

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL LIND,

Plaintiff-Appellant/Cross-Appellee,

V

CITY OF BATTLE CREEK,

Defendant-Appellee/Cross-Appellant.

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UNPUBLISHED

June 15, 2006

No. 258119

Calhoun Circuit Court

LC No. 98-005111-CL

Before: O’Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right the grant of defendant’s motion for summary disposition. We affirm.

In this reverse discrimination suit, plaintiff challenges the promotion of an African-American officer who was ranked fifth on the 1994 sergeant’s eligibility list, over plaintiff, a Caucasian officer ranked second on the list. The trial court originally granted summary disposition to defendant on the ground that plaintiff failed to establish the requisite “background circumstances” to demonstrate that defendant was the unusual employer, who discriminates against the majority under the *Allen*<sup>1</sup> test. The trial court also determined that plaintiff failed to demonstrate that defendant’s articulated, legitimate, nondiscriminatory reasons for failing to promote plaintiff were a pretext for discrimination. This Court affirmed. *Lind v Battle Creek*, unpublished opinion per curiam of the Court of Appeals, issued July 9, 2002 (Docket No. 227874) (*Lind I*). On appeal from this Court’s decision, our Supreme Court overruled the *Allen* test and remanded the case. *Lind v Battle Creek*, 470 Mich 230, 234; 681 NW2d 334 (2004) (*Lind II*). On remand, the trial court granted defendant’s renewed motion for summary disposition on the ground that, even if plaintiff could make out a prima facie case under some test other than the *Allen* test, it previously decided that plaintiff failed to establish that the legitimate reasons offered were a pretext. This ruling was the law of the case because this Court previously and specifically decided:

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<sup>1</sup> *Allen v Comprehensive Health Svcs*, 222 Mich App 426; 564 NW2d 914 (1997), overruled 470 Mich 230 (2004).

Moreover, we believe that defendant's proffered reason for promoting to the supervisory position the black officer rather than plaintiff, that being that the former was more mature, is a legitimate nondiscriminatory reason, and plaintiff failed to present sufficient evidence to show that this reason was pretextual, to disguise discriminatory intent. [*Lind I, supra*, p 3 n 1, citing *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001).]

Therefore, the trial court granted defendant's motion for summary disposition.

Plaintiff first argues on appeal that the trial court violated the law of the case doctrine. He claims that, because our Supreme Court reversed this Court's prior decision without reservation, this Court's ruling on the pretext issue was not law of the case. A determination of whether the law of the case applies is a question of law subject to de novo review. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine provides that, when an appellate court has made a ruling on a legal question and remanded the case for further proceedings, the legal question thus determined will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. *In re Cummin (After Remand)*, 267 Mich App 700, 704; 706 NW2d 34 (2005), rev'd in part on other gds 474 Mich 1117 (2006). The law of the case applies "only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Appellate decisions are controlling at all subsequent stages of the litigation, but rulings that are unaffected by a higher court's opinion remain the law of the case. *Reeves v Cincinnati, Inc*, 208 Mich App 556, 559; 528 NW2d 787 (1995).

Plaintiff argues that the trial court violated the rule of the case doctrine because the Supreme Court's reversal of this Court's decision "was total and without reservation." We disagree. Any issue addressed by this Court that is unaffected by a higher court ruling remains the law of the case. *Id.* Here, the only issue addressed by the Supreme Court was the validity of the *Allen* test. *Lind II, supra* at 232-234. In *Lind II*, our Supreme Court specifically noted that it was not deciding whether plaintiff had or had not made a prima facie case of discrimination, but rather, it was "simply concluding that the trial court applied the wrong standard in determining whether plaintiff established a prima facie case of discrimination." *Id.* at 234 n 5. The law of the case remained that plaintiff failed to demonstrate that defendant's legitimate, nondiscriminatory reasons for not promoting him were a pretext, and the trial court's grant of defendant's motion for summary disposition on that basis was appropriate.

Plaintiff next argues that the circuit court's grant of defendant's motion for summary disposition was inappropriate because he has presented sufficient direct evidence of discrimination. We disagree. This issue was also addressed by this Court in plaintiff's first appeal, *Lind I, supra*, p 2, and this Court's conclusion that plaintiff presented insufficient direct evidence of discrimination to avoid summary disposition has not been affected by any subsequent proceedings. Accordingly, this ruling remains the law of the case.<sup>2</sup>

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<sup>2</sup> See *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988):

(continued...)

Because the law of the case doctrine supported the grant of summary disposition, it is unnecessary for us to address plaintiff's final issue on appeal or defendant's issues on cross-appeal.

Affirmed.

/s/ Peter D. O'Connell  
/s/ William B. Murphy  
/s/ Kurtis T. Wilder

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(...continued)

“Where a case is taken on appeal to a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court. Rulings of the intermediate appellate court, however, remain the law of the case insofar as they are not affected by the opinion of the higher court reviewing the lower court's determination. 5B CJS, § 1964, p 574.”