STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

YVETTE M. CORMIER,

Plaintiff,

-vs-

PF FITNESS – MIDLAND, LLC, a Michigan Limited Liability Company; PLA-FIT FRANCHISE, LLC, a New Hampshire Limited Liability Company; Jointly and Severally,

Defendants.

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SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFF'S ANSWER TO DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

FILE NO: 15-2463-NZ-B

HONORABLE MICHAEL J. BEALE

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ARGUMENT

I. ELCRA APPLIES TO DEFENDANTS' POLICY.

Defendants distort what occurred at oral argument on September 25, 2015. This Court asked questions about the Elliott-Larsen Civil Rights Act (ELCRA), specifically MCL 37.2103(i). The statute provides that there are three ways for sexual harassment to occur: unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct or communication of a sexual nature. Plaintiff conceded that no violations for the first two types existed. There were, however, violations through verbal or physical conduct or communication of a sexual nature as a result of Defendants' policy. Defendants somehow re-characterize Plaintiff's acknowledgment that there were no requests for sexual favors or advances as admitting that Defendants' policy was not sexual in nature. Plaintiff makes no such concession. Curiously, Defendants failed to articulate this claim during their rebuttal argument at the hearing.

Further, Defendants argue that since Mrs. Cormier admitted that Mr. Sklodowska himself did not undress in front of her, that no violation of ELCRA occurred. This argument is without merit. Mrs. Cormier did suffer conduct and communication in violation of ELCRA by the implementation of Defendants' policy resulting in a biological man using the locker room with her. Again, as was emphasized at oral argument, Defendants' policy allowing men and women to get naked and shower together is sexual in nature. This policy deprived Mrs. Cormier of full access to Defendants' public accommodation. Mrs. Cormier, as a biological woman, cannot have full use and enjoyment of the locker room when she is forced to undress and shower in front of a biological man.

Defendants argue that ELCRA does not prohibit sexual harassment and intimidation if it is a matter of "mere policy." We are confident the Michigan Legislature would be shocked to learn

that the Act it passed redressed only random offenses of this nature but was powerless against systemic violations. So also, for that matter, would Michigan's appellate courts, which have routinely analyzed whether policies violate ELCRA. In fact, in the preamble, ELCRA plainly states that its purpose is "to prohibit discriminatory practices, policies, and customs.…" Preamble to Michigan Public Act 453 of 1976. The Legislature could not have more clearly expressed its intent that ELCRA applies to policies, and our courts have been faithful in enforcing that intent.

The Michigan Supreme Court analyzed the issue of interpreting ELCRA when it stated:

> **When there is any doubt about the meaning of statutory language, we have stated that "a court must look to the object of the statute, the harm which it is designed to remedy, and apply a reasonable construction which best accomplishes the statute's purpose."** *In re Forfeiture* of $5,264, 432 Mich. 242, 248, 439 N.W.2d 246 (1989). We have also stated that statutory language must be interpreted in light of "'the subject matter and ... the general scope of the provision, and ... in light of the general purpose sought to be accomplished or the evil sought to be remedied by the ... statute.'" *Altman v. Meridian Twp.*, 439 Mich. 623, 635, 487 N.W.2d 155 (1992), quoting *White v. Ann Arbor*, 406 Mich. 554, 562, 281 N.W.2d 283 (1979).
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> For the disposition of this case, I suggest that the breadth of the following portion of § 302 is uncertain: "a person shall not ... [d]eny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation...." The task, therefore, is to determine whether the Legislature intended the activities complained of here to be included in this section of the Civil Rights Act. …
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> **The purposes of the Civil Rights Act as declared by the Legislature are, in relevant part: "[T]o define civil rights; to prohibit discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, or marital status;** ... [and] to provide remedies and penalties...." Preamble to 1976 P.A. 453. …
>
> **These provisions, and §§ 301 and 302, clearly express the Legislature's intent to** "eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases," *Miller v. C.A. Muer Corp.*, 420 Mich. 355, 363, 362 N.W.2d 650 (1984), and **guarantee to all Michigan citizens equal access to businesses that offer goods and services to the public. <u>Moreover, the Civil Rights Act is remedial in nature and must be liberally construed to provide a broad remedy</u>**, *Holmes v. Haughton Elevator Co.*, 75 Mich. App. 198, 200, 255 N.W.2d 6 (1977), aff'd 404 Mich. 36, 272 N.W.2d 550 (1978).

Kassab v Michigan Basic Property Ins Ass'n, 441 Mich 433, 449-451 (emphasis added). The Supreme Court made it clear that Michigan courts can properly rely on the preamble of ELCRA to determine legislative intent. Further, it affirmed that such statutory interpretations should be construed liberally to provide for a broad remedy.

Numerous other cases exist where courts have analyzed whether certain policies violated ELCRA. In *Whitman v Mercy-Memorial Hosp*, 128 Mich App 155, the Court of Appeals analyzed whether a hospital's policy, which did not allow an unmarried father to be present during his child's birth, violated ELCRA. The Court held:

> Had plaintiffs Whitman and Coch been married to one another, it is clear that under defendant's policy Coch would have been permitted into the delivery room as Whitman's nonmedical support person. **Therefore, defendant's policy clearly violated the above statutory provision against discrimination on the basis of marital status.**

Id. at 160 (emphasis added). Notably, the Court did not dismiss the case simply because Plaintiff sued because of a "mere policy." The Court held that instituting and carrying out a policy, in and of itself, can violate ELCRA. (Please see the following cases where courts did analyze whether policies violated ELCRA. *See, e.g., Department of Civil Rights ex rel Forton v Waterford Tp Dept of Parks and Recreation*, 425 Mich 173 (1986)); *Whirlpool Corp v Civil Rights Com'n*, 425 Mich 527 (1986); *Scalise v Boy Scouts of America*, 265 Mich App 1 (2005). Clearly, courts have held that policies can constitute a violation of ELCRA.

In *Miller v CA Muer Corp*, 420 Mich 355 (1985), Plaintiff sued for discrimination under ELCRA based on Defendant's policy that prohibited married couples from working together. Defendants argued that their policy was facially neutral and thus could not violate ELCRA. The Court stated that "[w]e remand, however, for further consideration because impermissible

discrimination may occur in the application of a policy not facially discriminatory." *Id*. at 358. Further, the Supreme Court held:

> We turn to the argument that the instant anti-nepotism policies are discriminatory as applied to Miller and Lowry. **A facially neutral employment practice can operate as a mask or pretext for impermissible discrimination**. Thus our decision that the instant policies are facially neutral concerning the criterion of whether one is married does not preclude a finding that Miller and Lowry were nevertheless discriminated against because of their marital status or for some other impermissible reason. **Because summary judgments were entered in the instant cases, there are no factual records concerning the application of the antinepotism policies.** Therefore, these cases are remanded for further proceedings.

Id. at 365-366 (emphasis added). The Supreme Court held that policies can be discriminatory and one of the key factors is how the policy is applied, which is a factual finding. Even if this Court were to agree with Defendants that their policy was facially neutral, Plaintiff must be allowed to proceed to jury trial to present the facts as to the implementation and application of such a policy. Just as it was inappropriate for the lower court to grant summary disposition in *Miller*, it is inappropriate here when questions of fact exist regarding the full extent and application of Defendants' policy.

Clearly, Defendants' invitation for this Court to dismiss an ELCRA claim on its face merely because it addresses a policy of sexual intimidation rather than an isolated incident is one this Court should decline.

Finally, Defendants also attempt to improperly inject an irrelevant factual issue by asserting that their policy "only" allows "sincere" transgender men to use the women's locker room (as if that would be some consolation to women and girls who don't want members of the opposite sex in their showers and bathrooms). However, Defendants admitted at oral argument that they not only have no mechanism to determine who is actually "sincere," but that there is no possible way they could ever know who is "sincere" while on their "own personal journey." The true effect of

the policy is that all men can have access to the women's locker room by simply claiming to be "sincere." Any man can shower with women under the pretext of being "sincerely" transgender, which Defendants admit is an unknowable status. Such an offensive and irresponsible policy creates a hostile sexual environment and puts all women and children at risk.

II. SLAYTON V MICHIGAN HOST, INC., 144 MICH APP 535 (1985) APPLIES TO THIS CASE.

Defendants improperly cite *Haynie v State*, 468 Mich 302 (2003) again to argue that because their policy was "gender-based," it cannot be sexual in nature. Defendants again misrepresent that Plaintiff conceded that the policy was not sexual in nature at oral argument (see above). Nothing could be further from the truth. Apparently the best defense to *Haynie* Defendants could muster is a misrepresentation of Plaintiff's position at oral argument.

Defendants conflate the two holdings in *Haynie* and *Slayton*. *Haynie* held that policies that are gender-based and sexual in nature can be a violation of ELCRA. *Slayton* simply held that a jury should have been allowed to decide whether a policy was sexual in nature. These two cases are not in conflict. Nothing in *Haynie* overrules the holding in *Slayton* that the lower court should allow a jury to determine whether conduct or communication through a company policy is sexual in nature.

Defendants also imply that *Slayton* was only a disparate impact case. Defendants inserted the language "[for women only]" into their quote from the case. See Defendant Pla-Fit Franchise's Supplemental Brief, Page 2. However, no such bracketed language, or anything similar to it, is contained in that quote from the court. Rather than using the bracketed language to clarify the context and meaning of the quote, this bracketed language changed what the case was actually about. Despite Defendants' attempt to re-characterize *Slayton* as only a disparate impact case, it was actually about sexual harassment, specifically, a policy creating a hostile sexual environment.

Slayton was not about women having to wear clothes that men did not. It was about a uniform policy that created a hostile sexual environment for women. The end of the quoted sentence Defendants cite to the Court proves this point. It stated that the case concerned "sexual harassment," not disparate treatment. Further, the Court held:

> We believe the evidence sought to be admitted by plaintiff was directly relevant to the question of whether, **by imposing the uniform requirement, defendant had <u>created an environment</u> in violation of the Elliot-Larsen Civil Rights Act.** Therefore, it was error to exclude it.

Id. at 550 (emphasis added).

The real issue in *Slayton* was whether Defendant's uniform policy created a hostile sexual environment that violated ELCRA. Defendants admitted at oral argument that the policy in *Slayton* that forced women to wear scanty or revealing clothing in front of men was a violation of ELCRA. Paradoxically, Defendants' main defense in this case is that a policy requiring women (and girls as young as 13 years old) to undress, take showers, and be completely naked with men somehow does not violate ELCRA. Since a woman wearing revealing clothing is admittedly sexual in nature, how can Defendants possibly argue that a woman going from fully clothed, to only wearing revealing clothing, to being completely naked, to showering with a man cannot possibly be sexual in nature? At the very least, Defendants admit that while a woman is in the stage of undress of wearing revealing clothing, it is sexual in nature. Again, this is clearly a question for a jury to decide, especially in this case because Defendants' implementation of their policy endorsed and permitted a biological man to be in the women's locker room.

Just as in *Slayton*, Mrs. Cormier should be allowed to present evidence to a jury to decide if Defendants' policy creates a hostile sexual environment in violation of ELCRA. Defendants' motions are only pursuant to MCR 2.116(C)(8) for failure to state a claim, construing all facts in Plaintiff's favor and construing ELCRA broadly, as Michigan law requires. They did not file their

motions pursuant to MCR 2.116(C)(10). Therefore, the only question before this Court is whether Plaintiff's pleadings are sufficient to state a claim under which a reasonable jury could find that the policy and its application violates ELCRA.

CONCLUSION

For all the reasons stated above, Plaintiff clearly states claims upon which relief can be granted. Mrs. Cormier was clearly deprived of the full use and enjoyment of Defendants' public accommodation because of their policy. Defendants' policy violates ELCRA and a jury should be allowed to hear and decide this case. Defendants' motions for summary disposition should be denied and this matter should proceed to jury trial.

DATED: October 8, 2015.

Respectfully submitted,

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