STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Fitzgerald, P.J., and Zahra and Fort Hood, JJ.)

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS ex rel BERNETTE
BURNSIDE,

Claimant-Appellee,

vs.

FASHION BUG OF DETROIT, INC.,

Respondent-Appellant.

Supreme Court No. 126254

Court of Appeals No. 240325

Wayne Circuit No. 01-116726-AA

MDCR No. 122300-EM06

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RESPONDENT-APPELLANT'S SUPPLEMENTAL BRIEF

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INTRODUCTION & SUMMARY OF ARGUMENT

Respondent-Appellant Fashion Bug of Detroit, Inc. ("Fashion Bug") has suffered a miscarriage of justice. Claimant-Appellee Bernette Burnside's race discrimination claim is deficient as a matter of fact and law. After an initial favorable ruling by Hearing Officer Benjamin A. Kerner (the only person who actually heard live testimony in this matter) dismissing Ms. Burnside's claim, the parties' fortunes have been reversed through a series of legally erroneous decisions by the Michigan Civil Rights Commission ("MCRC"), the Wayne County Circuit Court, and the Michigan Court of Appeals. Fashion Bug now finds itself liable to Ms. Burnside for a substantial award of damages, attorney fees, and interest, despite the fact that it harbored no racial animus and acted for race-neutral reasons.

Although there has been a great deal of testimony in this case and a number of factual recitations written in the various tribunals and courts through which this case has traveled, the essential who, what, where, and when facts are not disputed. Rather it is the legal import of these facts that is in dispute. Ms. Burnside and the lower courts and tribunal rely heavily on Fashion Bug's alleged "disparate treatment" of Ms. Burnside and Ms. Jawoszek. Fashion Bug contends that the disparate treatment theory is misplaced because, based on the undisputed facts, Ms. Burnside and Ms. Jawoszek cannot be said to have been similarly situated. Fashion Bug believed that Ms. Burnside violated or attempted to violate an express company policy governing employee returns of merchandise. Ms. Jawoszek was accused, by a disgruntled customer, of providing poor service by refusing to accept a return without a receipt. It is undisputed that Fashion Bug had no policy *requiring* its employees to accept all customer returns unaccompanied by a receipt. Therefore, the alleged disparate treatment is not probative of a

discriminatory purpose. To compare Ms. Burnside's situation to Ms. Jawoszek's situation is to compare "apples to oranges."

Ms. Burnside and the lower courts and tribunal also have placed an inordinate emphasis on the possibility that Fashion Bug was factually incorrect in its determination that Ms. Burnside had violated or attempted to violate its company policy regarding employee returns. In Fashion Bug's view, any mistake of fact regarding Ms. Burnside's violation of company policy is not relevant to the question whether Fashion Bug harbored a discriminatory animus, as long as Fashion Bug's action—whether factually correct or incorrect—was taken in good faith. Minority status does not automatically confer upon an employee the right to be fired only for good cause; it merely prohibits adverse employment actions that are *motivated* by the employees' race. It is the employer's discriminatory intent, or lack of intent, that is relevant.

Finally, Ms. Burnside places a great deal of emphasis on a supposed racial remark allegedly directed toward her by co-worker Teresa Jawoszek. Fashion Bug contends that the remark is not legally relevant because Ms. Jawoszek was not a decision maker with respect to Ms. Burnside's termination and had no authority to act as such. The mere fact that Ms. Jawoszek's factual statement was considered by Fashion Bug as part of its investigation into Ms. Burnside's conduct does make Ms. Jawoszek's alleged attitude attributable to Fashion Bug.

In sum, Fashion Bug maintains that the Court of Appeals decision must be reversed because (1) there is no basis in the record for concluding that Ms. Burnside and Ms. Jawoszek were "similarly situated," (2) the Court of Appeals improperly relied on the alleged factual inaccuracy of Fashion Bug's good-faith race-neutral reason for the termination as evidence of pretext, and (3) supposedly racial remarks made by another employee having no decision-making role or authority were wrongly attributed to Fashion Bug.

THE RELEVANT UNDISPUTED FACTS

The following facts found by the hearing officer, Benjamin A. Kerner, have never been disputed:[1] Fashion Bug, through its Regional Supervisor Deborah Kerins, terminated Ms. Burnside's employment in 1991. Ms. Burnside is African American. From the beginning, Fashion Bug asserted that the reason for Ms. Burnside's termination was her alleged violation of the store policy regarding customer returns. The Fashion Bug policy required that all returns of Fashion Bug merchandise purchased by Fashion Bug employees be accompanied by a receipt. Ms. Burnside was aware of this policy, as she frequently purchased Fashion Bug merchandise using her employee discount, and she had also returned Fashion Bug merchandise on numerous occasions. (See Report and Recommendation of Hearing Officer Benjamin A. Kerner, pp 3-7, attached as Exhibit A to Fashion Bug's application for leave to appeal).

On September 29, 1991, Ms. Burnside, who worked at a Fashion Bug store on 8-Mile Road in Detroit, went to a different Fashion Bug store, located in the City of Warren, seeking to return and exchange a number of Fashion Bug items. Ms. Burnside did not have a receipt for all of the Fashion Bug items that she wished to return and exchange. Pursuant to Fashion Bug's employee return policy, the store manager of the Warren store, Ms. Jawoszek (a white woman), refused to accept the returns and exchanges for which Ms. Burnside had no receipt. The transaction between Ms. Burnside and Ms. Jawoszek at the Warren store quickly evolved into a verbal confrontation. Ms. Burnside asserted that certain remarks made by Ms. Jawoszek, along with allegedly poor customer service provided by the white employees at the Warren store, demonstrated that Ms. Jawoszek harbored a racist attitude toward Ms. Burnside. Fashion Bug

[1]The factual findings of the hearing officer are set forth at pp 3-7 of the Report and Recommendation of Hearing Officer Benjamin A. Kerner, attached as Exhibit A to Fashion Bug's application for leave to appeal.

conducted an investigation and, through its Regional Supervisor Deborah Kerins, decided to terminate Ms. Burnside's employment for a violation, or attempted violation, of the Fashion Bug employee return policy. (See Report and Recommendation of Hearing Officer Benjamin A. Kerner, pp 3-7, attached as Exhibit A to Fashion Bug's application for leave to appeal).

The hearing officer's factual findings have not been disputed by the parties or on subsequent review by higher courts and the MCRC. However, in support of its conclusion that Fashion Bug had violated the Elliot Larsen Civil Rights Act, MCL 37.2101 *et seq.*, the MCRC relied on additional facts elicited at the hearing that were not set forth in Hearing Officer's Kerner's recitation of the facts. The additional facts, which were essential the conclusions reached by the MCRC, Wayne County Circuit Court, and Michigan Court of Appeals involved a transaction between Ms. Jawoszek and Benita Withers (who was Ms. Burnside's identical twin sister).[2]

The testimony regarding the Withers-Jawoszek transaction is set forth on pages 11-15 of Ms. Burnside's response to Fashion Bug's Application for Leave to Appeal. It can be summarized as follows: Ms. Withers testified that, a few days after the September 29, 1991 incident, she went back to the Warren store to return some items that she had purchased at the Detroit Fashion Bug store where her sister worked. Ms. Jawoszek told Ms. Withers that she would have to go back to the store where she purchased the items and that the Warren store would not accept them without a receipt. (See Withers' testimony set forth on pages 11-12 of Ms. Burnside's response to Fashion Bug's application). Believing that Ms. Jawoszek's refusal to accept her return without a receipt was a violation of Fashion Bug company policy, Ms. Withers placed a call to Fashion Bug's headquarters in Chicago to lodge a complaint. Ms. Withers also

[2]See MCRC Opinion, p 5, attached as Appendix B to Fashion Bug's Application for Leave to Appeal.

complained that Ms. Jawoszek had been discourteous to her and Ms. Burnside on their September 29, 1991 visit to the Warren store. (See Withers testimony set forth on pages 12-13 of Ms. Burnside's response to Fashion Bug's application).

Fashion Bug District Supervisor Elaine Landolfe testified that the policy requiring receipts for customer returns did not extend to ordinary customers who were not Fashion Bug employees.

> A. Well, there's a difference between working for the company and customers.
>
> Q. So if a customer wanted to exchange an item without a receipt, that was possible?
>
> A. Yes, you could make an exchange; correct. That's good customer service.
>
> * * * * *
>
> **BY MR. NAVARRO:**
>
> Q. So it was possible for a customer to exchange an item of clothing based on the policy without a receipt.
>
> A. Yes. Id. at 389-390.

(See Landolfe testimony set forth on page 13 of Ms. Burnside's response to Fashion Bug's application). Landolfe's testimony merely showed that Fashion Bug's company policy with respect to employee returns did not extend to returns by ordinary customers. There has never been any evidence presented that Fashion Bug had any formal policy forbidding its employees from refusing to accept customer returns where the customer lacked a receipt. With respect to non-employee customers, the hearing officer explained that they were "frequently asked to produce receipts but were not rigorously required to have receipts," and that "a manager, or other person authorized to issue refunds or take exchanges, could and sometimes did perform these transactions for non-employee customers without the benefit of the customer's having a receipt." (Report and Recommendation of Hearing Officer Benjamin A. Kerner, p 4, attached as Exhibit A to Fashion Bug's application for leave to appeal). Ms. Jawoszek also testified that an ordinary

customer can "potentially" make a return without a receipt. (See Jawoszek testimony, set forth on pages 14-15 of Ms. Burnside's response to Fashion Bug's application). In this case, Ms. Jawoszek testified that she exercised her discretion not to accept Ms. Withers' merchandise because it appeared to be the same merchandise that Ms. Burnside had earlier sought to return without a receipt. (Hearing Transcript, pp. 207-213, attached as Appendix E to Fashion Bug's Application for Leave to Appeal).

After Withers made her complaint, Jawoszek was asked to prepare a statement regarding the incidents. The other employees at the Warren store, where the incidents occurred, were also asked to prepare statements regarding the incidents. The employees were white. (See Jawoszek testimony, set forth on pages 15-16 of Ms. Burnside's response to Fashion Bug's application & Kerins' testimony set forth on page 16 of Ms. Burnside's response to Fashion Bug's application). After reviewing the statements regarding the September 29, 1991 incident and the Withers-Jawoszek incident, Ms. Kerins, Fashion Bug's regional supervisor, decided to terminate Ms. Burnside's employment. (See Kerins testimony set forth on pages 16-17 of Ms. Burnside's response to Fashion Bug's application). Ms. Burnside's own testimony reveals that the reason given by Fashion Bug for her termination was her violation or alleged violation of the employee return policy. (See Burnside testimony, set forth on pages 17-19 of Ms. Burnside's response to Fashion Bug's application).

Ms. Jawoszek was not disciplined for refusing to allow Ms. Withers to make a return without a receipt.

The MCRC majority, Wayne Circuit Court, and Michigan Court of Appeals all concluded that the supposed "disparate treatment" of Ms. Burnside and Ms. Jawoszek by Fashion Bug showed that its termination of Ms. Burnside was motivated by discriminatory animus. (See

MCRC opinion, pp 6-11; Wayne Circuit Court opinion, pp 15-17; Court of Appeals opinion, slip op pp 2-3). The Wayne Circuit Court and Michigan Court of Appeals additionally held that the supposed "racial" remarks made by Ms. Jawoszek further evidenced discriminatory animus on the part of Fashion Bug. (See Wayne County Circuit Court opinion, pp 20-21; Court of Appeals opinion, slip op p 4). Although there has never been any evidence or finding that Ms. Jawoszek took any part in the decision to terminate Ms. Burnside (or that she had any authority to do so), the lower courts attributed her remarks to Fashion Bug based on the fact that she made a complaint to Fashion Bug about Ms. Burnside's conduct, starting the process which eventually led to Ms. Burnside's termination. *Id.*

The MCRC majority also concluded, based on its review of the record, that Ms. Burnside did not actually violate Fashion Bug's employee return policy. (MCRC opinion, pp 9-10). The Wayne County Circuit Court agreed, explaining that Ms. Burnside "never actually exchanged items without a receipt." (Wayne County Circuit Court opinion, p 19). Although the truth of the question whether Ms. Burnside actually violated or attempted to violate Fashion Bug's employee return policy is not legally relevant, because the factual accuracy of Fashion Bug's good faith belief is not probative of Fashion Bug's motive, the MCRC's conclusion is curious given the fact that Ms. Jawoszek's written statement, upon which it relied, specifically stated that she refused to give Ms. Burnside a "credit memo" for "the rest" of her merchandise, because "she had no receipt." (MCRC opinion, p 10, quoting Jawoszek written statement). The hearing officer found that Ms. Burnside's receipt "did not identify the item proffered for exchange." (See Report and Recommendation of Hearing Officer Benjamin A. Kerner, pp 3-7, attached as Exhibit A to Fashion Bug's application for leave to appeal).

STANDARD OF REVIEW

The Court of Appeals reviewed the entire matter under the clearly erroneous standard of review. Arguably, this is the correct standard to apply to the Circuit Court's "findings of fact."[3] See, e.g., *Michigan Dep't of Civil Rights ex rel Johnson v Silver Dollar Café* (On remand), 198 Mich App 547, 549; 499 NW2d 409 (1993). However, to the extent this appeal turns on mixed questions of fact and law (*i.e.*, the application of facts to a legal standard), this Court's review is de novo. *Johnson v Harnischfeger Corp*, 414 Mich 102, 121; 323 NW2d 912 (1982).

ARGUMENT

A. *Court of Appeals Error No. 1: There is no basis in the record for concluding that Ms. Burnside and Ms. Jawoszek were "similarly situated."*

Fashion Bug has been adjudged liable for racial discrimination because it fired Ms. Burnside for violating, or attempting to violate, a known company policy governing employee returns while at the same time it took no action against Ms. Jawoszek for refusing to accept a return from a customer lacking a receipt. This conclusion makes no sense at all.

The Court of Appeals explained that the Circuit Court had found (1) that Ms. Burnside and her fellow employee, Ms. Jawoszek, had been accused of "violating the same company policy," and (2) that Fashion Bug's investigation of Ms. Burnside was different than its investigation of Ms. Jawoszek. The Court of Appeals then stated—erroneously—that Fashion Bug "[did] not challenge [the Circuit Court's] factual findings" on these points. (Court of Appeals opinion, slip op p. 2). Contrary to the Court of Appeals statement, Fashion Bug

[3]Because the Circuit Court reached its conclusion based on a review of the cold record, without hearing testimony, there is arguably no sound reason to defer to the Circuit Court as an especially-qualified "factfinder." The only fact-finder to have actually heard live testimony in this case was Magistrate Benjamin Kerner, who ruled in favor of Fashion Bug. In any event, even accepting the Circuit Court's factual findings (as to what actually transpired) as true, Ms. Burnside's claim is *legally* deficient.

specifically argued in its Court of Appeals brief that "the record" did not support the Circuit Court's finding that Ms. Burnside and Ms. Jawoszek were "similarly situated." (See Fashion Bug's Court of Appeals Brief, pp. 20-22). Because Fashion Bug argued that the Circuit Court's findings were not supported by the record, it is entitled to a ruling on appeal.

Because the Court of Appeals erroneously believed that Fashion Bug did not challenge the Circuit Court's "findings," it accepted them without question. (Court of Appeals opinion, slip op pp 3-4). Accordingly, the Court of Appeals conclusion that Ms. Burnside made out a *prima facie* case of disparate treatment discrimination based on the Circuit Court's "finding" that Ms. Burnside and Ms. Jawoszek were treated differently for "violating the same company policy" was not responsive to Fashion Bug's argument that Ms. Burnside and Ms. Jawoszek were *not*, in fact, accused of "violating the same company policy." The undisputed evidence shows that there was only one company policy at issue. That was the policy governing employee returns. Only Ms. Burnside was accused of violating the employee-return policy. No evidence has ever been presented in support of the proposition that Fashion Bug had a policy requiring its employees to accept all customer returns despite the absence of a receipt. Accordingly, there is no evidence that Ms. Jawoszek violated any policy. In any event, even if such a policy did exist, it would not be "the same" policy as the *employee*-return policy governing Ms. Burnside's actions.

For these reasons, there is no basis on the record of this case for concluding that Ms. Burnside and Ms. Jawoszek were "similarly situated." Ms. Burnside was terminated for attempting to violate a specific company policy regarding employee merchandise returns. Ms Jawoszek, on the other hand, was accused by Ms. Burnside's sister (Ms. Withers) of providing poor customer service. Because Ms. Burnside and Ms. Jawoszek were accused by different

persons (one an employee and the other a customer) of engaging in different actions, at different times, the fact that Fashion Bug responded differently to the accusations does not support a presumption of disparate treatment discrimination. The trial court's finding to the contrary was clearly erroneous.

In particular, it is undisputed that Ms. Burnside was accused, by another employee (Ms. Jawoszek), of attempting to return store merchandise without a receipt in violation of Fashion Bug's official employee return policy. Ms. Burnside admitted that Fashion Bug required all employee returns to be made within fifteen days of purchase accompanied by a receipt. (Hearing Transcript, pp. 18-19, attached as Appendix E to Fashion Bug's Application for Leave to Appeal). Ms. Burnside's store manager, Sharon Mitchell-Harvey (also African American), testified that she repeatedly had to explain Fashion Bug's employee-return policy to Ms. Burnside. (Hearing Transcript, pp. 290-291). Deborah Kerins, the Regional Supervisor who decided to terminate Ms. Burnside's employment, testified that Fashion Bug's regional policy required employee merchandise returns to be accompanied by a receipt. Fashion Bug instituted the policy because it "had a lot of problems within the region on returns." Finally, Ms. Kerins explained that Ms. Burnside was terminated because of a violation of Fashion Bug's employee return policy. (Hearing Transcript, pp 439-441).

With respect to the accusation against Ms. Jawoszek, the record shows only that a customer (Ms. Withers) telephoned Fashion Bug's headquarters in Chicago to complain that Ms. Jawoszek had refused to accept her customer exchange without a receipt. (Hearing Transcript, pp 131-134). Ms. Burnside argues that Fashion Bug's "policy" was to allow customers to exchange clothing without a receipt. Nothing in the record, however, shows that Fashion Bug ever had any policy *forbidding* store managers, such as Ms. Jawoszek, from refusing to accept

customer returns where the customer lacked a receipt. In other words, there is no evidence that store managers were, as a matter of company policy, required to accept all customer returns, without question. Ms. Jawoszek testified that she exercised her discretion and refused to accept Ms. Withers return because there was no receipt and the merchandise appeared to be the same merchandise that Ms. Burnside had earlier sought to return without a receipt. (Hearing Transcript, pp. 207-213). Accordingly, the evidence proves only that the employee return policy *did not extend to* customers. Nothing presented by Ms. Burnside contradicts this account of the record. Therefore, the conclusion that Ms. Jawoszek was accused of "violating the same company policy" as Ms. Burnside required an extraordinary leap of logic wholly unsupported by the record.

Because Fashion Bug's employee return policy did not extend to ordinary customers, Ms. Jawoszek could not have "violated" that policy by refusing to accept a customer return. At most, the record shows only that Ms. Jawoszek was the subject of a complaint, from a customer, regarding the quality of her service. That is not "similar" to Fashion Bug's contention that Ms. Burnside attempted to violate an official company policy forbidding employees from making returns without receipts.

Even if Fashion Bug did have a *second* company policy forbidding store managers from refusing customer exchanges, the existence of such a "policy" could not provide a rational basis for claiming that Ms. Burnside and Ms. Jawoszek were "similarly situated." Among the differences between the two situations are the facts that (1) two different policies would be involved, with Ms. Burnside and Ms. Jawoszek accused of violating different policies; (2) Ms. Burnside and Ms. Jawoszek occupied different positions within the company, one being a rank and file employee and the other a store manager; (3) Ms. Burnside was accused of misconduct by

anther employee while the allegation against Ms. Jawoszek was made by a customer; and, most importantly, (4) Ms. Jawoszek was accused of providing poor customer service while Ms. Burnside was accused of attempting to violate a policy designed to thwart specific "problems" Fashion Bug was having with employee returns. No useful comparison can be made between these two dissimilar situations. "[T]o be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (6th Cir. 1992).

Finally, Ms. Burnside offered no evidence that Fashion Bug had a specific policy for investigating complaints against its employees (whether from customers alleging poor customer service or fellow employees alleging violations of company policy). To the contrary, Ms. Kerins testified that Fashion Bug had no "standard procedure" or policy for pre-termination investigations, because every situation is different. (Appendix E, p. 444, 456-458) In sum, the record is devoid of evidence that Ms. Burnside and Ms Jawoszek were "similarly situated." While it is true that comparable employees need not be the same in every conceivable respect to support a "disparate treatment" inference, they must be similarly situated in "all relevant respects." *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 352 (6th Cir, 1998). In this case, the fundamental differences between Ms. Burnside's situation and Ms. Jawoszek's situation with respect to the employee-return policy are certainly relevant.

B. *Court of Appeals Error No. 2: Evidence that an employer's good faith race-neutral reason for taking an adverse employment action is based on a mistake of fact is not probative of pretext.*

It is undisputed that Fashion Bug proffered a non-discriminatory reason for its termination of Ms. Burnside: She was discharged because of her apparent violation or attempt to

violate Fashion Bug's employee return policy. The articulation of this legitimate, non-discriminatory reason for Fashion Bug's actions had the effect of causing the initial rebuttable presumption of discrimination (*i.e.*, the prima facie case) to drop away. *Hazle v Ford Motor Co*, 464 Mich 456, 464-465; 628 NW2d 515 (2001). Once this occurred, the dispositive question became "whether consideration of a protected characteristic was a motivating factor, namely, whether it made a difference in the contested employment decision." *Id.* at 466. In other words: was the employer's stated reason a pretext for unlawful discrimination? *Id.* at 466-467.

Here, the Court of Appeals, relying on *Feick v Monroe Co*, 229 Mich App 335, 343; 582 NW2d 207 (1998), concluded that Fashion Bug's proffered reason for terminating Ms. Burnside was pretextual because it allegedly had "no basis in fact." The Court opined that Fashion Bug's proffered reason had "no basis in fact" because Ms. Burnside had a receipt and, therefore, was not actually guilty of violating the policy.[4] Whether Fashion Bug was correct in its determination that Ms Burnside violated the policy is beside the point. What matters is whether Fashion Bug acted with discriminatory animus. See, e.g. *Hazle*, *supra* at 465 n 7. Because Fashion Bug's good faith belief—and not the accuracy of its conclusion—is really at issue, there is no reason for courts to second-guess whether Ms. Burnside actually violated the policy. *Id.*

In short, an employer is entitled to be "wrong," so long as it does not act with discriminatory animus. See *Hazle, supra* at 476 (explaining that "the factual dispute at issue is

[4]Although not relevant to the question whether Fashion Bug acted with discriminatory animus, Fashion Bug disagrees that its conclusion regarding Ms. Burnside's violation or attempt to violate the employee return policy was factually incorrect. The hearing officer found that Ms. Burnside's receipt "did not identify the item proffered for exchange." (See Report and Recommendation of Hearing Officer Benjamin A. Kerner, pp 3-7, attached as Exhibit A to Fashion Bug's application for leave to appeal). This was consistent with Ms. Jawoszek's written statement, which specifically indicated that Ms. Burnside sought to exchange merchandise without a receipt. (MCRC opinion, p 10, quoting Jawoszek written statement).

whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent"). Under the Court's holding, all protected individuals would effectively be transformed into "just cause" employees, because any mistake regarding the grounds for their termination, whether probative of discriminatory animus or not, would be treated as evidence of pretext.

The factual question to which the "no basis in fact" language in *Feick, supra*, is properly directed is whether the proffered reason for the discharge (i.e., the reason offered in the litigation) was the actual reason for her discharge. Here, the record shows that Fashion Bug's proffered *reason* had a "basis in fact." Specifically, Ms. Kerins testified that she decided to terminate Ms. Burnside's employment because she believed Ms. Jawoszek's account of the incident in the Warren store. (Hearing Transcript, pp. 461-462, 474). Ms. Jawoszek testified that Ms. Burnside had a receipt for one item, but also sought to return at least six or seven other items for which she had no receipt. (Hearing Transcript, pp. 186-187). Ms. Kerins decision to accept Ms. Jawoszek's statement as a credible account of the events at the Warren store is not evidence of discriminatory animus. Ms. Burnside has offered no evidence that Ms. Jawoszek's statement did not exist, or that Ms. Kerins did not truly believe the statement.

The *Feick* language is confusing and subject to misapplication. That point is demonstrated by the fact that the MCRC, the Circuit Court, and the Court of Appeals panel have all wrongly concluded that evidence allegedly showing that Ms. Burnside did not actually violate the employee return policy somehow constituted valid evidence of pretext. The bench and bar would benefit from a per curiam opinion explaining that the factual inaccuracy of an employer's stated, race-neutral belief is not relevant to the question whether the employer's proffered reason for an adverse employment action is a pretext for unlawful discrimination. What matters, under

Feick, is whether the *proffered* reason for the discharge was, in fact, the *actual* reason for the discharge.

C. ***Court of Appeals Error No. 3:*** ***A remark made by a fellow employee with no decision-making authority is not properly attributable to the employer.***

The Court of Appeals erroneously relied on remarks made by Ms. Jawoszek as evidence of Fashion Bug's discriminatory animus. It is undisputed that Ms. Kerins, and not Ms. Jawoszek, made the decision to terminate Ms. Burnside. Nothing in the record suggests that Ms. Jawoszek (who was the store manager of a different store) had any authority to terminate Ms. Burnside's employment, or that she took part in Fashion Bug's decision regarding Ms. Burnside's discharge. Nor has Ms. Burnside ever argued that Ms. Jawoszek possessed or exercised any decision-making authority with respect to her termination. Nevertheless, the Court of Appeals explained that Ms. Jawoszek's remarks were attributable to Fashion Bug because "Jawoszek was an agent of the decisionmaker who decided to terminate [Ms. Burnside's] employment."

Instead of addressing the question whether Ms. Jawoszek had decisionmaking authority with respect to Ms. Burnside's discharge (which she did not), the Court of Appeals apparently accepted the Circuit Court's reasoning that Ms. Jawoszek's attitudes towards race were relevant because it was Ms. Jawoszek's complaint about Ms. Burnside that initiated the investigation process which ultimately led to Ms. Burnside's termination. (Appendix D, p. 3). This is not enough. A remark made by an employee *not* participating in the decisionmaking process should be irrelevant. See *Krohn v Sedgwick James of Michigan, Inc.*, 244 Mich App 289, 300; 624 NW2d 212 (2001). (holding that an allegedly discriminatory remark made by a former managerial employee was irrelevant because there was no evidence "that he had any

decisionmaking authority regarding the discharging of plaintiff'). Here, there is no evidence that Ms. Jawoszek had any decisionmaking authority with respect to Ms. Burnside's discharge.

No logical reason, and no legal authority, exists to support the Court of Appeals dubious conclusion that the racial attitudes of the person *reporting* an allegation of misconduct (in this case, Ms. Jawoszek) are relevant to the motives behind the employer's subsequent action where the reporter is not involved in the decisionmaking process. Merely being an "agent" of the employer—as *all* employees are—should not enough. Accordingly, the Court of Appeals conclusion on this point was clearly erroneous, and one more reason why the Court of Appeals decision constitutes a "miscarriage of justice."

CONCLUSION & RELIEF REQUESTED

As set forth above, the Court of Appeals committed three clear errors. These errors have resulted in a miscarriage of justice. Fashion Bug has been deemed liable for racial discrimination based on three dubious conclusions unsupported in fact or law. The Hearing Officer and the MCRC dissent reached the correct conclusion. Since then, Fashion Bug has had to fight long and hard in an attempt to clear its good name, but serious mistakes have been made at every step of the administrative and appellate process. The MCRC majority and lower courts have stretched the record to fit theories that cannot be supported on a fair reading. Worse yet, the MCRC majority and lower courts have reached legal conclusions in conflict with established principles of civil rights law. Some of these mistakes may be attributable to confusion regarding the meaning of certain legal precedents, such as the *Feick* case, for example. Or perhaps courts are losing sight of the fact that what matters in a civil rights case is the existence of a discriminatory motivation by the employer. Whether the termination may have been "incorrect" or "wrong" in some way unrelated to the employee's protected status is not relevant.

This Court should take this opportunity to correct the miscarriage of justice suffered by Fashion bug and to clarify that the central inquiry in civil rights cases is whether the employer acted with a discriminatory motivation. This may be accomplished by issuing a per curiam opinion holding (1) that Ms. Burnside and Ms. Jawoszek cannot be deemed to have been "similarly situated" where their situations were different in nearly every respect, (2) that the factual accuracy of Fashion Bug's determination regarding Ms. Burnside's alleged violation or attempted violation of company policy is not relevant to Fashion Bug's intent, and (3) that remarks made by a co-worker having no decision making authority are not attributable to Fashion Bug.

Respectfully submitted,

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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
(Fitzgerald, P.J., and Zahra and Fort Hood, JJ.)

MICHIGAN DEPARTMENT
OF CIVIL RIGHTS ex rel BERNETTE
BURNSIDE,

Claimant-Appellee,

vs.

FASHION BUG OF DETROIT, INC.,

Respondent-Appellant.

Supreme Court No. 126254

Court of Appeals No. 240325

Wayne Circuit No. 01-116726-AA

MDCR No. 122300-EM06

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PROOF OF SERVICE

STATE OF MICHIGAN)
) ss:
COUNTY OF WAYNE)

I, Jill M. Beyer, being duly sworn, depose and say that on the 24th day of January 2005, I served a copy of Respondent-Appellant's Supplemental Brief, along with a copy of this Proof of Service, upon Angelita Espino, Department of Civil Rights, 3030 W. Grand Blvd., Suite 10-200,

Detroit, MI 48202, and Thomas E. Marshall, 715 East South Blvd., Suite 100, Rochester Hills, MI 48307 via first class mail.

Jill M. Beyer

Subscribed and sworn to before
me this 24th day of January 2005

Notary Public

KAREN SCOTT-MOORE
Notary Public, Wayne County, MI
My Commission Expires Jul. 26, 2005

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