STATE OF MICHIGAN

COURT OF APPEALS

BETTY L. REISMAN,

Plaintiff-Appellee,

v

REGENTS OF WAYNE STATE UNIVERSITY,

Defendant-Appellant.

UNPUBLISHED
August 23, 1996

No. 165022
LC No. 84-420898-CZ

Before: MacKenzie, P.J., and White and M.W. LaBeau,* JJ.

PER CURIAM.

Defendant appeals by leave granted orders of the trial court, entered post-trial and following remand for retrial by this Court, granting plaintiff's motion for partial summary disposition to preclude defendant from asserting its affirmative action statement of policy as a defense, and denying defendant's motions to reopen discovery and for partial summary disposition on the issue of future damages. We affirm in part, and reverse in part and remand.

This reverse race discrimination case brought under the Elliot-Larsen Civil Rights Act[1] (ELCRA) dates back to 1984 and is before us for the second time. A 1988 trial ended in a substantial jury verdict in plaintiff's favor.[2] *Reisman v Regents of Wayne State Univ (Reisman I)*, 188 Mich App 526; 470 NW2d 678 (1991). Plaintiff, a former professor at defendant's College of Education, had argued at trial that defendant's decision not to renew her contract was based on race considerations, and that since defendant's affirmative action policy statement (policy) was not submitted to and approved by the Civil Rights Commission (CRC), defendant's consideration of race violated the ELCRA. 188 Mich App at 532, 541. At trial, defendant denied that race played any part in its decision not to renew plaintiff's contract, or that affirmative action played a part in the decision.

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* Circuit judge, sitting on the Court of Appeals by assignment.

It is undisputed that defendant's policy was not submitted to or approved by the CRC. Section 210 of the ELCRA permits voluntary adoption and implementation of an affirmative action plan if the plan is filed with, and approved by, the Commission:

> 37.2210 Elimination of effects of past discrimination; assurance of equal opportunity
>
> Sec. 210. A person[3] subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan. [MCL 37.2210; MSA 3.548(210), effective March 31, 1977.]

At the time of the first appeal in this case, this Court had issued conflicting decisions on the issue whether employment decisions made pursuant to unapproved affirmative action plans are discriminatory as a matter of law, and the plans themselves invalid. *Reisman I*, 533-536.

In *Reisman I*, a panel of this Court held that actions taken pursuant to an unapproved affirmative action plan are not discriminatory per se, in accord with *Ruppal v Dep't of Treasury*, 163 Mich App 219; 413 NW2d 751 (1987). *Reisman I* at 536-537. This Court reversed and remanded for a new trial, holding that defendant was denied a fair trial by the trial court's instruction to the jury regarding defendant's affirmative action policy. *Id*. at 537.

> Over defendant's objection, the trial court had instructed the jury:
>
> I instruct you that if you find that race or color was at least one of the reasons that made a difference in determining that Betty Riesman's contract was to be non-renewed, defendant cannot avoid liability by claiming that the defendant's acts were done pursuant to an affirmative action plan. [*Reisman I*, 188 Mich App at 532-533.]

This Court found "dispositive defendant's argument that the trial court erred in instructing the jury regarding the effect of defendant's affirmative action policy," holding that the instruction "precluded the jury from considering whether consideration of the affirmative action policy was a legitimate justification for the nonrenewal of plaintiff's contract," and further noted:

> Read as a whole, the instructions erroneously directed the jury that, if it found that defendant considered race in deciding not to renew plaintiff's contract, it must find that defendant violated plaintiff's civil rights. In effect, the instruction set forth a strict liability standard. The effect of the affirmative action policy was a basic and controlling issue in this case. . . [*Id*. at 537.]

This Court denied plaintiff's motion for rehearing by order dated June 29, 1991.[4] In March 1992, while plaintiff's application for leave to appeal to the Michigan Supreme Court was pending, the

Court issued its decision in *Victorson v Dept of Treasury*, 439 Mich 131; 482 NW2d 685 (1992), which discussed several of this Court's conflicting decisions regarding § 210, including *Ruppal*, *supra*, but not *Reisman I*. The *Victorson* Court held that employment decisions made pursuant to unapproved affirmative action plans do not necessarily constitute discrimination in violation of the ELCRA as a matter of law. *Id*. at 140.

The *Victorson* Court noted that a plaintiff may establish a prima facie case of discrimination by establishing that the employer used an unapproved affirmative action plan. However, the defendant is then afforded an opportunity to rebut the presumption of discrimination:[5]

> The absence of an approved plan does not mean that the employer is precluded from articulating a nondiscriminatory reason for its employment decisions. Thus, use of an unapproved plan will not entitle the plaintiff to succeed on a motion for summary disposition. Instead, we believe that allowing an employer an opportunity to demonstrate that the unapproved affirmative action plan is otherwise valid is consistent with the Civil Rights Act and the intention of the Legislature. [439 Mich at 143-144.]

The *Victorson* Court adopted three factors to be considered when determining whether an unapproved affirmative action plan is "otherwise valid," citing *United Steelworkers of America v Weber*, 443 US 193, 208; 99 S Ct 2721; 61 L Ed 2d 480 (1979), and *Johnson v Santa Clara Co Transportation Agency*, 480 US 616, 107 S Ct 1442; 94 L Ed 2d 615 (1987):

> (1) whether the purposes of the employer's plan are similar to the purposes of title VII,
> (2) whether the employer's plan unnecessarily trammels the rights of nonminorities, and
> (3) whether the plan is temporary in nature. [439 Mich at 144.]
>
> * * * *
>
> . . . When faced with the existence of an unapproved voluntary affirmative action plan, summary disposition does not automatically follow. Instead, the defendant is to be afforded an opportunity to show that the plan is otherwise valid. This may be accomplished by showing that (1) the unapproved plan is similar in purpose to the Civil Rights Act, (2) the plan does not unnecessarily trammel the rights of nonminorities, and (3) the plan is temporary in nature. [*Id*. at 146.]

Plaintiff's application for leave to appeal to the Supreme Court in *Reisman I* was denied by order dated September 9, 1992.[6] Plaintiff filed a motion for reconsideration, arguing that the Supreme Court's order would prevent the trial court on remand from considering *Victorson* and *Wygant v Jackson Bd of Ed*, 476 US 267; 106 S Ct 1842; 90 L Ed 2d 260 (1986). By order dated January 12, 1993, the Supreme Court denied reconsideration "without prejudice to plaintiff raising at the trial court claims concerning the affirmative action policy" under *Victorson* and *Wygant*.

On remand, plaintiff moved for partial summary disposition pursuant to MCR 2.116(C)(9) and (C)(10). Plaintiff's motion argued that defendant should be precluded from asserting its affirmative action policy as a defense because the policy violated both *Victorson* and *Wygant*. Plaintiff argued that defendant admitted it never adopted an affirmative action plan, but merely had a statement of policy regarding affirmative action and non-discrimination which was adopted in the early 1970s. Plaintiff argued that the trial court's instruction to the jury was given as a result of defendant never having claimed at trial that its statement of policy was a defense to plaintiff's discrimination claim and as a result of defendant maintaining at trial that the case had nothing to do with affirmative action or race considerations. Plaintiff argued defendant's statement of policy was not "otherwise valid" under *Victorson*, as it failed the three prong test of *Victorson*. Plaintiff argued that she "cannot bear the burden constitutionally of trying to achieve racial balance" and that defendant could not rely on its affirmative action policy because it is unconstitutional under *Wygant* and thus cannot be a defense. Plaintiff argued the *Wygant* Court's concern was "somebody losing an existing job because of affirmative action . . . if you have a job and lose it because of affirmative action, that's too great a burden to place on one person."

Plaintiff argued that the sole basis for this Court's reversal was that the jury instruction precluded the jury from considering defendant's possible affirmative action motivation under its statement of policy as a defense to discriminatory conduct, and that if the trial court should conclude the statement of policy violates either *Victorson* or *Wygant*, there is no need for retrial. Plaintiff attached to her motion her application for leave to appeal to the Supreme Court, defendant's affirmative action statement of policy, plaintiff's motion, supplemental brief and appendix in support of plaintiff's motion for reconsideration of the Supreme Court's denial of leave to appeal, defendant's answer and affirmative defenses, and the two Supreme Court orders discussed above.

In response to plaintiff's motion, defendant argued plaintiff's motion was premature because defendant "has not yet, to date, asserted that its actions were done exclusively pursuant to some sort of affirmative action plan or policy," and that plaintiff's motion was an attempt to circumvent this Court's remand order. Defendant admitted it had not adopted an affirmative action plan, but rather had an equal opportunity and affirmative action statement of policy. Defendant argued that at trial it had presented evidence as to the "true reason for plaintiff's non-renewal," that plaintiff's layoff was based on seniority, and that defendant "merely claims that non-renewal was consistent with an affirmative action policy and not discriminatory." Defendant argued that it had "at no time . . . claimed that its actions were required or mandated by an affirmative action policy." Defendant argued retrial is necessary regardless of whether defendant considered its affirmative action statement of policy because this Court's opinion remanding was based on more than the affirmative action issue--specifically, that plaintiff had to present sufficient evidence to establish race was a determining factor in defendant's adverse employment decision and that certain evidentiary rulings should be made anew on the record.[7]

Defendant argued *Wygant* is inapplicable because that plan involved minority quotas and set-asides, unlike the instant case, and also argued the instant case presented a failure to hire and not a

layoff situation like *Wygant*. Defendant further argued that plaintiff's assertion that the policy does not satisfy *Victorson* was unsubstantiated, and that the policy in fact conforms to *Victorson* because its purposes are consistent with the ELCRA, it does not trammel non-minority rights as in *Wygant*, and is intended to be temporary.

The trial court granted plaintiff's motion for partial summary disposition, stating:

> . . . this Court recalls that the defendant never claimed at any point during the trial that its statement of policy was a defense to plaintiff's claim of discrimination. To the contrary, defense counsel argued that the case had nothing to do with affirmative action.
>
> This Court has examined the Wygant case, W-y-g-a-n-t, Wygant v Jackson Board of Education, located at 576 US 267. A decision which holds that affirmative action plan is violative of the U.S. Constitution if it causes a person to lose their job. This Court has also read the Victorison [sic] . . . versus the Department of Treasury, located at 439 Mich 131.
>
> This Court making the determination that under Wygant or Victorison [sic], a defendant cannot raise its statement of policy as a defense to plaintiff's claim of violation of the Elliot-Larsen Civil Rights Act.
>
> This Court agrees with the jury that the defendant's wrongful conduct resulted in the loss of plaintiff's job. And that the statement of policy failed to satisify [sic] any of the requirements for a valid affirmative action plan which were enunciated in Victorison [sic].
>
> Therefore, this court is granting the plaintiff's motion for partial summary disposition.
>
> The plaintiff can prepare an order forthwith as a result of this Court's opinion that was just enunciated on the record.

The trial court denied defendant's subsequent motions to reopen discovery and for partial summary disposition as to future damages. We granted leave to appeal.

We first observe what is apparent. This case comes to us with a significant history and we do not write on a clean slate. We must address the issues presented in this appeal in the context of this Court's and the Supreme Court's prior rulings. To the extent the parties present arguments in this appeal that attack or undermine the prior appellate decisions in this case, they are not considered, as being contrary to the law of the case.

Defendant has never adopted an affirmative action "plan," but rather has a statement of policy. Defendant's policy states:

WAYNE STATE UNIVERSITY

AFFIRMATIVE ACTION POLICY:

A Statement of Principle

Wayne State University recognizes not only a legal obligation but also a moral and educational responsibility to achieve equal opportunity within the University. Accordingly, the University:

(1) reaffirms its long-standing commitment to the policy that in its programs, operations, and activities there shall be no discrimination; on the basis of race, color, religion, national origin, marital status, age, sex or handicap in the hiring, terms, remuneration, conditions or privileges of employment or any matter directly or indirectly related to such employment; in the promotion or discharge of employees; and in the admission, training, advancement and treatment of students.

(2) will ensure fair employment practices in all personnel matters.

(3) will ensure equality in the provision of educational services.

(4) will ensure that realistic and appropriate goals are established, implemented, periodically reviewed, and when necessary revised with respect to:

> (a) alteration of the composition of the University staff to effect a better proportion of minority persons and females, consonant with the particular needs of Wayne State University in its present setting.
>
> (b) participation of minority companies in University contracts, the awardability of bidders for construction or maintenance work and the awardability of any vendor providing goods or services to the University.

(5) will determine the appropriateness of the affiliation of this University, or any of its divisions, with other institutions in providing educational services, athletic competition, or student accommodations; and contracts for operation and use of facilities or accommodations of affiliated institutions shall include such a policy statement.

(6) will ensure under this policy the fair use of University buildings and other facilities.

This policy shall not preclude the University from being a member of an organized group of institutions which includes institutions not fully following this policy if the objectives of the group itself are consistent with the policy.

> This policy shall not preclude the acceptance of fellowship or scholarship grants intended to benefit students of particular geographic origin, ancestry, nationality or religious belief when conceived in a manner which does not reflect unfairly upon any group and those persons eligible under the terms of the grant.
>
> This policy shall not preclude the Board of Governors from giving earnest consideration to a recommendation for a provisional non-affiliative working relationship for a limited period with any institution which gives evidence of real and substantial progress toward the elimination of discriminatory practices.
>
> The mechanisms for achieving these objectives shall be continually reviewed and refined to make them sensitive to the entire range or personnel practices in the University. This range includes but is not limited to: recruitment, appointment, reappointments, tenure, promotions, compensation determination, benefits, transfers, layoff, returns from layoff, University-sponsored training and education, tuition assistance, social and recreational programs, retirement, disabilities, adjustments in workloads, etc. All of these matters must be administered without regard to race, color, religion, national origin, marital status, age, sex or handicap.
>
> A pressing need of the times is to direct greater resources and special efforts to identify and attract minorities and women to positions and programs in the University in which they are underrepresented, in order to rectify the results of years of deleterious practices which have limited their development and participation.
>
> This policy includes all programs, operations and activities financed by the University regardless of the source of funds-general, private, local, state or Federal, and it is designed to realize equal opportunity in fact.
>
> 10/14/77

We conclude that the affirmative action policy is not invalid on its face. The policy is not on its face inconsistent with the ELCRA. It does not on its face unnecessarily trammel minority rights, and there is language indicating that it is intended to be temporary in nature. The policy does not purport to require any particular action, including the non-renewal of a white teacher's contract in favor of renewing an African-American teacher's contract under circumstances such as involved here.[8] There is some indication on the face of the policy that the policy is intended to respond to "years of deleterious practices" which limited the development of minority and women's programs and the participation of minorities and women in University positions. Also there is reference to the need to continually renew and refine the policy's objectives. Given that plaintiff's summary disposition motion did not rely on evidence pertaining to the adoption and implementation of the policy, but attacked the policy on its face under *Victorson* and *Wygant*, we conclude that the trial court erred in granting plaintiff's motion and refusing to allow further development of the record on this issue,[9] both as to reliance on the policy as the

basis for the employment decision,[10] and the circumstances surrounding the adoption and implementation of the policy.[11]

We next conclude that the court did not err in denying defendant's motion for summary disposition regarding the future damages issue. This Court in *Reisman I* left plaintiff to her proofs. *Reisman*, 188 Mich App 541-543. The law of the case requires affirmance.

Finally, we conclude that the court abused its discretion in denying defendant's motion to reopen discovery regarding matters transpiring since the close of discovery and trial, particularly regarding damages. Given the many years between trial and the significant damages issues, the refusal to grant defendant any opportunity to discover facts regarding plaintiff's damages during the interim period was an abuse of discretion.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion and for a new trial as ordered in *Reisman I*. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Barbara B. MacKenzie
/s/ Michael W. LaBeau

[1] MCL 37.2101 et seq.; MSA 3.548(101) et seq.

[2] The judgment on jury verdict order, dated February 18, 1988, states that the jury awarded plaintiff $1,582,000, broken down as follows: $170,000 in damages "to the present date for lost wages, benefits, and pension;" future damages in the amount of $912,000, and $500,000 for past and future mental and emotional suffering. The trial court granted defendant's motion for remittitur in part and reduced the amount of non-economic damages awarded by $200,000, resulting in an award of $1,382,000.

[3] MCL 37.2103(f); MSA 3.548(103), defines "person" as including the state.

[4] Plaintiff's motion for rehearing raised many of the arguments asserted here. Plaintiff argued that defendant denied reliance on the policy, and that the policy is invalid under *Wygant v Jackson Bd of Ed*, 476 US 267; 106 S Ct 1842; 90 L Ed 2d 260 (1986). In its original appellee brief, plaintiff also stressed defendant's non-reliance on the policy and the fact that what is involved is a policy, not a plan.

[5] The Court noted that the order of proof set forth in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), was appropriate for cases arising under the ELCRA:

> . . . First the plaintiff must establish a prima facie case of discrimination; then the burden shifts to the employer to articulate a non-discriminatory, legitimate reason for its employment decision. Finally, should the employer successfully rebut the plaintiff's prima facie case, the plaintiff is afforded an opportunity to demonstrate that the employer's articulated nondiscriminatory reason is merely pretext. The plaintiff bears the burden of proving the invalidity of an affirmative action plan at all times. *Wygant v Jackson Bd of Ed*, 476 US 267; 106 S Ct 1842; 90 L Ed 2d 260 (1986). [*Victorson*, 439 Mich at 143.]

[6] The order stated "On order of the Court the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court prior to the proceedings ordered by the Court of Appeals and any further subsequent review by the Court of Appeals."

[7] This Court's discussion of these issues can be found at 188 Mich App 539-541 and 543-544.

[8] We note that the present fact situation is not a layoff situation as argued by plaintiff, or a failure to hire situation, as argued by defendants, but falls somewhere in between and should be evaluated accordingly.

[9] The decision of *Adarand Constructors v. Pena*, 515 US ___; 115 S Ct 2097; 132 L Ed 2d 158 (1995), addressed in the parties' supplemental briefs, does not affect our conclusion in this regard.

[10] We also observe that reliance on an affirmative action plan as the basis for taking a particular employment action as in *Victorson* and *Wygant* presents a factual circumstance different from a case where a general affirmative action policy exists and defendant maintains that any action taken was not based on the plan but was consistent with the plan. We recognize that it has been difficult for plaintiff to pin down defendant's position with respect to the relationship between its employment decision and its affirmative action policy. Nevertheless, as we observed, *supra*, we decide this case within the framework of the prior appellate decisions. On remand, decisions regarding the admissibility of evidence, and the need for, and form of, any instruction regarding the affirmative action policy shall be made in the context of the claims and arguments of the parties and the proofs at trial.

[11] If at some point defendant asserts that plaintiff's contract was not renewed, and Gordon Smith's contract was, pursuant to the implementation of defendant's affirmative action policy and that therefore defendant's treatment of race as a determining factor did not violate the ELCRA, a grant of summary disposition may prove to be appropriate. We recognize that the trial court may have intended to do no more than foreclose the possibility of such a defense at trial. However, any such decision should be made when the nature of defendant's reliance on the policy, if any, is asserted, and after the validity of the policy is fully explored. Further, we think it important to observe that defendant's inability to use the policy as a shield does not mean that plaintiff can use it as a sword. The mere existence of the policy

and reference to it, even if it does not satisfy *Victorson*, does not automatically mean that defendant violated the ELCRA.