

2004 Mich. App. LEXIS 1081, *

1 of 2 DOCUMENTS

**BRENT VEENSTRA, Plaintiff-Appellant, v WASHTENAW COUNTRY CLUB,
Defendant-Appellant.**

No. 244930

COURT OF APPEALS OF MICHIGAN

2004 Mich. App. LEXIS 1081

April 27, 2004, Decided

NOTICE: [*1] THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

PRIOR HISTORY: Washtenaw Circuit Court. LC No. 97-004385-NO.

DISPOSITION: Reversed and remanded for trial on plaintiff's claim for employment discrimination. We do not retain jurisdiction.

JUDGES: Before: Jansen, P.J., and Markey and Gage, JJ.

OPINION:

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to *MCR 2.116(C)(10)* on plaintiff's claim that his employment contract was not renewed because of his impending divorce and that he was thereby discriminated against because of his marital status, in violation of the Elliott-Larsen Civil Rights Act, *MCL 37.2202(1)(a)*. We reverse and remand for trial.

This is plaintiff's second appeal from an order granting summary disposition to defendant. After summary disposition was entered the first time, a different panel of this Court reversed in part, leaving undisturbed the trial court's grant of summary disposition on the breach of contract count, but reversing on the discrimination count. The Supreme Court granted [*2] leave, reversed our decision, and remanded the case for further proceedings. *Veenstra v Washtenaw Country Club*, 466 Mich. 155; 645 N.W.2d 643 (2002). In its opinion, the Supreme Court clarified the standard for analyzing a claim of discrimination based on marital status. The Supreme Court ruled that if there was evidence of discrimination based on plaintiff's actual marital status, that is, his impending divorce, summary

disposition was inappropriate, even if such discrimination was only one of the factors leading to the non-renewal of plaintiff's employment contract. *Veenstra, supra* at 164. If on the other hand the contract was not renewed because the employer disapproved of plaintiff's romantic attachment before the divorce to a woman who was not his wife, this was not marital status discrimination, and if the only evidence of supposed marital status discrimination rested on this ground, summary disposition would be appropriate. *Id.* at 167-168. The Supreme Court noted that the trial court had not focused sufficiently on an affidavit presenting evidence that the divorce, as opposed to the relationship, was a factor in the non-renewal, [*3] and directed the trial court to do so on remand. On remand, the trial court again granted defendant summary disposition.

Summary disposition is appropriate under *MCR 2.116(C)(10)* only if there is no genuine issue of material fact as to the dispositive issues in the case. *Ritchie-Gamester v City of Berkley*, 461 Mich. 73, 76; 597 N.W.2d 517 (1999). The evidence is viewed in the light most favorable to the nonmoving party, and it is given the benefit of all reasonable inferences. *Hall v McRea Corp*, 238 Mich. App. 361, 369-370; 605 N.W.2d 354 (1999). If reasonable minds could, when the evidence is viewed in this light, view the issue differently, summary disposition is not appropriate. *Allstate Ins Co v State*, ___ Mich. App. ___; ___ N.W.2d ___ (# 243201, rel'd 12/9/03), slip op p 3. Summary disposition is rarely appropriate in cases that hinge on determinations of credibility, intent or state of mind. *Michigan National Bank-Oakland v Wheeling*, 165 Mich. App. 738, 744-745; 419 N.W.2d 746 (1988). A court may not make findings of fact or weigh credibility in deciding a summary disposition motion. [*4] *Skinner v Square D Co*, 445 Mich. 153, 161; 516 N.W.2d 475 (1994).

Plaintiff asserts that there was evidence that defendant chose not to renew plaintiff's contract because plaintiff was getting a divorce. We agree. In reaching the contrary conclusion, the trial court ignored the appropriate standard for deciding a motion for summary

disposition. Rather, it weighed the evidence, consisting of depositions and affidavits, and credited that evidence favoring defendant while discounting that favoring plaintiff. The trial court apparently gave dispositive weight to affidavits from several of defendant's board members in which the members asserted that they did not discriminate against plaintiff based on his upcoming divorce, instead their reasons for not renewing plaintiff's contract had nothing to do with the divorce and were reasons that were determined before the members were aware of the breakup of plaintiff's marriage. This is certainly evidence the finder of fact could consider at trial, and it might lead to a verdict in defendant's favor. But there was contrary evidence as well. In particular, the affidavit of defendant's outside operations manager Patrick [*5] Godfrey, which the Supreme Court specifically directed the trial court to consider on remand, *Veenstra, supra at 165*, states that "on several occasions" he heard three board members "express their disapproval about [plaintiff's] divorce from his wife," and "that they 'had to get rid of him.'" The affidavit also references the board members' statement that "the situation was 'disgusting.'" While this statement could be a reference to the alleged extramarital affair, the remark was coupled with the expressions of disapproval about the divorce. Even though an employment decision based on the affair would not be actionable, one based on the divorce is, and where there is evidence of "mixed motives," summary disposition is precluded. *Veenstra, supra at 164*. Moreover, to the extent Godfrey's affidavit was ambivalent as to the relation between the board members' attitudes and plaintiff's upcoming divorce, Godfrey clarified in his deposition that the board members disapproved of the divorce and were negative toward plaintiff because of it. This evidence permits an inference that the adverse employment decision was based on plaintiff's marital status, and thus, was sufficient [*6] to avoid summary disposition.

The trial court placed a great deal of reliance on the fact that the decision not to extend plaintiff's contract was made before his wife filed divorce papers. However, this reasoning places too mechanical a reliance on chronology. There clearly is evidence in the record that plaintiff and his wife separated in contemplation of a divorce in April 1996, well before the employment decision was made. The trial court ignored the realities of the situation. Discrimination based on marital status is just as real when it is committed against a person about to be married or divorced as when committed against someone who has completed the process or begun the paperwork by filing a complaint for divorce or obtaining a license to be married. If this reality were ignored, there would be nothing to stop an unscrupulous employer who wanted to have only single persons on staff from discharging them as soon as they began to make plans for a wedding, and then asserting that, because the marriage

had not been effectuated, there was no discrimination. n1

n1 The Supreme Court does not discuss whether "separated" as well as "divorced" constitutes a marital status category on the basis of which discrimination is prohibited, and so we do not base this ruling on evidence of discrimination based on separation. Rather, because separation is both the normal legal prerequisite to a divorce, and the first practical step divorcing couples usually take in the divorce process, it is evidence that the divorce was underway and that defendant knew about it.

[*7]

There was also evidence that, at a club tournament shortly after the separation, a member stood up on a bench in the locker room and made a speech to about forty people present that their "favorite pro" and his wife were separating. Almost immediately after this, a survey was sent to club members, asking them to evaluate certain employees. There is no evidence that the positions of the other employees evaluated were in jeopardy; thus, the survey could also be evidence, along with the locker room speech, that a campaign to terminate plaintiff because he was getting a divorce began as soon as the divorce plans were known.

In sum, there was evidence both to support the position that plaintiff was not rehired because he was getting divorced, and that he was not rehired for legitimate reasons. The outcome depends on whose evidence is believed. The trial court, contrary to the clear instruction of *MCR 2.116(C)(10)* and case law interpreting it, chose to credit the evidence of defendant's witnesses and discredit that of plaintiff's, and to give the moving party (defendant) the benefit of favorable inferences from the evidence (such as chronology) rather than giving the benefit of such inferences [*8] to plaintiff, as the law directs. Summary disposition was, therefore, inappropriate. On remand, the case should be tried on its merits, and decided by the trier of fact.

Reversed and remanded for trial on plaintiff's claim for employment discrimination. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Jane E. Markey

/s/ Hilda R. Gage

