and public." *Detroit Fire Fighters Ass'n v Detroit*, 127 Mich App 673, 677; 339 NW2d 230 (1983).

Whether a particular statute creates a private cause of action is a question of legislative intent. *Boscaglia v Michigan Bell Telephone Co*, 420 Mich 308, 317; 362 NW2d 642 (1984), superseded by statute as stated in *Eide v Kelsey-Hayes, Co*, 431 Mich 26; 427 NW2d 488 (1988).

Generally, when a statute creates a new right or imposes a new duty, the remedy provided by the statute to enforce the right, or for nonperformance of the duty, is exclusive. *Pompey v General Motors Corp*, 385 Mich 537, 552; 189 NW2d 243 (1971). Where the common law provides no right to relief, but the right to relief is created by statute, a plaintiff has no private cause of action to enforce the right unless (1) the statute expressly creates a private cause of action, or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. [*Lane, supra* at 695-696, citing

Long v Chelsea Community Hosp, 219 Mich App 578, 583; 557 NW2d 157 (1996).]

As a general proposition, where remedies provided by statute for violation of a right have no counterpart in the common law, the statutory remedies are exclusive rather than cumulative. *Driver v Hanley (After Remand)*, 226 Mich App 558, 566; 575 NW2d 31 (1997).

In the case at bar, defendant's city charter and ordinances provide plaintiff with a remedy by allowing her to file a complaint with the Human Rights Department. The Human Rights Department and Human Rights Commission were established pursuant to §§ 7-1001 and 7-1102 of defendant's city charter. The duties of the Human Rights Department include the following:

Investigate complaints of unlawful discrimination against any person because of race, color, creed, national origin, age, handicap, sex, or sexual orientation in violation of any ordinance or any law within the city's jurisdiction to enforce; and secure equal protection of civil rights without discrimination. The city shall implement this section by ordinance. The human rights department may cooperate with other civil rights agencies in the resolution of complaints where jurisdiction is concurrent; . . . [Detroit Charter, art 7, ch 10, § 7-1004.]

Defendant has adopted ordinances to implement the duties of the Human Rights Department. See Detroit Ordinances, §§ 27-1-1, et al. However, plaintiff's remedies pursuant to these provisions appears to be limited to securing findings by the department concerning discrimination, an order from the department to cease and desist in discriminatory activity, and an order requiring affirmative action.

It is apparent that defendant's charter and ordinances have granted plaintiff a remedy. The question is whether that remedy was intended to be the exclusive remedy available to redress discrimination claims. In another section of the charter, Detroit Charter, art 7, ch 10, § 7-1007, the charter provides that the remedies addressed in Chapter 10 on human rights are not exclusive: "This chapter shall not be construed to diminish the right of any party to direct any immediate legal or equitable remedies in any court or other tribunal." From this section, it is apparent that defendant did not intend to make the remedies available under its charter or ordinances the exclusive means of redress for affected persons.

Although the general rule is that where a new right or duty is created by statute, the remedy provided for enforcement of the right or duty by the statute is exclusive, courts have found exceptions to this general rule when the rights infringed were civil rights. Moreover,

Michigan has a long history of stalwartly defending individuals from invidious discrimination in their pursuit of basic civil liberties, such as equal opportunity in the pursuit of employment. Unlike federal law, Michigan also has an unwavering history of faithfully defending an aggrieved individual's right to a judicial forum to remedy unlawful discrimination. [*Heurtebise v Reliable Business Computers, Inc*, 452 Mich 405, 414; 550 NW2d 243 (1996) (opinion of Cavanagh, J.)]

In fact, our Supreme Court has stated that civil rights claims should be given the “highest priority.” *Holmes v Haughton Elevator Co*, 404 Mich 36, 46; 272 NW2d 550 (1978). The importance of the protection of citizens’ civil rights in Michigan is indeed longstanding. In 1890, our Supreme Court held in *Ferguson v Gies*, 82 Mich 358, 364-365; 46 NW 718 (1890), that a private restaurant owner’s rule requiring black persons to sit in a separate area of the restaurant violated the common law of Michigan, as well as the civil rights act of 1885, 1885 PA 130. Furthermore, the Court held that the plaintiff had a right to pursue a private civil suit for damages even though the statute did not provide a specific right of action for civil damages. The Court reasoned that the statute merely codified the common law, under which the plaintiff’s “right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred in the court as that of any other citizen.” *Id.* at 365.

Our Supreme Court reaffirmed that where illegal discrimination has occurred, the victim has a civil right of action for damages, even in the absence of a statutory remedy, in subsequent cases. See *St John v General Motors Corp*, 308 Mich 333, 336-337; 13 NW2d 840 (1944) (gender discrimination); *Bolden v Grand Rapids Operating Corp*, 239 Mich 318, 328; 214 NW 241 (1927) (racial discrimination).

In *Pompey v General Motors Corp*, *supra*, the plaintiff claimed racial discrimination under the Fair Employment Practices Act and the Michigan Constitution. *Id.* at 542. One of the arguments raised by the defendant was that the plaintiff’s claim was within the exclusive jurisdiction of the Michigan Civil Rights Commission. *Id.* at 543. The Court rejected the argument that the Civil Rights Commission had exclusive jurisdiction in the matter, and concluded that the plaintiff could avail himself of the cumulative judicial remedy of a civil action for damages. *Id.* at 551.

In its reasoning, the Court recognized that at common law there was no remedy for racial discrimination and that ordinarily this meant that any statute creating new rights, if it provided a remedy, was the exclusive remedy available for violation of that right. *Id.* at 552. However, the Court found that there was a history of applying an exception to this rule where civil rights legislation was involved:

For reasons presently given, we reject defendant’s arguments that the Civil Rights Commission’s jurisdiction in this area is exclusive, and conclude that plaintiff may avail himself of a cumulative judicial remedy in vindication of this specific civil right.

Our reasons for so holding are immersed in the origins of plaintiff’s asserted civil right. In 1955, the Fair Employment Practices Act created a civil right in the opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry. Defendant contends, and we agree, that prior to the passing of this important legislation in 1955, there was in Michigan no recognized legal remedy for acts of discrimination based on race in private employment. While a right of action was recognized for racial discrimination in public accommodation . . . and in the enjoyment of various other civil rights, the right to be free from discrimination on account of race in private employment was not regarded as a civil right entitled to protection of the law.

We recognize that the fact that there was no pre-existent common law remedy for racial discrimination in private employment is generally highly significant in determining the exclusiveness of the statutory remedy. The general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive. . . . Correlatively, a statutory remedy for enforcement of a common law right is deemed only cumulative.

But courts have forged exceptions to these general rules when the statutory rights infringed were civil rights. Although there is some authority to the contrary most decisions have held that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the statute, notwithstanding the statute did not expressly give him such right or remedy. [*Id.* at 551-553; citations and footnotes omitted.]

The Court went on to discuss earlier cases in Michigan that supported finding that a civil action for damages could be brought where a party's civil rights are at issue. The Court concluded that its decisions in the following cases supported holding that such a civil remedy existed, although those cases involved statutes that provided for only criminal remedies: *Ferguson, supra*; *Bolden, supra*; and *St John, supra*. *Pompey, supra* at 553-557. In a footnote, the Court stated that an aggrieved person was entitled to a cumulative civil remedy for damages regardless of the form the civil rights statute took, whether it provided only for a criminal remedy, no remedy, or any other remedy. *Id.* at 556-557, n 18.

The Court in *Pompey* then reviewed the remedies available to the plaintiff and found that, while the Civil Rights Commission had jurisdiction and could provide a remedy, there was no intent apparent from the legislation or from comments made at the constitutional convention that the remedy before the Civil Rights Commission was meant to be the exclusive remedy. *Id.* at 557-559. In fact, there was a clear statement contained in Const 1963, art 5, § 29, that the creation of the Civil Rights Commission did not intend to displace any judicial remedies an individual may have. *Id.* at 558. The Court then held as follows: "We hold that plaintiff can maintain a civil damage action for redress of his statutorily created right to be free from discrimination in private employment, and that this remedy may be pursued in addition to the remedial machinery provided by statute." *Id.* at 560. See also *Heurtebise, supra* at 421-426; *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 167-168; 596 NW2d 208 (1999) (opinion of Cavanagh, J., dissenting).

Pompey has been extended to other types of civil liberties. For example, in *Holmes v Houghton, supra* at 42-43, the Court held that *Pompey* extends to age discrimination claims and not just racial discrimination claims. However, *Pompey* has not been extended to claims not involving civil rights. See *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 126, n 9; 252 NW2d 818 (1977).

We conclude that *Pompey* is applicable to this case. Equal opportunity in the pursuit of employment is a protected civil right. Michigan's Constitution of 1963 provides:

No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. [Const 1963, art 1, § 2.]

“The Address to the People explained that a primary mission of this provision was to ensure equal opportunity in the pursuit of employment.” *Heurtebise, supra* at 427. The right against discrimination in the pursuit of employment is also protected by the ELCRA:

The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right. [MCL 37.2102(1); MSA 3.548(102)(1).]

Thus, there is an express civil right to be free from discrimination in employment based on one’s sex. Furthermore, defendant voluntarily extended these protections to a new class, those who are discriminated against based on their sexual orientation, by enacting the declaration of rights section of its city charter. In its charter defendant declared that “[n]o person shall be denied the enjoyment of civil or political rights or be discriminated against in the exercise thereof because of race, color, creed, national origin, age, handicap, sex, or sexual orientation.” Plaintiff thus had a right under defendant’s charter not to be discriminated against in her employment with defendant based on her sex or sexual orientation. Therefore, in light of our Supreme Court’s ruling in *Pompey* and this state’s history of defending individuals from invidious discrimination in their pursuit of basic civil liberties, such as equal opportunity in the pursuit of employment, we conclude that plaintiff is entitled to pursue a civil action for damages against defendant for any wrongful discrimination in her employment based on plaintiff’s sex or sexual orientation in violation of defendant’s city charter in addition to seeking redress from defendant’s Civil Rights Department. The trial court erred in granting defendant summary disposition under MCR 2.116(C)(8).

Reversed and remanded for further action consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Harold Hood