STATE OF MICHIGAN

COURT OF APPEALS

ROBERT F. DEWINTER,

Plaintiff,

and

MARY A. POTTS,

Plaintiff-Appellee,

v

CITY OF SOUTHFIELD and WALTER CHAPMAN,

Defendants-Appellants.

UNPUBLISHED
September 19, 1997

No. 180699
Oakland Circuit Court
LC No. 91-414519-NO

ROBERT F. DEWINTER and MARY A. POTTS,

Plaintiffs-Appellants/
Cross-Appellees,

v

CITY OF SOUTHFIELD and WALTER CHAPMAN,

Defendants-Appellees/
Cross-Appellants.

No. 180703
Oakland Circuit Court
LC No. 91-414519-NO

ROBERT F. DEWINTER,

Plaintiff,

and

MARY A. POTTS,

Plaintiff-Appellant/
Cross-Appellee,

v

No. 186003
Oakland Circuit Court
CITY OF SOUTHFIELD, LC No. 91-414519-NO

Defendant-Appellee/
Cross-Appellant.

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, plaintiff Potts was awarded $186,000 on her claim for sex discrimination, but the jury found no cause of action on the unlawful retaliation claims of either Potts or plaintiff DeWinter. In lieu of ordering that Potts be reinstated, the trial court ordered an additional front pay award of $60,000. In these three consolidated appeals, all parties raise a number of issues. We affirm.

Docket No. 180699

Defendants argue, as they did in a post-judgment motion for judgment notwithstanding the verdict (JNOV), that the after-acquired evidence rule bars or limits recovery in this Elliott-Larsen sexual discrimination case. This rule cannot act as a complete bar to recovery. *Wright v Restaurant Concept Mgmt Inc*, 210 Mich App 105, 109-110; 532 NW2d 889 (1995). Further, for the after-acquired evidence rule to apply at all, there must be evidence that the employer would have actually fired an employee for the application fraud had it been discovered. *McKennon v Nashville Banner Publishing Co*, 513 US 352; 115 S Ct 879; 130 L Ed 2d 852, 864 (1995); *O'Day v McDonnell Douglas Helicopter Co*, 79 F3d 756, 759 (CA 9, 1996); *Shattuck v Kinetic Concepts, Inc*, 49 F3d 1106, 1108-1109 (CA 5, 1995). Testimony at trial established that the information concerning Potts' earlier sexual assault was disclosed during depositions in September and October 1991, while Potts was still employed as a probationary firefighter. No action was taken at this time, and, in fact, defendant City of Southfield later agreed to rehire her. When Potts was finally terminated the following year, her failure to mention the prior sexual assault on her application was not even mentioned. The trial court properly determined that defendants were not entitled to JNOV with respect to this issue.[1]

Defendants argue that the trial court improperly excluded Dr. Stock's psychological report and precluded full cross-examination of plaintiff Potts. A trial court's decision whether to admit or exclude evidence is reviewed for an abuse of discretion. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991). To the extent that the psychological report was probative,[2] it was an out-of-court statement offered to prove the truth of the matter asserted (i.e., plaintiff's psychological rating) and is hearsay. MRE 801(c). Defendants failed to make Dr. Stock, the maker of the report, available for cross-examination. *Carlisle v Gen'l Motors Corp*, 126 Mich App 127, 129; 337 NW2d 4 (1983). Although defendants argue on appeal that Dr. Stock's report is admissible under the business records exception, MRE 803(6), this exception was not argued at trial and no foundation for the exception was established. The trial court did not abuse its discretion in excluding the report. With regard to defendants' assertion that a new trial is mandated because they were precluded from fully cross-examining plaintiff Potts, we are not convinced that defendants' substantial rights were materially affected. MCR 2.611(A)(1).

Defendants argue that they were entitled to JNOV, a directed verdict, or a new trial because plaintiff Potts failed to prove either disparate treatment or intentional discrimination. In reviewing the JNOV and directed verdict claims, we examine the evidence and all legitimate inferences that may be drawn in the light most favorable to plaintiffs. *Matras v Amoco Oil Co*, 424 Mich 675, 681; 385 NW2d 586 (1986). If reasonable jurors could honestly reach different conclusions, this Court has no authority to substitute its judgment for that of the jury. *Id.* at 682-683. Applying these standards to the record in this case, we conclude that there was sufficient evidence for a reasonable juror to conclude that plaintiff Potts had been the victim of disparate treatment or intentional discrimination and to disbelieve defendants' evidence regarding legitimate reasons for any disparate treatment that might have occurred. Further, the trial court's determination that defendants were not entitled to a new trial because the verdict in favor of plaintiff Potts was not against the great weight of the evidence is given substantial deference. *Arrington v Detroit Osteopathic Hosp Corp (On Remand)*, 196 Mich App 544, 560; 493 NW2d 492 (1992). We see no reason to disturb that determination on appeal.[3]

Defendants argue that testimony of Katherine Harmon regarding Valerie Crumps' opinion of Walter Chapman was improperly admitted for a number of reasons. Assuming that defendants' arguments have merit, error requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected. MRE 103(a); *Temple v Kelel Distributing Co, Inc*, 183 Mich App 326, 329; 454 NW2d 610 (1990). Harmon's testimony concerned a single isolated statement that did not directly involve Potts, and the existence of that statement was disputed, Crump denying having made it. Further, other witnesses testified, without objection, that Valerie Crump had made similar statements regarding Chapman. We do not conclude that any error resulting from the admission of Harmon's statement would justify reversal.

Defendants argue that the trial court abused its discretion in admitting remarks about Lt. McRoberts because they were irrelevant to Potts' theories of recovery (or created the impression that Potts was seeking recovery under a hostile work environment, sex harassment claim) and they constituted inadmissible hearsay. We disagree. However, the challenged testimony did not relate to Potts' claims but, instead, related to plaintiff DeWinter's claims that the city retaliated against him by

selectively enforcing its rules against him. In that context, the testimony was not hearsay, offered to prove the truth of any matter asserted out of court, but rather was an account of how an inappropriate remark made by another officer had not resulted in discipline similar to that received by plaintiff DeWinter. The trial court did not abuse its discretion in allowing this evidence.

Finally, defendants argue that they are entitled to JNOV under MCR 2.610 or a new trial under MCR 2.611 because the damages awarded were improper in light of precedents construing the after-acquired evidence rule. However, as we have previously determined, that rule is inapplicable under the facts of this case, and defendants' arguments are without merit. With regard to defendants' argument that the evidence does not support the jury's noneconomic damages award, we have reviewed the evidence and conclude that the jury's award is supported by the evidence. *Clemens v Lesnek*, 200 Mich App 456, 464; 505 NW2d 283 (1993). In addition, we disagree with defendants' argument that the jury's back pay award should be vacated because it is inconsistent with the jury's verdict of no cause of action on plaintiff Potts' claim for unlawful retaliation.

Docket No. 180703

Plaintiff DeWinter argues that the trial court improperly excluded the findings of the Civil Service Commission, a decision we review for an abuse of discretion. *Gore*, *supra*. The Civil Service Commission findings related to whether the charges brought against DeWinter would sustain disciplinary action on behalf of the city, not the motivation of the city in bringing the charges. As the trial court pointed out, the fact that the Civil Service Commission determined that some of the charges brought were without sufficient factual basis did not constitute a determination that the charges were brought for retaliatory reasons. The trial court further reasoned that the findings of the Civil Service Commission would be confusing to the jury and would have further complicated an already factually complex case. We conclude that the trial court appropriately determined that this evidence was not admissible under MRE 401 and MRE 403 and that there was no abuse of discretion. *Rancour v The Detroit Edison Co*, 150 Mich App 276, 291; 388 NW2d 336 (1986); *Jackson v Bunge Corp*, 40 F3d 239, 246 (CA 7, 1994). Further, because "a question of fact essential to the judgment" (i.e., the city's motivation in filing the charges) was not "actually litigated and determined by" the Civil Service Commission, plaintiff DeWinter's arguments regarding issue preclusion and/or collateral estoppel are without merit. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995); see, also, *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994).

DeWinter next argues that a new trial should be ordered because the defense failed to produce the written report of its expert John Harper and misrepresented the existence of that report in answering interrogatories. DeWinter moved for a new trial regarding these issues, and we review the trial court's denial of that motion for an abuse of discretion. *Beasley v Washington*, 169 Mich App 650, 655; 427 NW2d 177 (1988). The asserted relevance of the report is that it would have "verified the existence of hostile attitudes towards women," but this relevance is applicable only to the issue of sex discrimination, an issue the jury resolved in favor of plaintiff Potts. Further, as the trial court noted, the report essentially consists of the results of anonymous surveys of firefighters on their attitudes toward working with minorities and women and does not express expert opinions or findings on the claims at issue in

DeWinter's case. We do not conclude that the trial court abused its discretion in denying DeWinter a new trial because the report had not been made available by defense counsel.[4]

Finally, plaintiff DeWinter argues that the trial court improperly denied his motion requesting that the case be removed from mediation. Because the applicable court rule, MCR 2.403(A)(2) states that the court "may" except an action from mediation when appropriate, we conclude that the trial court's decision on this issue was discretionary and review for an abuse of discretion. See *Jordan v Jarvis*, 200 Mich App 445, 451; 505 NW2d 279 (1993); *Harrison v Grand Trunk W R Co*, 162 Mich App 464, 470; 413 NW2d 429 (1987). DeWinter argues that mediation was inappropriate in this case because the primary remedy sought by plaintiffs was equitable. However, DeWinter's second amended complaint sought monetary damages and the focus of the trial was on monetary damages. In denying plaintiff's request to remove the case from mediation, the trial court ordered that the mediators would be empowered to decide only questions of money damages, leaving the equitable claims brought by plaintiff for consideration at trial. We do not conclude that the trial court abused its discretion in failing to remove the case completely from mediation.

On cross-appeal, defendants argue that DeWinter is collaterally estopped from relitigating his retaliation claim because the Civil Service Commission found that one of the charges against DeWinter was legitimate. As previously discussed, the doctrine of collateral estoppel does not apply to the Civil Service Commission findings because the issues determined by the Civil Service Commission were different than the issue here, i.e., defendants' motivation in bringing the charges. That analysis applies equally against defendants as well as DeWinter. As the trial court pointed out: "you could have a legitimate charge brought for retaliatory reasons."

Finally, defendants argue upon cross-appeal that plaintiff DeWinter was precluded from pursuing the circuit court action because he failed to exhaust his administrative remedies under a collective bargaining agreement or with the Civil Service Commission. These arguments are without merit.[5] *Jackson v City of Flint*, 191 Mich App 187, 189-190; 477 NW2d 489 (1991); *Hall v Kelsey-Hayes Co*, 184 Mich App 277, 281; 457 NW2d 143 (1990); *Walters v Dep't of Treasury*, 148 Mich App 809, 815-819; 385 NW2d 695 (1986); *Marsh v Dep't of Civil Service*, 142 Mich App 577, 562-563; 370 NW2d 613 (1985).

Docket No. 186003

Plaintiff Potts raises a number of arguments regarding the trial court's decision to deny her reinstatement. The decision whether to grant reinstatement is discretionary with the trial court. *Rasheed v Chrysler Corp*, 445 Mich 109, 124-125; 517 NW2d 19 (1994).[6] Although reinstatement is the preferred remedy for an unjust discharge, it should not be ordered where it is impracticable, impossible, or infeasible. See *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 200-201; 390 NW2d 227 (1986). The trial court determined that reinstatement was not feasible because the prolonged litigation in this case had irreparably damaged the employer-employee relationship between the parties. This was an appropriate consideration. *Stafford v Electronic Data Systems Corp*, 749 F Supp 781, 785-786 (ED Mich, 1990). Testimony at trial established that employees picked sides between plaintiffs and defendants and that some employees were ostracized or suffered

repercussions for showing support of one or another party. The trial court further noted that firefighting is an inherently hazardous and stressful occupation and that Potts has a prior history of work-related stress. In comparison with *Jackson v Albuquerque,* 890 F2d 225 (CA 10, 1989), upon which plaintiff Potts relies, the trial court here did not seek merely to protect plaintiff from future hostilities; the trial court's concern was with the operation of the fire department as a whole and the effect that Potts' reinstatement would have on other employees and the general public that the department serves.

Further, although the trial court may have been factually mistaken as to whether DeWinter continued to be employed with the city, that continued employment was only one factor in the decision and any mistake would not be the kind of "palpable error" which, if corrected, would have led to a different disposition of the request for reinstatement. MCR 2.119(F)(3). In addition, contrary to plaintiff Potts' assertions, the trial court did not base its decision regarding reinstatement on plaintiff's alleged misconduct and poor job performance. We find no abuse of discretion in the trial court's initial determination that reinstatement should not be ordered or in the decision not to reconsider that decision when the trial court's relatively minor factual mistake was pointed out. *Rasheed, supra*; *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 1989).

Finally, the trial court did not err by not scheduling an evidentiary hearing before deciding the issue of reinstatement. The trial court suggested that the matter be handled by allowing the parties to submit supplemental memoranda together with supplemental evidentiary materials. Neither party objected to this procedure and supplemental materials were in fact submitted by both sides. The trial record, as supplemented, provided a sufficient basis upon which to consider the issue of reinstatement.

Plaintiff Potts also argues that the amount of front pay awarded, $60,000, was inadequate to compensate her for future damages. This Court has held that front pay is available to a plaintiff, even when reinstatement is the requested remedy, at the discretion of the trial court. *Riethmiller, supra* at 201. In determining the amount of a front pay award, the court must consider the employee's prospects for other employment and the years remaining before retirement. *Id.* at 200-201. In the present case, the trial court determined that Potts' prospects for other employment were good inasmuch as she was young and well-educated. Consideration of the number of years remaining before retirement is necessary because front pay awards are "inherently speculative" if they cover a long period of time. *Stafford, supra* at 789. In the present case, the trial court properly declined to award Potts long-term front pay, finding that such an award would be unduly speculative.

Our review of the record and the trial court's reasoning in arriving at the amount to award plaintiff Potts as front pay convinces us that the trial court properly exercised its discretion based on the circumstances of this case. *Riethmiller, supra* at 201. We further conclude that considerations relative to a proper determination of front pay, such as Potts' age, schooling, work-history and experience, occupational training, and employment status at the time of trial, were all matters of record, providing the trial court with a sufficient evidentiary basis upon which to decide the issue of front pay. We do not conclude that this matter should be remanded for an evidentiary hearing regarding the amount of front pay awarded. We conclude that the front pay award of $60,000 is both reasonable and adequate and that it is not an abuse of discretion.[7]

On cross-appeal, defendant city of Southfield argues that plaintiff Potts' circuit court action was precluded based on collateral estoppel principles. We disagree. Because plaintiff Potts withdrew her claims in the Civil Service Commission before proceedings were completed, "a valid and final judgment" was not rendered and, thus, the doctrine of collateral estoppel does not apply. *Nummer, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald

[1] Defendants also complain about the jury instruction regarding the after-acquired evidence rule. However, defendants did not object to the instruction given and, absent manifest injustice, review of this issue is waived. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). Because we have determined that the after-acquired evidence rule is not applicable in this case, any error in the trial court's instruction could not have resulted in manifest injustice to defendants.

[2] Defendants argue that the report was offered for a number of nonhearsay purposes, but we conclude that the trial court properly determined that the report was not relevant as to those purposes. The report simply does not discuss the prior assault or any attendant effects therefrom.

[3] Defendants argue that the trial court erroneously believed that Potts was proceeding under a hostile work environment, sexual harassment theory. However, the trial court instructed the jury only on gender-based sex discrimination in accordance with SJI2d 105.01-105.04, and the hostile work environment, sexual harassment instruction, SJI2d 105.10, was not used. We do not conclude that the trial court based its decisions on an erroneous conception of plaintiff Potts' case.

[4] This assumes that the Harper report was available to defense counsel at the time of trial and that plaintiff DeWinter did not know of the existence of the report at the time of trial, although neither of these facts is clear from the record.

[5] We also conclude that these same arguments raised by cross-appellant city of Southfield in Docket No. 186003 with respect to plaintiff Potts are without merit.

[6] Defendant city of Southfield argues that reinstatement was not available to plaintiff for a number of reasons. The trial court determined that reinstatement was a possible remedy, and we agree. The complaint clearly encompasses reinstatement as a possible remedy, and reinstatement is widely recognized as a potential remedy that a trial court may order. *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 199; 390 NW2d 227 (1986). As noted earlier, defendant's reliance on the after-acquired evidence rule is inapposite. Further, the jury determined that plaintiff Potts had not been discharged for retaliatory reasons, not that her discharge was legitimate. We agree with the trial court that reinstatement was a possible remedy available in this case.

[7] Because the trial court did not abuse its discretion in awarding $60,000 in front pay, we need not address plaintiff Potts' argument that a rehearing on this issue should have been granted by the trial court.