STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINE RABEDEAU,

Plaintiff-Appellee/Cross-Appellant,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 18, 1998

No. 189347
Wayne Circuit Court
LC No. 92-232915 NZ

Before: Saad, P.J., and Wahls and Gage, JJ.

PER CURIAM.

Defendant appeals as of right a jury verdict awarding plaintiff $215,000 on plaintiff's unlawful retaliation claim, and the trial court's award to plaintiff of attorney fees amounting to $113,590. Plaintiff cross-appeals as of right the trial court's grant of summary disposition to defendant regarding her handicap discrimination and intentional infliction of emotional distress claims, and the court's denial of her request for mediation sanctions against defendant. We affirm in part, reverse in part and remand.

Plaintiff filed a four-count complaint alleging (1) sex discrimination and sex harassment, (2) handicap discrimination, (3) unlawful retaliation, and (4) intentional infliction of emotional distress. The trial court granted defendant summary disposition regarding the handicap discrimination and emotional distress claims. A jury heard the remaining claims, finding for defendant on the sex discrimination and harassment claims, and for plaintiff on the retaliation claim. The jury awarded plaintiff a total of $215,000: $55,000 in past economic damages, $100,000 for future economic damages, and $60,000 in noneconomic damages.

Plaintiff began working for defendant as a janitor in 1972. She subsequently obtained bachelors and masters degrees, and completed defendant's eight-year in-house skilled trades journeyman training program. Plaintiff alleged at trial that, after she completed this program, defendant refused to promote her into a supervisory position over other skilled trades employees, as was customary with the program's male graduates. While working as a level 6A38 planner/scheduler in defendant's site operations unit in August 1991, plaintiff filed sex discrimination charges with the Michigan Department of Civil Rights and Equal Employment Opportunity Commission (EEOC). In September 1991, plaintiff

received but declined a sixth level supervisor of sanitation position. In October 1991, plaintiff was approached about a level 6M42 position with design staff, but expressed disinterest in the position unless it qualified as a seventh level job. In December 1991, plaintiff received a $500 bonus. In April 1992, she was transferred to a planner/scheduler position with design staff in a different building. Here, she worked with Tom Cook. In August 1992, she received her first review from Cook, which she described as negative. She subsequently requested a transfer to a level 6M42 skilled trades supervisor position, but at that time no such openings existed. In October 1992, Cook orchestrated a three-way job exchange, in which plaintiff was transferred to the second shift as a maintenance supervisor. Because plaintiff had objected to this transfer, Cook gave her the option to remain in her first shift planner/scheduler position in the design department. However, plaintiff chose the transfer, which included supervision of skilled tradespeople working overtime in the second shift. Plaintiff filed this lawsuit in November 1992, and continues to be employed by defendant.

Defendant first argues that the trial court erred in denying its motions for new trial and for judgment notwithstanding the verdict regarding plaintiff's retaliation claim. A motion for JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Distr v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). It is improper where reasonable minds could differ on issues of fact. *Michigan Microtech, Inc v Federated Publications, Inc*, 187 Mich App 178, 186; 466 NW2d 717 (1991). When deciding a motion for JNOV, a trial court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the plaintiff. *McLemore v Detroit Receiving Hospital and University Med Ctr*, 196 Mich App 391, 395; 493 NW2d 441 (1992). This Court reviews de novo the trial court's ruling on a motion for JNOV. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

The jury awarded plaintiff damages for her claim that defendant unlawfully retaliated against her for filing a claim of sex discrimination under the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*. The ELCRA forbids any person from retaliating against one who has filed a complaint pursuant to its provisions. MCL 37.2701; MSA 3.548(701). To establish a prima facie case of unlawful retaliation under subsection 2701, a plaintiff must show (1) that he engaged in a protected activity, (2) that this was known by the defendant, (3) that the defendant took an employment action adverse to the plaintiff, and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

Plaintiff presented sufficient evidence from which a reasonable jury could have concluded that she established a prima facie case of unlawful retaliation. First, in August 1991, plaintiff filed sex discrimination charges against defendant with both the Michigan Department of Civil Rights and the EEOC. Second, plaintiff testified that the EEOC told her that it would inform defendant of plaintiff's sex discrimination charges. Plaintiff also testified that defendant's personnel manager told her that, due to her filing of sex discrimination charges, no one in the company wanted her. Third, testimony established that defendant took several employment actions adverse to plaintiff. For example, in December 1991, defendant gave plaintiff a lower bonus than in previous years. In 1992, defendant transferred plaintiff

into a planning and scheduling position for which she lacked experience and then failed to provide plaintiff with adequate training to permit her to succeed in the position. Plaintiff subsequently requested a reassignment and defendant offered her only a second shift position, despite plaintiff's objections that second shift hours would make it impossible for her to care for her ailing parents. During 1992 and 1993, defendant denied four applications by plaintiff for promotions.

Regarding the fourth element, plaintiff established the causal connection between defendant's adverse employment actions and her sex discrimination charges with testimony showing that all the above-listed adverse employment actions occurred after plaintiff had filed sex discrimination charges. Plaintiff further testified regarding her bonus that she received a reduced award at the end of a year in which she had helped establish inside an empty warehouse a joint learning center for General Motors employees, and that others who had done less work received larger bonuses. Plaintiff testified that her completion of defendant's eight year skilled trades program qualified her for a level 6M42 position supervising skilled workers, and that while men who had also completed the skilled trades program routinely obtained 6M42 positions, defendant denied her post-1991 applications for a level 6M42 or higher position. Plaintiff also explained that in October 1994 she was the only level 6M55 supervisor of nonskilled workers who had completed defendant's eight year skilled trades program. Regarding defendant's failure to train plaintiff for the planning and scheduling position to which she was assigned several months after filing sex discrimination charges, plaintiff testified that this failure to train occurred after she had repeatedly informed her supervisors that she needed training for this position.

A reasonable juror could have concluded, based on the evidence, that defendant had knowledge of her sex discrimination charges. *Polk v Yellow Freight System, Inc*, 876 F2d 527, 531 (CA 6, 1989). In light of plaintiff's testimony, a reasonable juror could also have inferred that no explanation but retaliation existed for defendant's actions adverse to plaintiff. While "the mere fact that [the adverse actions] occurr[ed] after a charge of discrimination is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the discrimination claim," *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1314 (CA6, 1989), plaintiff presented abundant other testimony from which a reasonable juror could infer that defendant's adverse employment actions resulted from plaintiff's discrimination claim. Furthermore, when viewing the whole record, the overwhelming weight of the evidence does not favor defendant. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

Therefore, we conclude that the trial court correctly denied defendant's motions for judgment notwithstanding the verdict and for a new trial. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). As in most cases, the parties presented varying characterizations of the same events. It is not the province of this Court to engage in conjecture regarding which party's account it believes most accurately reflects the actual unfolding of the relevant underlying events. An appellate court recognizes the jury's and the judge's unique opportunity to observe the witnesses, as well as the factfinder's responsibility to determine the credibility and weight of trial testimony. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). An appellate court will not grant a new trial simply because the court may have drawn different inferences from the evidence, resolved conflicting testimony in a different way, reached a different conclusion on

credibility, or even preferred a different decision as between permissible alternatives. *Bosak v Hutchinson*, 422 Mich 712, 740; 375 NW2d 333 (1985). If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand. *Severn*, *supra*.

Second, defendant argues that the jury's awards for past and future economic and noneconomic damages were excessive, and that the trial court therefore erred in denying its motion for remittitur. When presented with a motion for remittitur, the trial court must determine whether the jury's award is supported by the evidence. *Szymanski v Brown*, 221 Mich App 423, 431; 562 NW2d 212 (1997). We review the trial court's determination for an abuse of discretion, *id*., deferring to the trial court's superior ability to view the evidence and evaluate the credibility of witnesses. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997).

The jury's awards of noneconomic and past economic damages were supported by evidence produced at trial. Regarding noneconomic damages, plaintiff's testimony and letters from a treating physician and psychotherapist indicated that defendant's failure to promote her damaged her self-esteem and caused plaintiff to suffer feelings of hopelessness and depression, and various physical manifestations of depression. Regarding past economic damages arising from defendant's failure to promote her to a level 6M42 position, plaintiff presented evidence that between the years 1985 through 1994 she received lower wages and less overtime compensation than that received by level 6M42 skilled trades supervisors.

Further, the trial court properly ruled that defendant was not entitled to remittitur with regard to plaintiff's future economic damage award. Defendant argues that *Rasheed v Chrysler Corp*, 445 Mich 109, 133; 517 NW2d 19 (1994), and *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 201; 390 NW2d 227 (1986), support its claim that reinstatement is preferred over an award of future economic damages. However, these cases are wrongful discharge cases that discuss the wrongfully terminated employee's duty to mitigate damages by accepting a reasonable offer of reinstatement. The instant case does not involve reinstatement, because defendant never discharged plaintiff. Additionally, plaintiff had sought better positions up to the time of trial. Defendant denied plaintiff these positions, and failed to unconditionally offer plaintiff a level 6M42 position until the jury had awarded plaintiff future economic damages. Because defendant failed to show that plaintiff in any way failed to mitigate future economic damages, we conclude that the trial court did not abuse its discretion in denying defendant's motion for remittitur.

Defendant contends third that the trial court erroneously awarded plaintiff attorney fees and costs in the amount of $113,590, the full amount requested by plaintiff. MCL 37.2802; MSA 3.548(802) authorizes the trial court to "award all or a portion of the costs of litigation, including reasonable attorney fees," to the complainant in an action under the Civil Rights Act. We review the trial court's grant of attorney fees for an abuse of discretion. *Dep't of Civil Rights v Horizon Tube Fabricating, Inc*, 148 Mich App 633, 640; 385 NW2d 685 (1986). In determining the reasonableness of an award of attorney fees, the trial court should consider the *Crawley* [*v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973)] factors discussed in *Wood v DAIIE*, 413 Mich 573, 588; 321 NW2d 653 (1982).

We disagree that plaintiff's attorney's failure to keep contemporaneous time records precluded an award of attorney fees. In *Howard v Canteen Corp*, 192 Mich App 427, 438; 481 NW2d 718 (1992), this Court explained that:

> [w]hile [contemporaneous time] records are not required to be kept, in demanding a large sum of attorney fees the lack of contemporaneous time records leaves room for doubt regarding the reasonableness of the hours expended. Where the opposing party challenges the reasonableness of the requested fee, the trial court should hold an evidentiary hearing regarding the issue. If any of the underlying facts, such as the number of hours spent in preparation, are in dispute, the trial court should make findings of fact regarding the disputed issues.

Here, the trial court correctly observed that plaintiff's attorney was not required to provide contemporaneous time records. However, because the amount of expenses incurred and the actual number of hours expended were in dispute, we conclude that the trial court erred when it granted plaintiff the full amount of her requested fees without having first conducted an evidentiary hearing. Accordingly, we remand for a hearing to determine the proper amount of attorney fees.

Defendant further argues that the trial court improperly awarded statutory prejudgment interest on the attorney fee portion of the judgment pursuant to MCL 600.6013; MSA 27A.6013. We disagree. The trial court correctly observed that, while other statutes or court rules provide for an award of attorney fees as an element of costs, § 802 of the Civil Rights Act provides that attorney fees are recoverable as an element of damages. Therefore, plaintiff's attorney fee award represents a portion of the money judgment in her civil rights claim. Furthermore, an amendment to MCL 600.6013; MSA 27A.6013 that took effect after plaintiff filed her instant claims provides that statutory interest "shall be calculated on the entire amount of the money judgment, *including attorney fees and costs*." MCL 600.6013(6); MSA 27A.6013(6), as amended by 1993 PA 78. Although the amendment went into effect after the filing of the instant case and therefore is not controlling for purposes of this case, it supports the conclusion that preamendment cases allowing statutory interest on an award of attorney fees constitute the preferred line of authority. Accordingly, we find that the trial court did not err in awarding statutory interest on the attorney fee portion of plaintiff's judgment.

Plaintiff argues on cross-appeal that the trial court erred in granting defendant summary disposition of her handicap discrimination and intentional infliction of emotional distress claims. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests whether there is factual support for a claim. *Mitchell v Dahlberg*, 215 Mich App 718, 725; 547 NW2d 74 (1996). The court examines the evidence and determines whether a record might be developed that will leave open an issue upon which reasonable minds could differ. *Singerman v Municipal Service Bureau, Inc*, 455 Mich 135, 139; 565 NW2d 383 (1997). The motion must be granted if no factual development could justify the plaintiff's claim for relief. *Id*.

To establish a prima facie case of discrimination under the Handicappers' Civil Rights Act (HCRA), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, plaintiff had to demonstrate that (1) she is

handicapped as defined by the HCRA, (2) the handicap is unrelated to her ability to perform the duties of a particular job, and (3) she was discriminated against in one of the ways described in the statute. *Chmielewski v Xermac, Inc*, ___ Mich ___; ___ NW2d ___ (1998).

Plaintiff premised her HCRA claim on the fact that defendant refused to accommodate her request to remain on the first shift. However, MCL 37.1210(15); MSA 3.550(210) provides that "[j]ob restructuring and altering the schedule of employees under this article applies only to minor or infrequent duties relating to the particular job held by the handicapper." Because plaintiff's request to remain on the first shift involved more than minor or infrequent duties, defendant had no obligation under the HCRA to accommodate her request. See *Bowerman v Malloy Lithograph*, 171 Mich App 110, 117-118; 430 NW2d 742 (1988). Therefore, summary disposition of this claim was proper.

Next, the elements of a prima facie case of intentional infliction of emotional distress are (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Haverbush v Powelson*, 217 Mich App 228, 234; 551 NW2d 206 (1996). It has been said that the case is generally one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!" *Doe v Mills*, 212 Mich App 73, 91; 536 NW2d 824 (1995). It is initially for the trial court to determine whether the defendant's conduct may be regarded as so extreme and outrageous as to permit recovery. *Id*. at 92.

The trial court did not err when it granted defendant's motion for summary disposition of plaintiff's intentional infliction of emotional distress claim. In dismissing this claim, the trial court stated that it was "of the opinion this is not the type of case someone would say that is outrageous and gives rise to the intentional infliction count." We agree with the trial court that defendant's alleged conduct did not amount to extreme and outrageous conduct sufficient to support a claim for intentional infliction of emotional distress.

Next, plaintiff argues that the trial court erred when it refused to consider the award of attorney fees as part of the verdict for the purpose of determining defendant's liability for mediation sanctions under MCR 2.403(O). We agree. In *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 480-481; 442 NW2d 705 (1989), this Court held that an award of attorney fees is to be considered part of the verdict for the purpose of determining liability for mediation sanctions. Therefore, after the trial court has on remand determined the appropriate amount of plaintiff's attorney fees, it should incorporate these fees into the verdict in order to determine whether either party is liable for mediation sanctions.

Affirmed in part and remanded for a hearing on the issue of attorney fees. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Myron H. Wahls
/s/ Hilda R. Gage