21-1365

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RYAN BOSHAW,

Plaintiff / Appellant

v.

MIDLAND BREWING COMPANY,
DAVE KEPPLER, and
DONNA REYNOLDS,

Defendants / Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
Hon. Thomas L. Ludington
Case No. 19-cv-13656

APPELLANT'S BRIEF

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CORPORATE DISCLOSURE STATEMENT

The following information is submitted pursuant to FRAP 26.1 and 6 Cir.R. 26.1.

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No.

2. Is there a publicly owned corporation, not a party to this appeal, that has a financial interest in the outcome? No.

By: /s/ Collin H. Nyeholt
Attorney for the Plaintiff / Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Given the nuances of the law, the fact-specific nature of the case, and the importance of the questions at issue herein, Appellant believes that oral argument will be warranted and helpful in determining the outcome of this appeal and therefore requests same.

STATEMENT OF JURISDICTION

This is a claim of sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Michigan Civil Rights Act, and retaliation for opposing same under both statutes. The claim was filed in the Eastern District of Michigan on December 12, 2019. The district court had jurisdiction over the federal law claims pursuant to 28 U.S.C. § 1331 and pendent jurisdiction over the state claims pursuant to 28 U.S.C. § 1367. On March 30, 2021 the district court GRANTED Defendants' / Appellees' motion to dismiss pursuant to Fed.R.Civ.Pr. 56. This order fully and finally adjudicated the last pending claims in this matter and was, therefore, a final order as that term is defined by 28 U.S.C. § 1291 and FRAP 3 and 4. Appellant noticed his appeal on April 12, 2021, well within FRAP 4(a)(1)'s appeal period. This Court, therefore, may exercise jurisdiction over this appeal.

STATEMENT OF ISSUES

1. Whether the district court properly granted the Defendants' motion for summary judgment.

Appellant answers: No.

2. Whether the district court erred by resolving questions of fact and credibility in the moving Defendants' favor on their motion for summary judgment, thus depriving Appellant of his right to a jury determination of same.

Appellant answers: Yes.

3. Whether the district court properly relied upon a purported exception to the prohibition on a court's considering the weight and sufficiency of the evidence on summary judgment "if an objective assessment of the evidence demonstrates evidence that is so one-side that one party must prevail as a matter of law" to justify its decision to disregard key portions of Plaintiff's testimony in considering, and granting, dismissal.

Appellant answers: No.

4. Whether the Trial Court erred by ruling that "Michigan law does not prohibit discrimination based upon sexual orientation."

Appellant answers: Yes.

5. Whether the district court erred when it ruled that a supervisor's conditioning a homosexual male employee's promotion upon his "acting more masculine" and removing reference to his homosexual relationship from his social media did not, as a matter of law, amount to unlawful discrimination based upon sex.

Appellant answers: Yes.

6. Whether the district court properly concluded that Plaintiff had not presented evidence that the stated reason for his termination, supposedly missing a "mandatory" meeting, was a pretext for retaliation when Plaintiff had presented evidence that Defendant Reynolds had excused him from same.

Appellant answers: No.

7. Whether the district court otherwise erred in dismissing Plaintiff's retaliation claim.

Appellant answers: Yes.

8. Whether the district court properly concluded, as a matter of law, that Defendants Keppler and Reynolds had not engaged in civil rights conspiracy, in violation of Michigan's CRA, through their concerted retaliatory actions.

Appellant answers: No.

STATEMENT OF THE CASE

The year 2016 truly was a turning point for Ryan Boshaw. Mr. Boshaw had a history of troubled relationships and alcohol addiction. This had caused him to suffer chronic employment instability and led him to multiple criminal convictions.[1] In 2016, he was arrested for drunk driving.[2] He was also charged with resisting arrest because he kicked the door of the police car.[3] And, he was charged with disturbing the peace because he called the nurse who took his blood sample a "cunt."[4] This was what many in recovery refer to as a "rock bottom" moment for him. He thereafter made the decision to commit to sobriety. He remains so to this day.

Sober, he was able to begin a long-term relationship with a man named Andrew Rohlfs. The two built a home together for themselves and for the children of Mr. Boshaw's prior relationships, his 5-year-old daughter Kylen and 14-year-old son Landen. On May 6, 2017 the couple went "facebook official" and decided to published their relationship status on social media.[5] This doesn't quite have the poetic nuance of shouting ones' love from the rooftops, but in today's society it

[1] Boshaw Dep, ECF 16-4, PageID 195-97
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.* at PageID 239; Facebook Posting, ECF 16-20, PageID 484.

serves the same function because Mr. Boshaw's facebook is "public," meaning that anyone in the world can see what he posts.[6]

Sober, Mr. Boshaw was able to be the good and reliable employee that he wants to be. He applied for employment with Defendant Midland Brewing Company on April 3, 2018.[7] He was hired as a server. His rise within MBC was, to say the least, meteoric. He was quickly promoted to shift leader, then again to floor leader.[8] By August, MBC's general manager, Defendant Donna Reynolds, was talking to him about a promotion to front of house manager.

This is when it all started to go very, very wrong.

There is a significant factual dispute about what occurred during the conversation between Reynolds and Boshaw about his promotion. Reynolds, predictably, has told the Court that she did not at any point in Boshaw's employment tell him to appear more masculine or remove his relationship status from his facebook.[9] Mr. Boshaw's account is very different. He testified that

> [t]he conversation that we had for me to become a leadership role was, you know, she asked me – or she essentially told me that before she presented the opportunity to [Defendant] Dave [Keppler] and moving forward, that I need to change my appearance and kind of just act a little more masculine while I'm at work and while I'm off duty and like when I'm out in public and

[6] Boshaw Dep, ECF 16-4, PageID 239.
[7] *Id.* at PageID 198.
[8] *Id.* at PageID 342-43.
[9] Reynolds Aff, ECF 16-11, PageID 410.

> stuff especially because we're representing Midland Brewing Company, which is something that Dave held a lot of high standards for[.][10]

Mr. Boshaw particularly testified that Reynolds did *not* say "more professional" but "more masculine"[11] when referring to the desired changes to his appearance and behavior. Mr. Boshaw further testified that, with respect to his relationship status on facebook,

> [s]he [Reynolds] specifically told me that I need to act more masculine and appear to be more masculine while I am at work or not at work while I am representing Midland Brewing Company and hiding – and telling me that my Facebook, people can log on and see that, and as I'm in a leadership role, that sometimes people do that, and that I should hide it, and I did.[12]

Mr. Boshaw testified that, when she made this request, he then expressed concerns that this would cause discord with Andrew but Reynolds told him that "if I wanted a promotion, Drew would understand that it would, you know, it would make sense at the time."[13]

Mr. Boshaw wanted the promotion, so he did as Reynolds asked. He changed his appearance. He stopped wearing his hair spikey, but instead combed it

[10] Boshaw, ECF 16-4 at PageID 363.
[11] *Id.* at PageID 347.
[12] *Id.* at PageID 352.
[13] *Id.* at PageID 364.

to the side.[14] He also followed up on the conversation described above with a text message to Reynolds where he asked about removing his lob earrings and covering his neck tattoo, to which she approved.[15] And, he removed his relationship status with Andrew from facebook.[16]

Mr. Boshaw began to suffer emotional distress which he attributed to the fact that he had to hide who he was. Worse, the removal of his relationship status caused discord with Andrew. This became increasingly intolerable and he began looking for different employment. In February of 2019, Mr. Boshaw spoke to Defendant Dave Keppler, the owner of Defendant MBC, about an opportunity he had to take a position at Old Chicago Pizza.

There is, again, significant factual dispute about what happened during the February 2019 conversation between Boshaw and Kepler. Kepler, predictably, claimed that Boshaw did not bring up his appearance or sexual orientation during the meeting.[17] But, Mr. Boshaw testified that he told Kepler that he was looking at the job at Old Chicago "because I have felt like for the last several months, I have

[14] *Id.* at PageID 344-46. Spikey hair was, apparently, viewed as "un-masculine" by Reynolds. Mr. Boshaw was asked "and is there something about having spiky hair that identifies you as a homosexual?" to which he responded "I never thought it did, though, but to Donna apparently it mattered; before I could ever become a salaried manager, I need to look different." *Id.* at PageID 347.
[15] Text Message, ECF 16-5, PageID 389
[16] Boshaw Dep, ECF 16-4, PageID 373-74.
[17] Keppler Aff, ECF 16-12, PageID 413.

had to hide kind of who I am"[18] and further complained to him because "I had to like keep my relationship on the down-low ever since I've been promoted."[19] In response to this, Keppler became visibly angry and stormed off.[20] When he calmed down, he came back and told Mr. Boshaw he wanted him to stay and that he would "make things right with Donna" and that "I will have Donna make things right with you."[21]

After the conversation with Kepler, Defendant Reynolds and Mr. Boshaw sat down to talk. Reynolds told Mr. Boshaw "I can't believe that you even talked to Dave while I wasn't even here, I thought we had said we were friends."[22] Immediately after that conversation, Mr. Boshaw *thought* that the two had cleared the air and resolved their concerns. He was in a good mood afterwards, and walked around all day with a "perma-smile."

But, as it turned out, they hadn't cleared the air at all. Mr. Boshaw testified that, after the conversation at the Red Keg, things got worse between them.[23] Boshaw testified that, after the conversation, "[i]t was like night and day. Every time I did something, it was wrong."[24]

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[18] *Id.* at PageID 368.
[19] *Id.* at PageID 368-69.
[20] *Id.* at PageID 369
[21] *Id.* at PageID 370.
[22] *Id.*
[23] *Id.* at PageID 371
[24] *Id.*

Some context is helpful for what happened next. Defendant MBC's employee manual provides for termination based upon unapproved absenteeism. However, this is not ever strictly enforced even among managerial staff. Megan Moody, the bar manager, was frequently absent from her shifts without calling in or making prior arrangements.[25] Another employee named Taylor also had several 'no-call, no-shows.'[26] Moody and Taylor, in fact, 'no-call no-showed' on or about May 29, 2019 and did not suffer termination or, in fact, any disciplinary action.[27] Reynolds was aware of this, because Mr. Boshaw discussed it with her, but she declined to discipline either of them.[28]

On May 30, 2019 Defendant MBC held a mandatory "problem solver meeting."[29] Mr. Boshaw was also scheduled to cover a shift for Megan Moody. There is a *significant* factual dispute as to what happened at this point. Defendant Reynolds, predictably, has claimed that Mr. Boshaw was required to attend the meeting, and that she did not give him permission to miss it.[30] Mr. Boshaw has claimed, repeatedly, that "I was told to stay home with my daughter by her

[25] *Id.* at PageID 372
[26] *Id.* at PageID 371
[27] *Id.*
[28] *Id.* at PageID 372
[29] Reynolds Aff, ECF 16-11, PageID 411.
[30] Reynolds Aff., ECF 16-11, PageID 411 at ¶¶ 11-17.

[Reynolds] and that I didn't really need to attend the meetings this week, so that is exactly what I did."[31]

On May 31, 2019 Mr. Boshaw was fired.[32] The Defense's stated reasons for Appellant's termination have varied over time. The May 31st termination letter says that "among other issues, and finally due to your absence and failure to notify management, we have decided to terminate your employment."[33] In response, Mr. Boshaw told Mr. Keppler, in writing, that he had been *excused* from the meeting *by Reynolds*.[34] Rather than reverse the termination, Mr. Kepler instead doubled down and shifted his story slightly and emailed Boshaw and said "your release as explained, was primarily due to you not showing up at work. But prior to your termination and since, you have continued to disparage and harass several employees of Midland Brewing Company."[35] During discovery, the Defense was asked to state any and all of the reasons that they terminated Boshaw. They responded that

> he was terminated after demonstrating his disregard for the professionalism required for his position, which included speaking

[31] R. Boshaw May 31, 2019 Email re Termination, ECF 16-36, PageID 535. *See also* Verified Complaint, ECF 1, ¶ 32 ("Plaintiff can demonstrate that, for the meeting she [Reynolds] identified, she had verbally excused his absence"); Amended Complaint, ECF 9, ¶ 32 (same); Boshaw Dep, ECF 16-4, PageID 301 (testifying that his absence on the day in question was after "the conversation I had the day prior.")
[32] Boshaw Dep, ECF 16-4, PageID 323; Term Letter, ECF 16-15, PageID 531.
[33] Boshaw Dep, ECF 16-4, PageID 299; Term Letter, ECF 16-15, PageID 531.
[34] R. Boshaw May 31, 2019 Email re Termination, ECF 16-36, PageID 535.
[35] Boshaw Dep, ECF 16-4, PageID 304.

> unprofessionally and disparaging MBC and its staff on an ongoing basis, and missing mandatory meeting on May 30, 2019, as well as his shift.[36]

In contrast again, in Keppler's post-lawsuit affidavit to the Court he said that "[o]n May 30, 2019, Donna Reynolds informed me that Mr. Boshaw did not show up for work on May 30, 2019, although he was responsible for doing so" and so "I made the decision to terminate Mr. Boshaw's employment, effective May 31, 2019, after he did not attend the Problem Solving training or his shift on May 30, 2019."[37]

The common thread in the varied reasons the Defense has offered for Mr. Boshaw's termination is that Boshaw missed the "problem solver" meeting on May 30, 2019. Keppler has repeatedly stated that Reynolds told him he missed the meeting, and so terminated him. This is a blatant pretext because, as Kepler was well aware, Mr. Boshaw "was told to stay home with my daughter by her [Reynolds] and that I didn't really need to attend the meetings this week."[38]

Mr. Boshaw received his right-to-sue letter from the EEOC on September 24, 2019. He timely filed his lawsuit on December 12, 2019. The Defense moved for summary judgment pursuant to Fed.R.Civ.Pr. 56 on November 30, 2020.[39] The Trial Court granted the motion without oral argument in a written opinion dated

[36] Defendant MBC Supplemental Discovery Response, ECF 19-3, PageID 688-89.
[37] Kepler Aff, ECF 16-12, PageID 413-414 at ¶¶ 8, 9.
[38] R. Boshaw May 31, 2019 Email re Termination, ECF 16-36, PageID 535.
[39] ECF 16, PageID 111-148.

March 30, 2021.[40] This appeal centers on the March 30, 2021 decision and the Trial Court's reasoning behind same.

SUMMARY OF THE ARGUMENT

Mr. Boshaw suffered gender-based discrimination when he was denied a promotion unless and until he agreed to alter his appearance and behavior to appear "more masculine." As the Supreme Court told us in *Price Waterhouse*, when an employer considers conformance with sex-based stereotypes as part of a promotional decision, it violates Title VII's prohibition on discrimination because of sex. Accepting Mr. Boshaw's testimony as true, the Appellees committed sex discrimination by considering conformance with sex stereotypes in making their promotional decision.

In *Bostock v. Clayton County*, the US Supreme Court held that Title VII's prohibition on discrimination based upon "sex" includes discrimination based upon sexual orientation. Mr. Boshaw testified that he was refused a promotion unless and until he removed mention of his homosexual relationship from his public Facebook page. If this is so, then the Appellees violated Title VII by including consideration of his sexual orientation in making the decision to promote.

[40] Opinion, ECF 24, PageID 749-775.

Michigan's Civil Rights Act shares common language to Title VII. When interpreting the state Civil Rights Act the Michigan courts often, but do not always, follow Title VII's interpretation of like terms. There is strong indication that Michigan intends to follow *Bostock's* lead and hold that the CRA's prohibition on "sex" discrimination prohibits sexual orientation discrimination. Yet, the Trial Court ruled that the CRA does *not* prohibit discrimination based upon sex. This was an error. If anything, the trial court should have submitted a certified question to the Michigan Supreme Court on this important question of state law. If there is any doubt the direction in which Michigan's courts are heading, this court should consider doing the same.

The Trial Court agreed that on summary judgment "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[41] But, the Court nevertheless dismissed the claim because it concluded, in spite of Mr. Boshaw's sworn testimony, that the evidence was "so one-sided that one party must prevail as a matter of law."[42] In so doing, the trial court not only violated the review standard for summary judgment, but it violated Mr. Boshaw's Seventh Amendment right to a jury determination of the facts of his case. In *Wexler v.*

[41] Op, ECF 24, PageID 772.
[42] *Id.*

White's Furniture, Inc.[43], this Honorable Court found reversible error when a trial court dismissed because it found the employer's proffered documentation of "performance deficiencies" more credible than the employee's testimony about discriminatory comments made during the challenged employment action. As in *Wexler,* the court should reverse and remand for a proper jury determination.

The Trial Court has made it clear that it does not believe Mr. Boshaw, and will not entertain the possibility that a jury may believe his testimony. After its comments, it is hard to imagine how the Court would be able to set aside its view of the case and conduct a fair trial. And, it is hard to imagine how the *public* would ever view a trial conducted by a judge who has already decided that he does not believe the plaintiff as fair. Respectfully, cause exists for this Court to remand to a different judge for trial and Appellant requests that it will do so.

[43] 317 F.3d 564 (6th Cir. 2003)

ARGUMENT

I. Standard of Review

The Sixth Circuit "reviews a district court's grant of summary judgment *de novo,* applying the same standards as the district court."[44] It is well established that, at the summary judgment stage, the evidence "must be viewed in the light most favorable to the opposing party"[45] and that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge" because, in deciding whether to take a claim away from the jury, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."[46]

II. Mr. Boshaw Suffered Gender-Based Discrimination.

This is a claim for sex discrimination in violation of Title VII and Michigan's ELCRA. This court has noted that

> [i]ntentional discrimination claims under Title VII can be proven by direct or circumstantial evidence. Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Circumstantial evidence, on the other hand, is proof that does

[44] *Fed. Trade Comm'n v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 629 (6th Cir. 2014) *quoting Villegas v. Metro. Gov't of Nashville,* 709 F.3d 563, 568 (6th Cir.2013).
[45] *Adickes v. S.H. Kress Co.*, 398 US 144, 157 (1970). *See also Soper ex Rel. Soper v. Hoben*, 195 F.3d 845, 850 (6th Cir. 1999).
[46] *Morales v. American Honda Motor Co., Inc.*, 71 F.3d 531, 535 (6th Cir. 1995) *citing Anderson v. Liberty Lobby, Inc.,*477 U.S. 242, 255 (1986).

> not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred.[47]

Reynolds' *told Mr. Boshaw* that he could not be promoted unless he acted more masculine and removed mention of his homosexual relationship from his public facebook page which, plainly, is *direct* evidence of discrimination. For this reason, Appellant need not proceed to prove his claim through the *McDonnel Douglas* indirect approach because, as this court has explained,

> [t]he McDonnell Douglas test and its shifting burdens are inapplicable where the plaintiff presents direct evidence of discrimination. Direct evidence and the McDonnell Douglas formulation are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent. Where the evidence for a prima facie case consists of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference is required.[48]

This Court has applied the foregoing precepts to claims under the ELCRA as well as Title VII.[49]

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[47] *Ondricko v. MGM Grand Detroit, LLC*, 689 F.3d 642, 648-49 (6th Cir. 2012) (internal citations and quotations omitted)
[48] *Blalock v. Metals Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985).
[49] *Ondricko,* 689 F.3d at 653.

a. Mr. Boshaw suffered discrimination for failure to conform to gender stereotypes, in violation of Title VII.

Title VII of the Civil Rights Act forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," or to "limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's . . . sex."[50] The Supreme Court has told us that we are to "take these words to mean that ***gender must be irrelevant to employment decisions***."[51] The Civil Rights Act of 1991 clarified that the statute is violated when sex "was ***a motivating factor*** for any employment practice, ***even though other factors also motivated the practice***."[52]

Title VII is violated when employment decisions -most notably *promotional* decisions- are tainted with impermissible gender-based considerations. This includes conformance with gender stereotypes. In *Price Waterhouse,* [53] the Supreme Court considered whether 42 USC 2000e-2(a)(1) was violated when a

[50] 42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added).
[51] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (emphasis added).
[52] 42 U.S.C. § 2000e–2(m).
[53] *Price Waterhouse, supra* (1989).

female accountant was denied partnership in the accounting firm because she was viewed as being too "macho." She was told that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[54] The Supreme Court found that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[55] Notably, in finding a Title VII violation on the facts of that case, the *Price Waterhouse* Court found that management's *consideration* of conformance with gender stereotypes when deciding whether to promote violated Title VII.

The facts of our case align themselves almost exactly with *Price Waterhouse*. Mr. Boshaw testified that Defendant Reynolds told him she would only consider him for the promotion if he were to act "more masculine." The Supreme Court has told us that conditioning a *woman's* promotion on her acting and appearing *less masculine* is a violation of Title VII. It follows that conditioning a *man's* promotion on his acting *more masculine* does also.

Accepting Appellant's testimony as true, Defendant Reynolds committed the same sin as the employers at *Price Waterhouse*. The result should also have been the same. However, the Trial Court declined to apply *Price Waterhouse* because

[54] *Id.* at 235.
[55] *Id.* at 250.

"there is no evidence that Plaintiff's promotions were denied or even delayed."[56] The Trial Court further proclaimed that "Plaintiff furnishes no explanation for how a reasonable juror could conclude that Reynolds and Kepler were discriminating against him because of his sexuality by promoting him and increasing his salary[.]"[57] Respectfully, he most certainly did. Mr. Boshaw was granted the promotion only *after* he gave in to Reynold's demands to change his appearance and remove his Facebook relationship status. His promotion was conditioned on conforming to gender stereotypes, and concealing his membership in a protected status. *Price Waterhouse* tells us that, in order to conform to Title VII, "***gender must be irrelevant to employment decisions***."[58] Here, gender plainly was *not* irrelevant to the promotional decision. That is discrimination.

The Trial Court's distinction from *Price Waterhouse,* respectfully, does not mesh with the reasoning of that decision. Title VII, noted the *Price Waterhouse* Court, requires that gender must be *completely irrelevant*[59] in employment decisions. When conformance to gender stereotypes becomes a consideration, even among other consideration, Title VII is violated. Price Waterhouse's management violated Title VII, not because it *delayed* the plaintiff's promotion, but because it *considered* her conformance to gender stereotypes in *making* the decision. If she

[56] Opinion, ECF 24, PageID 17.
[57] Opinion, ECF 24, PageID 773.
[58] 490 U.S. 228, 240 (1989) (emphasis added).
[59] *Id.*

had just agreed to the firm's demands to put on makeup, wear prettier clothes, go to charm school and get her hair done, she probably would have gotten the promotion. But, she would have been no less a victim of gender-based discrimination because she has been subjected to an employment decision that was based upon her conformance to gender stereotypes.

The Trial Court's reasoning implies that the victim of a gender-biased decision ceases to be a victim of discrimination if they give in to their bosses' unlawful demands to conform. When a manager conditions a promotion on gender stereotypes, the statute is violated. If the employee gives in to their unlawful demands, the violation has nevertheless occurred.

To support its strange view that a person whose promotion is premised on conformance to gender stereotypes is not a victim of sex discrimination if they give in to them, the Trial Court cited *Samuel v. Metropolitan Police Department,* an out-of-circuit 2017 decision from the D.C. Circuit.[60] Samuel was a Canadian national who attempted unsuccessfully to emigrate to the US. While on a work visa, she held employment with the Metropolitan Police Department. Her visa ran out, which made her ineligible for employment, and she was fired as a result. Ms. Samuel nevertheless alleged national origin discrimination because, at one point, one of the people who made the decision to fire her had made various "snide

[60] 258 F. Supp.3d 27, 43 (2017).

comments" about her being Canadian. *Samuel* did not involve a situation, as here, where en employee was *told* that they had to conform to stereotypes in order to receive a promotion. Respectfully, *Samuel* is not illuminating to the case at bar and it was error to rely upon it.

Strangely, the Trial Court relied upon evidence of misconduct and misfeasance that occurred *after* the promotion to justify its dismissal of the gender stereotyping claim. The Trial Court noted that, according to the Defense, "[a]fter Plaintiff was promoted to FOH Operations Manager, Plaintiff was critiqued for not communicating concerns quickly enough to Reynolds" and that there were complaints he did not "stay in his lane."[61] But, the later termination was a separate event. Even if the court accepted that Boshaw's *termination* was lawful (which it wasn't) the fact remains that his *promotion* was premised on his acceding to unlawful demands to conform to gender stereotypes, and conceal his membership in a protected status. The Trial Court erred in relying upon the post-promotional performance deficiencies the Defense produced in order to dismiss the claim premised on discrimination during the promotional process.

The Trial Court also accepted the Defense's argument that Reynold's comments to Appellant during the promotional meeting was merely a "stray remark" because "the remark was alleged to have been made by Reynolds, not

[61] Opinion, ECF 24, PageID 766.

Keppler, in the context of a discussion about Appellant's promotion, not his termination, and it allegedly occurred seven months prior to his termination."[62] The Trial Court applied an unpublished decision from the Michigan Court of Appeals, *Wolfgang v. Dixie Cut Stone and Marble,* to reach this conclusion. First, with all due respect, it is questionable whether this unpublished decision by the Michigan Court of Appeals even applies to the case at bar. Second, *Wolfgang* is out of place because it considered whether an alleged stray remark could be imputed to a decision maker in favor of a *wrongful termination* claim instead of a failure to promote claim like the instant. The Trial Court erred because it got hung up on the remark's relationship to the later *termination* decision when, in fact, it was targeted at the *promotional* decision. Applying the *Wolfgang* considerations to the decision not to promote,[63] it is clear they do not preclude liability in this case. Reynolds *was* involved in the *promotion* decision. She *did* make the remark *during* the conversation about promotion, so it *was* made during the *promotional process*. The statement was not vague, or ambiguous; Reynolds clearly and unequivocally stated that Boshaw would not be promoted unless and until he changed his appearance

[62] Opinion, ECF 24, PageID 764 (citing *Wolfgang v. Dixie Cut Stone and Marble,* 2010 WL 199595 at *2 (MI Ct. of App. 2010)).

[63] Under *Wolfgang,* in order to determine whether an allegedly "stray remark" was material to a termination decision, the court considers "(1) whether the remark was made by a person involved in the termination decision, (2) whether the remark was made during the decision making process, (3) whether the remark was vague, ambiguous, or isolated, and (4) whether the remark was proximate in time to the termination."

and behavior to be "more masculine." And, Reynold's remark was made proximate in time to the *promotion decision*. Reynold's statement that Appellant will only be promoted if he acts more masculine, during the conversation with Appellant about his promotion, cannot reasonably be viewed as a "stray remark." It was a clear and unequivocal statement of discriminatory intent.

Further, looking at this as a "stray remark" is just plain wrong. Reynolds told Boshaw that he had to act "more masculine" and hide the fact that he was in a homosexual relationship in order to receive the promotion. This could not have been a "remote" act because he had to deal with the unlawful consequences every day. Every day he got up and got ready for work, he had to do his hair and put on clothes to appear "masculine." At work, he had to be sure to portray more "masculine" behavior (whatever that means). Worse, every time he and Andrew fought after Boshaw had to conceal their relationship he felt the results. This was not an isolated incident; it was an ongoing discriminatory act that continued from the moment Reynolds made this unlawful demand, to the day Mr. Boshaw told Mr. Keppler he was leaving his job because of it.

The decision to promote Appellant was, without question, tainted by adverse considerations of gender stereotypes. The Trial Court found no violation under these circumstance because Appellant acquiesced to the unlawful demand to

conform and so received the promotion. This reasoning on the trial court's part, respectfully, misapprehends the statute and should be reversed.

b. Mr. Boshaw suffered discrimination because of his sexual orientation, in violation of Title VII.

In *Bostock v. Clayton County,* the Supreme Court considered whether Title VII's prohibition on discrimination 'because of sex' applied to decisions based upon sexual orientation.[64] The Supreme Court concluded that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex"[65] and held that, yes, it does.

Reynolds refused to consider Appellant for a promotional opportunity unless he agreed to remove reference to his homosexual relationship from his public facebook. In so doing, she made Appellant's homosexuality relevant to this particular employment decision and, thus, violated Title VII.[66]

The Trial Court rejected this claim, however, because "Plaintiff's only evidence…is his testimony regarding the alleged conversation with Reynolds in

[64] *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020)
[65] *Id.* at 1754.
[66] *Price Waterhouse*, 490 U.S. at 240 (1989) (42 USC § 2000e-2(a)(1) mandates that gender must be irrelevant to employment decisions.)

July 2018" and "Plaintiff offers no further evidence in his Response."[67] The Court then considered various pieces of counter-evidence the Defense had raised pertaining to Boshaw's supposed performance deficiencies, found it to be more credible, and so disregarded Mr. Boshaw's testimony.[68] Basically, the Trial Court noted Boshaw's testimony, but ruled that it would not accept it as true because it though the Defense's evidence was better. In so doing, the Trial Court made a *judgment* on the weight and credibility of the evidence, and drew factual inferences *against* the party opposing summary judgment. Respectfully, this was exactly the *opposite* of what clearly established law says the court was supposed to do in deciding this motion.

Further, the trial court's conclusions from the evidence before it were unwarranted and inaccurate. The court below found significant the fact that Appellant had, in December of 2018, posted information and pictures about his relationship and family on Instagram. But, Reynolds never told Boshaw to remove anything from Instagram. In fact, there is no evidence that she even *knew* about Boshaw's Instagram account much less the photographs he was posting of his relationship and family. Nor was there any evidence that, at the time of his promotion, Appellant had made the Instagram photos *public*. But, Boshaw's facebook status *was* public, Reynolds *did* know about it, and she *did* tell him to

[67] Opinion, ECF 24, PageID 766.
[68] *Id.*

remove it as a condition of receiving the promotion. A jury could conclude that Reynolds' failure to object to his activities on Instagram was an oversight on her part, not a tacit approval of same.

The Court made much of Appellant's testimony that he later learned, when he spoke to Keppler about the incident, that he had no problem with his homosexuality. But, a person may suffer discriminatory decisions, even if the discriminating manager does not personally agree with the stereotypes upon which they are based. Consider a hypothetical example. A female attorney rises to a managing partner role in her law firm. She herself does not have a problem with women lawyers, being one herself. But, in her years of practice, she has come to believe that clients trust and prefer grey-haired males to advise them in legal matters. So, she makes a *business* decision to value male associates more than female associates. She pays the males higher salaries than the females because she believes them to be more in line with client preference and therefore more valuable. And, she gives the males more prominent roles in client development activities. If there's a presentation to give, or a board to join, she'll assign one of the firm's young males to do it. She's gone so far as to remove female associates from boards or trade associations they have joined on the firm's behalf, only to replace them with males. None of this is happening because she *herself* thinks women can't be good attorneys; she's a woman and she knows she's a good

attorney. But, she thinks the *clients* are sexist and this is a business. In this scenario, have the lesser paid, under-promoted female associates suffered an adverse employment decision based upon considerations of their sex? Absolutely. *Price Waterhouse* tells us that to pass muster under Title VII, an employment decision cannot be based upon *any* gender based consideration. The fact that a discriminating manager may not, *personally*, have any problem with the discriminated class is irrelevant if she takes adverse actions based upon it.

What if it turned out that the partners in *Price Waterhouse* themselves had no problem with more aggressive acting women, but were motivated by their belief that their clients might prefer a more "traditional" soft spoken, nicely dressed and made up female? Under these circumstances, the adverse gender stereotype they acted upon is no less an unlawful, impermissible element of the decision. But, it is coming not from the *manager's* own personal views, but from a business decision based on the perceived preferences of their customers. The end result is the same: an adverse employment decision based on impermissible considerations of gender stereotypes.

Consider yet another example. A restaurant opens in a predominantly conservative corner of Northern Michigan. The managers themselves are liberal-minded and themselves have no problem with homosexuals. But, they know where they are, and they know that a lot of their customers may and likely do have more

conservative views on homosexuality. So, they make sure not to employ anyone in a leadership role known to be involved in homosexual lifestyle or who acts or appears in ways that suggest that they are. This is not because *they* have a problem with homosexuals, but because their customers may. Again, we have gender stereotypes playing a role in an employment decision, even though conformance therewith is not based on any *personal* animus by the managers themselves.

We may never know what was in Reynold's mind when she told Mr. Boshaw that he must remove his relationship with Andrew Rholfs from Facebook if he wanted his promotion. Maybe she had a problem with homosexuals herself. Maybe she was afraid, it turns out inaccurately, that Mr. Keppler did. Maybe she was simply afraid the *customers* of this Northern Michigan business would not be accepting of Mr. Boshaw's relationship. That is all immaterial. What is material is that Reynolds told Boshaw that he would not be suitable for promotion unless and until he removed mention of his homosexual relationship from his public Facebook status. A jury could conclude that Mr. Boshaw's sexual orientation was made material to the promotional decision. This is precisely the conduct that Title VII seeks to avoid. It was grave error to dismiss this claim on the facts before the Court.

c. Mr. Boshaw was subjected to a hostile work environment by reason of his failure to conform to gender stereotypes and based upon his sexual orientation.

A party prevails on a claim of hostile work environment when (1) she was a member of a protected class; (2) she was subjected to unwelcome sexual harassment; (3) the harassment complained of was based on sex ; (4) the charged sexual harassment created a hostile work environment ; and (5) the employer is liable."[69] This occurs when the "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment ."[70] A claim may prevail on a claim involving severe or pervasive sexually harassing conduct, even where no other tangible employment action is proven.[71] This Court has held that hostile work environment claims premised on animus towards sexual orientation are now cognizable in light of *Bostock*.[72]

Mr. Boshaw was subjected to a hostile work environment based upon his sexual orientation, and based upon his nonconformance with gender stereotypes.

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[69] *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016).
[70] *Randolph v. Ohio Dep't. of Youth Servs.*, 453 F.3d 724, 733 (6th Cir. 2006) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).
[71] *Morris v. Oldham Cty. Fiscal Ct.*, 201 F.3d 784, 790 (6th Cir. 2000) ("Because plaintiff suffered no tangible employment action . . . she must establish that she was subjected to severe or pervasive sexually harassing conduct[.]").
[72] *Kilpatrick v. HCA Human Res., LLC*, Case No. 19-5230 at *4 (6th Cir. Dec. 17, 2020)

He was told that, unless he concealed his relationship status on facebook, and changed his appearance and behavior to be "more masculine," he would not be granted a promotion. He was required to maintain this subterfuge even after his promotion in order to maintain the position. Every day he got up and went to work, he had to look different and he had to act different. Even when he went home, he could not share his relationship on his Facebook. This created an abusive and unsatisfactory working environment for him which, eventually, led him to seek alternate employment and complaint to Dave Keppler. Donna Reynolds, his direct supervisor, was the culprit and so the employer is liable. The elements are satisfied.

The Trial Court nevertheless dismissed the hostile work environment component of the claim because "Plaintiff does not identify a separate claim for hostile work environment in his original or amended complaint."[73] But, in pleading a Title VII claim, a party must only articulate "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests."[74] Plaintiff alleged counts of sex discrimination in violation of both Title VII and the Michigan CRA. Clearly, his

[73] Opinion, ECF 24, PageID 24.
[74] *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012) (articulating pleading standard in Title VII cases.)

pleadings were sufficient to put the Defense on notice that there was a hostile work environment element to the claim because they devoted time in their motion to dismiss to brief against it.[75] Plaintiff, in turn, argued that the claim should not be dismissed.[76]

Further, it was error to rest its decision on the *pleadings* standard because this was *not* a motion for judgement on the pleadings under Fed.R.Civ.Pr. 12; it was a motion for judgment on the *record* pursuant to Fed.R.Civ.Pr. 56. "Rule 56 (c) of the Federal Rules of Civil Procedure requires a party to 'go beyond the pleadings' and identify admissible evidence of the essential elements of his claim."[77] The record was sufficient to support a claim for hostile work environment under Title VII. The claim should not have been dismissed.

The Trial Court rested its dismissal of the hostile work environment component of the claim on a mis-application of the pleadings standard. Reversal is warranted because the factual record is sufficient to support a claim for hostile work environment.

[75] Def's Brief, ECF 16, PageID 140-42.
[76] Plaintiff's Brief, ECF 19, PageID 670-71.
[77] *Shreve v. Franklin Cnty.*, 743 F.3d 126, 136 (6th Cir. 2014) (citations omitted).

III. The Trial Court Erred in Holding that Michigan's Civil Rights Act Does not Prohibit Discrimination Based upon Sexual Orientation.

Michigan's Elliott-Larsen Civil Rights Act, MCL 37.2202 *et seq* (hereinafer the "ELCRA"), just like Title VII, prohibits an employer from discriminating based upon "sex."[78] Unlike Title VII, the ELCRA permits an aggrieved employee to hold a discriminating manager personally responsible. Plaintiff sought to hold Reynolds individually responsible for her discrimination against him based upon his sexual orientation. The trial court held that the ELCRA does not prohibit discrimination based upon sexual orientation and so dismissed the pendent claim against Reynolds individually. Recently, the Supreme Court ruled that Title VII's prohibition on discrimination because of "sex" includes discrimination because of sexual orientation. There is strong indication that the courts of the State will follow suit. The Trial Court, however, ruled that the ELCRA does not prohibit discrimination because of sex. If anything, it should have submitted a certified question to the State of Michigan. This Court should consider doing that as well.

Since the Michigan Supreme Court has not yet spoken on whether it will follow *Bostock* in its interpretation of the ELCRA, "it is the duty of the [federal court]… to ascertain from all the available data what the state law is and apply

[78] MCL § 37.2202(1)(a).

it[.]"[79] The "available data" suggests, strongly, that the State of Michigan will apply the *Bostock* holding and conclude that the ELCRA's prohibition on discrimination because of "sex" will include discrimination based upon sexual orientation. The Courts of the State of Michigan defer to federal cases interpreting Title VII to determine whether it applies to discrimination because of sexual orientation.[80] In the 1993 decision, *Barbour v. Department of Social Services*, the Michigan Court of Appeals concluded that because federal courts had held that Title VII "sex" did not include sexual orientation, then the ELCRA would not either.[81] There is strong indication, however, that the courts of this State intend to track the *Bostock* decision. On June 19, 2020 the Michigan Attorney General issued direction to the Michigan Department of Civil Rights to wait for the Supreme Court's decision in *Bostock* and apply same to claims of discrimination based on sexual orientation.[82] There is *strong* indication, then, that the Court of the state will reasoning from *Bostock* and conclude that the ELCRA's prohibition on discrimination because of "sex" precludes discrimination based on sexual orientation.

[79] Opinion, ECF 24, PagID 761 (*quoting West v. Am.Tel. & Tel. Co.,* 311 US 223 (1940)).
[80] *Barbour v. Department of Social Services*, 198 Mich.App. 183, 185-86 (1993).
[81] *Id.*
[82] Exhibit A

The Trial Court nevertheless ruled that "sex" under the ELCRA does not include "sexual orientation" because "the Michigan Court of Claims also recognized that under Michigan precedent, the ELCRA does not encompass sexual orientation discrimination."[83] What the Court of Claims actually said in *Rouch World* was "*Barbour* is binding on this Court … and must be followed" and "whether *Barbour's* reasoning is no longer valid in light of *Bostock v. Clayton Co.* … and cases containing similar reasoning, is a matter for the Court of Appeals, not this Court."[84] In other words the Court of Claims, a trial level court that hears cases against the State of Michigan, held that it lacked authority to overrule *Barbour* but strongly hinted that, in light of *Bostock,* it thought this outcome was likely.

If there was any doubt as to the direction Michigan law is heading, the Trial Court *should* have submitted a certified question to the Michigan courts for a determination. MCR 7.308(A)(2) permits the Michigan Supreme Court to hear a certified question from another court as to state law. The Sixth Circuit itself and the lower district courts have availed themselves of that rule previously to seek clarification from the Michigan Supreme Court as to questions of state law relevant to the case[85]. This Court may, and should, consider doing so as well.

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[83] Opinion, ECF 24, PageID 761 *citing Rouch World v. MI Dep't of Civil Rights,* ECF 20-2.
[84] *Rouch World v. MI Dep't of Civil Rights*, ECF 20-2, PageID 706.
[85] *In re Certified Question from U.S. District Court for Eastern Dist. of Mich .*,793 N.W.2d 560 (2010) (District Court certifies question to MI Supreme Court.); *Allen v. Redman*, 858 F.2d 1194, 1198 (6th Cir. 1988)(Sixth Circuit certified question to MI Supreme Court.)

IV. Mr. Boshaw Suffered Unlawful Retaliation for Opposing the Discrimination to Which he was Subjected.

Mr. Boshaw claims that the Defense's stated reason for his termination is a pretext. As such, his *retaliation* claim must rely upon consequential evidence and should be evaluated under the *McDonnell Douglas* burden shifting analysis.[86] He must show that (1) he engaged in protected activity, (2) the defendants knew about it, (3) the defendants took 'materially adverse' actions thereafter, and (4) there was a causal connection.[87] If he can, the burden then "shifts" to the defendant to provide a nondiscriminatory reason for the adverse action.[88] If they can, the burden "shifts" back to the plaintiff to show that the proffered reason was a pretext for discrimination, such as by showing the stated reason was false, or insufficient to justify termination.[89]

Importantly, a claim for retaliation may prevail, even if the underlying claim of discrimination does not.[90] Even if the Court rejected Mr. Boshaw's claim for sex-based discrimination in the promotional decision, it could have found that he

[86] *See A.C. v. Shelby Cty. Bd. Educ.*, 711 F.3d 687, 697 (6th Cir. 2013)
[87] *Mys v. Mich. Dep't of State Police*, 886 F.3d 591, 599-600 (6th Cir. 2018).
[88] *Penny v. United Parcel Serv.*, 128 F.3d 408, 417 (6th Cir. 1997).
[89] *Id.*
[90] *Mys, supra.* (Sixth Circuit affirmed judgment in Plaintiff's favor for Title VII retaliation, even though underlying claim of sexual discrimination was earlier dismissed.)

suffered unlawful retaliation for complaining about sex-based discrimination in the promotional decision.

a. Mr. Boshaw engaged in protected activity and the defense knew it.

42 USC 2000e-3(a) "protects not only the filing of formal discrimination charges with the EEOC, but also complaints to management and less formal protests of discriminatory employment practices."[91] The Sixth Circuit has found that "protected activity includes complaints to co-workers, reporters, and managers."[92] In *Yazdian v. Conmed*,[93] the Sixth Circuit held that an employee's complaints directly *to* a discriminating manager about his own discrimination were protected conduct.

Mr. Boshaw testified that, in February of 2016, he spoke to Kepler and told him that he was dissatisfied that Defendant Reynolds' had made him conceal his sexuality and involvement in a homosexual relationship in order to receive his promotion. Shortly after, he discussed his concerns regarding same with Reynolds herself at the Red Keg. This was all protected conduct. There is no sensible

[91] *Mys,* 886 F.3d at 601 (6th Cir. 2018) (internal citations omitted).
[92] *Yazdian v. Conmed Endoscopic Techs, Inc.*, 793 F.3d 634 (6th Cir. 2015). Indeed, the Sixth Circuit has noted that "complaining about allegedly unlawful conduct to company management is classic opposition activity" to sustain a Title VII retaliation claim despite the employee not having yet filed a formal complaint with the EEOC. *Wasek v. Arrow Energy Services,* 682 F.3d 463, 469 (6th Cir. 2012).
[93] *Yazdia, supra.*

argument to be made that Kepler and Reynolds were unaware of Appellant's protected conduct.

b. Mr. Boshaw suffered adverse actions: hyper-scrutiny and eventual termination.

The Sixth Circuit has noted that the yardstick for a "materially adverse" action is substantially "less onerous" in the retaliation context[94] and "[t]his more liberal definition permits actions not materially adverse for purposes of an anti-discrimination claim to qualify as such in the retaliation context."[95] For instance, harassment by coworkers can support a claim of unlawful retaliation.[96] So can heightened scrutiny by management.[97] "[E]vidence offered to support a substantive claim of sexual harassment may also be offered to establish unlawful retaliation."[98]

We see the foregoing precepts in action in *Laster v. City of Kalamazoo*.[99] Laster was "facing heightened scrutiny, receiving frequent reprimands for breaking selectively enforced policies, being disciplined more harshly than similarly situated peers, and forced to attend a pre-determination hearing based on unfounded

[94] *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 58, 594-96 (6th Cir. 2007) (internal quotation marks omitted).
[95] *Id.* at 731-32 (quoting *Michael,* 496 F.3d at 596).
[96] *Mys v. Mich. Dep't of State Police*, 590 F. App'x 471, *16 (6th Cir. 2014)
[97] *Laster v. City of Kalamazoo*, 746 F.3d 714 (6th Cir. 2014)
[98] *Mys,* 590 F.App'x 471 at *17.
[99] 746 F.3d 714 (6th Cir. 2014).

allegations[.]"[100] In denying summary judgment, this honorable court held that all of this could amount to actionable adverse actions in a retaliation claim.[101]

Mr. Boshaw's claim aligns itself well with *Laster*. Mr. Boshaw began facing heightened scrutiny and harassment from Donna Reynolds after his complaints. He was also subjected to selective enforcement because he was terminated for missing *one* meeting while the bar manager, Moody, was repeatedly absent without any discipline at all.

c. There was a causal connection between Mr. Boshaw's protected activity and the adverse actions he suffered.

Both Kepler and Reynolds expressed anger towards Mr. Boshaw for his protected activity. Kepler got angry at first, but then said he would "make Donna make this right with you." Reynolds expressed anger that he had talked to Dave, saying "I thought we were friends." After he his conversation with Reynolds, the difference was "night and day." Suddenly, he "could not do anything right." It is clear that she got mad, and started hyper-scrutinizing him as a result. Reynolds and Kepler terminated Boshaw for missing *one meeting* and *one shift* while other managers, notably bar manager Meg Moody, were frequently absent without suffering any discipline. Further, there is indication that Reynolds *told* Boshaw he

[100] *Id.* at 732.
[101] *Id.*

could miss the shift and meeting he was absent for, and that Kepler *knew this* and yet terminated him based largely on the supposed absence nonetheless. A jury could conclude that Reynold's hyper scrutiny was in retaliation for his complaints. And, a jury could conclude that Mr. Boshaw's termination tracks to Kepler and Reynold's retaliatory animus towards him.

d. The Defense's stated reason for Mr. Boshaw's termination is a blatant pretext.

Appellant can prove pretext by showing the Defendants' stated reason had no basis in fact, did not actually motivate, or was insufficient to motivate their actions.[102] The Defense claims that Appellant was fired for missing the mandatory problem solver meeting on May 30th. But, according to Mr. Boshaw, Reynolds *told him* tha he could "stay home with his daughter" on May 30th and Defendant Kepler knew it.[103] Accepting this testimony as true, the Defense's stated reason for his termination lacks basis in fact.

Ignoring that, at least one other managerial level employee, bar manager Meg Moody, was repeatedly absent and did not suffer termination or discipline of

[102] *Stokes v. Detroit Pub. Sch.*, No. 19-1773, at *9 (6th Cir. Mar. 31, 2020)
[103] Email, ECF 16-36, PageID 535. *See also* Verified Complaint, ECF 1, ¶ 32 ("Plaintiff can demonstrate that, for the meeting she [Reynolds] identified, she had verbally excused his absence"); Amended Complaint, ECF 9, ¶ 32 (same); Boshaw Dep, ECF 16-4, PageID 301 (testifying that his absence on the day in question was after "the conversation I had the day prior.")

any kind. A jury could conclude that Appellant's "absence" on May 30th was not factually correct, or was insufficient to motivate his termination. There was, without question, a question of fact that should have been submitted to the jury as to whether Defendants' stated reason for Boshaw's termination was a pretext.

The Trial Court's dispensation of the aforesaid argument, respectfully, leaves much to be desired. The Trial Court correctly noted that "Plaintiff testified that he *received verbal permission from Reynolds* to skip the meeting to care for his daughter, but Reynolds and Kepler both swore in affidavits that no permission was granted."[104] Yet, the Court concluded factually that Plaintiff's termination was justified because "Plaintiff missed a mandatory meeting for higher level employees and a shift."[105] Here, again, the Trial Court has blatantly resolved a factual dispute in favor of the *movant*.

The Trial Court brushed off Boshaw's testimony that Reynolds *excused him* from the meeting he was *fired for missing* because "even if he believed he received permission to miss, was not adequately communicated to Reynolds and Keppler, providing further evidence of his documented communications issues."[106] Basically, Reynolds told Boshaw he could miss the meeting and then he was fired for missing the meeting. According to the Trial Court, this is more evidence of

[104] Opinion, ECF 24, PageID 755.
[105] Opinion, ECF 24, PageID 766.
[106] Opinion, ECF 24, PageID 768-69.

Boshaw's misfeasance at work. Quite frankly, and with all due respect, that is a very strained interpretation. The better view is that Reynolds *told* Boshaw he could miss the meeting and then recommended his termination for missing the meeting because she was angry at him for complaining to Keppler, and that Keppler went along with it because he was also angry about the complaint. On summary judgment, all reasonable inferences must be drawn in favor of the nonmovant. Here, the Trial Court made an *unreasonable* inference from the evidence *against* the nonmovant. This again was a plain error and should be reversed.

V. Mr. Boshaw's Claim for Civil Rights Conspiracy Should not Have Been Dismissed.

Section § 37.2701 of the ELCRA says that "two or more persons shall not conspire to…retaliate against a person because the person has opposed a violation of this act."[107] Appellant therefore stated, as Count 5 of his Complaint, a claim for "Civil Rights Conspiracy…in violation of …MCL § 37.2701…as against Defendant Kepler and Reynolds."[108]

Mr. Boshaw's claim for violation of the ELCRA's anti-conspiracy language is compelling. Both Kepler and Reynolds expressed anger towards him after he complained. Defendant Reynolds, according to Mr. Boshaw, verbally approved his

[107] MCL§ 37.2701
[108] Am Comp, ECF 9, PageID 58-60.

absence on May 30th. Kepler knew this as early as May 31, 2019.[109] Yet, Mr. Keppler now claims that he terminated Mr. Boshaw because of the supposedly "unapproved absence".[110] A jury, apprised of all of this, could reasonably conclude that the two together set Mr. Boshaw up and terminated him for a pretextual reason because they were mad at him for making civil rights complaints. His claim for violation of MCL § 37.2701 against Kepler and Reynolds is compelling. The Trial Court rejected all of this because it found the Defense's supposed "performance deficiencies" to be the more compelling explanation for its decision. Again, the Trial Court's decision to weigh the evidence, and draw conclusions in favor of the Defense, was clear error.

VI. The Trial Court Committed Reversible Error by Making Credibility Determinations Against Mr. Boshaw and Basing Its Decision Upon Same.

The Trial Court correctly noted that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[111] The Court then proceeded to eschew this precept, proclaiming that

[109] R. Boshaw May 31, 2019 Email re Termination, ECF 16-36.
[110] Keppler Aff, ECF 16-12, ¶¶ 9, 10.
[111] Op, ECF 24, PageID 772.

> Plaintiff argues that because he has furnished a "version of events" that contracts with that of Defendants, a genuine issue of fact necessarily exists. Not so, however, if an objective assessment of the evidence demonstrates evidence that is "so one-sided that one party must prevail as a matter of law," [quotation original, absence of citation also original] which is the conclusion that this Court has reached for the reasons outlined in the Opinion. Plaintiff's "version of events" is his testimony about Reynolds' criticism of his behavior as being less than "masculine" and his need to hide his sexual orientation early in his tenure as an MBC employee. From this conversation, Plaintiff contends that MBC management disapproved of his sexuality and, accordingly, sought to get rid of him. But simply saying so, alone, in light of the significant probative evidence to the contrary, does not a "genuine issue of material fact" make.[112]

Basically, the trial court held that even though Appellant had offered sworn testimony that, if accepted as true, would permit the jury to rule in his favor, it would not accept it because it thought the documentation of performance deficiencies the Defense had offered was more credible. The trial court justified its decision to weigh the sufficiency of the evidence saying it could do so if it felt the evidence is "so one-sided that one party must prevail as a matter of law." This ruling was clear error because this is not a correct statement of the law, nor a correct application to the facts of the case.

a. The Trial Court seems to have misinterpreted *Anderson v. Liberty Lobby, Inc.*

First and foremost, even though the Court quoted the precept that dismissal is proper if it decides the evidence is "so one-sided that one party must prevail as a

[112] *Id.* at PageID 773.

mater of law" it did not offer any citation in support. This alone militates in favor of reversal because the weight of authority says exactly the opposite. The language upon which the Court relied seems to be drawn from *Anderson v. Liberty Lobby, Inc.*[113] A search of the caselaw found no such language in any other case deciding a Rule 56 motion. The section the Court seems to refer to from that decision reads as follows:

> [t]he Court has said that summary judgment should be granted where the evidence is such that it "would require a directed verdict for the moving party ." And we have noted that the "genuine issue" summary judgment standard is "very close" to the "reasonable jury" directed verdict standard: "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence , while directed verdict motions are made at trial and decided on the evidence that has been admitted." ***In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.***[114]

The Court's comment that the inquiry is "so one-sided that one party must prevail as a matter of law" was a summarizing statement, used to juxtapose the standard of review on summary judgment against the standard under directed verdict, to highlight the point that more or less identical analysis applies to both decisions. It was *not* an invitation to disregard the well-settled principle that a jury, and not the

[113] 477 US 242, 259 (1986). Indeed, the Trial Court referred to this passage from *Liberty Lobby* in a different portion of its opinion. (Opinion, ECF 24, PageID 758). It seems reasonable to conclude that this is what it intended to cite for the quotation.
[114] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)

judge, is to weight the weight and credibility of the evidence. The *Liberty Lobby* court made this abundantly clear when, it reiterated that, on summary judgment,

> [i]t is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that ***sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.***[115]

The *Liberty Lobby* court further reminded us that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[116] The Court emphasized this important precept, stating

> [w]e repeat, however, that the plaintiff, to survive the defendant's motion, ***need only present evidence from which a jury might return a verdict in his favor***. If he does so, there is a genuine issue of fact that requires a trial.[117]

Read in the context of the opinion, the "so one-sided" language that the court seems to cite from *Liberty Lobby* was a brief summary of the summary judgment standard, offered to compare Rule 56(c) summary judgment motions to directed verdict motions in order to determine whether and to what extent similar reasoning should apply. It was not, as the Trial Court seemed to suggest, an invitation to eschew the well-established precept that the jury, and not the court,

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[115] *Id.* at 248-49.
[116] *Id.* at 248 (citations omitted)
[117] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986)

should make credibility determination and weigh the evidence. Read as a whole, the *Liberty Lobby* decision contradicts the Trial Court's approach, it does not support it.

b. The Trial Court's interpretation of Rule 56 violated the Appellant's Seventh Amendment right to a jury trial on questions of fact.

The Trial Court's actions have constitutional implications. The Seventh Amendment to the United State Constitution states that

> [i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[118]

The summary judgment rule avoids conflict with the Constitutional dictate that "no fact tried by the jury, shall be otherwise re-examined in any Court" by requiring the Court to abstain from making credibility determinations and weighing the sufficiency of the evidence.[119] The Trial Court's decision to dismiss based on its determination that the evidence was "one-sided" violated Mr. Boshaw's Seventh Amendment right to a jury trial on the facts of his civil claim.

[118] US Const. amend. VII.
[119] *See, eg McDaniel v. Kin. Hosp*, 311 F. App'x 758 (6th Cir. 2009).

c. In *Wexler v. White's Furniture, Inc.* this Court found error in circumstances nearly identical to the instant.

This Court has reversed trial courts that have done exactly what the lower court did here. *Wexler v. White's Furniture, Inc.*[120] was a discrimination case very similar to the one at bar. Mr. Wexler, a 55-year-old man, was hired as a sales representative. Two years later, he was promoted to a store manager role. Two years after that, he was demoted. During the meeting on the demotion, two of the manager's made several statements about Mr. Wexler's age, implying that they believed he would be less able to perform as a manager due to his age.[121] He sued, and he invoked *Price Waterhouse* for the proposition that his termination was based upon impermissible adverse considerations of stereotypes pertaining to his age. The store, in turn, presented several pieces of evidence about Mr. Wexler's supposed "performance problems" and claimed that the documented performance issues were the *real* reason for the demotion and *not* the comments he testified the managers had made during the demotion. The cistrict court accepted the store's

[120] 317 F.3d 564 (6th Cir. 2003)

[121] "Wexler has produced a series of statements by Schiffman and Lively that, if believed, indicate that age was at least a factor in their decision to demote him. These statements permit the inference that both the president and the executive vice-president of White's adhered to the stereotype that an older manager cannot perform in a high-stress management position where the company would be pushing him to work harder and do more." *Id.* at 572.

argument that the reason for the demotion was the performance problems it had documented and so dismissed. This Court found problematic the fact that

> instead of drawing inferences favorable to Wexler from the above statements as required by Rule 56 of the Federal Rules of Civil Procedure, the district court elected to believe the explanation of the company's officers and imposed its own credibility assessment on both parties. ***The widely differing perspectives on whether these statements reveal a discriminatory motivation provide a classic example of a genuine issue of material fact; that is, did White's hold stereotypical beliefs about the capabilities of older managers that influenced its decision to demote Wexler?***[122]

This Court found impermissible error in the Trial Court's decision to accept the company's explanation over Mr. Wexler's, and so reversed.

Wexler is binding, and instructive, to the instant. Just as Mr. Wexler did, Mr. Boshaw has offered a verbal account of statements made by a decision maker that evince discriminatory intent. Just as the furniture store did, Mr. Boshaw's employers have come forward with purported documentation as to his "performance problems" which, they claim, were the true motivation for the decision. As in *Wexler,* the widely differing perspectives on whether these statements reveal a discriminatory motivation provide a classic example of a genuine issue of material fact; that is, did Appellees hold stereotypical beliefs about the gender norms that influenced its decision whether to promote Mr.

[122] *Id.* at 72.

Boshaw? As in *Wexler,* the proper remedy for the trial court's error is reversal and remand.

The trial court committed the same error as the district court in *Wexler*: It discredited the employee's testimony and accepted the employer's stated reason for the adverse actions complained of. In so doing, the Trial Court misstated and misapplied the summary judgment standard. At best, this is reversible error. At worst, this is a violation of Mr. Boshaw's constitutional right to a jury trial on the factual merits of his claim. This Court should reverse and remand for a proper jury determination.

VII. Cause Exists to Remand the Case to a Different Trial Judge.

This Court has the authority pursuant to 28 U.S.C. § 2106 to remand a case to a different judge within the originating district.[123] It is recognized that "this is an extraordinary power and should rarely be invoked" and that "[s]uch reassignments should be made infrequently and with the greatest reluctance."[124] Such a request is considered under the following three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to

[123] *Hamad v. Woodcrest Condominium Ass'n*, 328 F.3d 224, 238-39 (6th Cir. 2003)
[124] *Id,* citations omitted

> preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.[125]

On balance, and with due deference to the extraordinary nature of this relief, it is suggested that these factors militate in favor of remand to a different judge.

The Trial Court has made its opinion of the case, and of Mr. Boshaw, abundantly clear. "Plaintiff's 'version of events' is his testimony about Reynolds' criticism of his behavior as being less than 'masculine' and his need to hide his sexual orientation early in his tenure as an MBC employee. From this conversation, Plaintiff contends that MBC management disapproved of his sexuality and, accordingly, sought to get rid of him. But simply saying so, alone, in light of the significant probative evidence to the contrary, does not a 'genuine issue of material fact make."[126] The Court proceeded to disregard Plaintiff's sworn testimony as to this conversation, and rule in favor of MBC based on its affidavits. Clearly, the Court has decided that it does not believe Mr. Boshaw to be telling the truth. It has said as much.

It is unreasonable to think that a trial court that has already expressed its belief that the Plaintiff is being untruthful will be able to put aside its previously expressed views. At trial, it would be required to accept testimony from Mr.

[125] *Id.*, citations omitted.
[126] *Id.* at PageID 773.

Boshaw that it has already ruled to be false. Mr. Boshaw's interest in receiving a fair trial is clearly threatened by trying his case in front of a judge that has already decided that he is not to be believed.

Perhaps more troubling is the *appearance* of impropriety before the general public. The Trial Judge has already said he thinks the Plaintiff's testimony is false. Trying a case in front of this same judge, to a third-party observer, will certainly appear unfair. Remanding to a different judge will preserve the appearance of fairness.

The case has not yet gone to trial. The only significant decision the Court has made to date was its erroneous decision to grant summary judgment. There will be no judicial waste by reassigning to a different judge to complete trial.

CONCLUSION

For the reasons stated herein, Appellant requests that this Honorable Court REVERSE the trial court's decision in all material respects, or REVERSE in part and submit the questions of state law as a certified question to the Michigan Supreme Court and, in any event, REMAND to a different judge for trial.

Respectfully Submitted,

Dated: 5/19/2021

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed.R.App. P. 32(a)(7)(B) because, even including the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 12,945 words in total (fewer than 13,000), according the word processing software used to create it.
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby affirm that on today's date the attached document was served upon all parties of record via the Court's ECF system.

Respectfully Submitted,

Dated: 5/19/2021

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