STATE OF MICHIGAN

COURT OF APPEALS

KATHLEEN WINTER, Plaintiff-Appellee,	UNPUBLISHED November 12, 1999
v	No. 188648 Genesee Circuit Court
FITNESS USA HEALTH SPAS CORP.—FLINT/LANSING, Defendant-Appellant.	LC No. 94-027472 CL ON REMAND

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

PER CURIAM.

This case appears before us on remand from the Supreme Court. Defendant initially appealed to this Court challenging on various grounds a $225,000 jury verdict for plaintiff with respect to her age discrimination claim. This Court reversed plaintiff's judgment on the basis that plaintiff's counsel's deliberate, repeated inflammatory comments casting defendant corporation as a wealthy, greedy, unfeeling and powerful entity denied defendant a fair trial. We concluded that the trial court abused its discretion in denying defendant's motion for new trial. *Winter v Fitness USA Health Spas Corp, Flint/Lansing*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 1997 (Docket No. 188648). Because we determined that plaintiff's counsel's improper remarks alone warranted reversal, we did not reach defendant's remaining allegations of error.

Plaintiff sought leave to appeal our decision in the Supreme Court. On November 3, 1998, the Supreme Court issued the following order:

> In lieu of granting leave to appeal, the judgment of the Court of Appeals is reversed, and the case is remanded to that Court for consideration of the additional issues raised by the defendant but not decided by the Court of Appeals. MCR 7.302(F)(1). The trial court did not commit a clear abuse of discretion in denying defendant's motion for new trial. [459 Mich 893.]

On April 30, 1999, the Supreme Court denied defendant's motion for reconsideration. Consequently, we now consider defendant's additional challenges of plaintiff's judgment, and we affirm the judgment for plaintiff.

I

Defendant first contends that, in light of plaintiff's age of thirty-seven years at the time of her discharge and the fact that defendant replaced her with a thirty-one year-old woman, only six years plaintiff's junior, the trial court erred in refusing defendant's proposed special jury instruction that "[r]eplacement of the plaintiff by a significantly or sufficiently younger employee may raise an inference of age discrimination. However, no inference is raised by a slight difference between the age of plaintiff and the replacement."

When the standard instructions do not properly cover an area, a trial court must give requested supplemental instructions if they properly inform the jury of the applicable law. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995), rev'd in part on other grounds 458 Mich 1; 580 NW2d 835 (1998). A court is not required to give an instruction that does not properly inform the jury of the applicable law or that is not supported by the evidence. The determination whether supplemental instructions are applicable and accurate is within the trial court's discretion. A trial court's decision will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Nabozny v Pioneer State Mut Ins Co*, 233 Mich App 206, 216-217; 591 NW2d 685 (1998).

To establish a prima facie case of age discrimination under the intentional discrimination theory, the plaintiff must show that (1) she was a member of a protected class, (2) she was discharged, (3) she was qualified for the position, and (4) she was replaced by a younger person. *Matras v Amoco Oil Co*, 424 Mich 675, 682-683; 385 NW2d 586 (1986); *Barnell v Taubman Co, Inc*, 203 Mich App 110, 120; 512 NW2d 13 (1993). Age need not constitute the sole basis for the employee's discharge. *Matras*, *supra* at 682; *Barnell*, *supra* at 121. With respect to age discrimination, the trial court instructed the jury pursuant to SJI2d 105.01 through SJI2d 105.04. After reviewing the trial court's reading of these instructions, we find that they properly informed the jury of the applicable law concerning age-based employment discrimination, adequately defining intentional discrimination and explaining the parties' burdens of proof. Accordingly, we find no abuse of discretion in the trial court's denial of defendant's requested supplemental instruction, nor any error requiring reversal. *Nabozny*, *supra* at 216-217.

We further note that defendant's requested instruction does not properly describe Michigan law. In formulating its proposed supplemental instruction, defendant relied on federal case law interpreting the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 USC 621 *et seq*.[1] While Michigan courts have at times considered federal law when reviewing age discrimination claims based on state law, this Court is not bound to follow the federal precedent. *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997); *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357-358; 486 NW2d 361 (1992). Both *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 116 S Ct 1307, 134 L Ed 2d 433, 438-439 (1996), and *Maxfield v Sinclair Int'l*, 766 F2d 788, 792-793 (1985), on which defendant relies, held that in presenting a prima

facie case under the ADEA, a plaintiff need not establish replacement by someone outside the protected class (someone under forty years of age). *O'Connor* and *Maxfield* observed that replacement by a substantially younger employee more reliably indicated age discrimination, and that "a substantial difference in the ages may be circumstantial evidence that gives rise to that inference." *O'Connor*, *supra* at 439; *Maxfield*, *supra* at 792.[2] Michigan law, however, imposes no age forty protected class limitation in ELCRA age discrimination actions, and does not require that an ELCRA plaintiff show replacement by a substantially younger employee. An ELCRA plaintiff need only show replacement by a younger individual. *Matras*, *supra* at 683; *Barnell*, *supra* at 120. While we agree with defendant that no substantial inference of age discrimination should arise from the replacement of a thirty-seven year-old employee with a thirty-one year-old individual, the ELCRA does not restrict the category of potential age discrimination plaintiffs. It is for the Legislature to establish public policy. See *Morgan v Taylor*, 434 Mich 180, 192; 451 NW2d 852 (1990) (The wisdom of a statutory provision in the form in which it was enacted is a matter of legislative responsibility with which the courts may not interfere; it is the court's function to fairly interpret a statute as it then exists.). Because defendant's proposed instruction incorrectly suggested that an ELCRA plaintiff must show his replacement by a substantially younger individual, the trial court correctly rejected the instruction. *Nabozny*, *supra* at 217.

Finally, we note that where, as here, a plaintiff presents direct evidence of age discrimination, the inference analysis approach to establishing a prima facie case is inapplicable. *Downey v Charlevoix Co Bd of Rd Comm'rs*, 227 Mich App 621, 633; 576 NW2d 712 (1998).

II

Defendant next argues that the trial court improperly submitted to the jury the front pay damages issue, and that, even assuming that plaintiff submitted evidence sufficient to support front pay damages, the trial court should have read to the jury defendant's proposed supplemental instruction concerning front pay damages. Front pay damages relate to an award for an employee's loss of future income for a period after the date of trial; for example, until the discharged employee would have reached mandatory retirement age. *Riethmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 198; 390 NW2d 227 (1986). In deciding whether to award such damages, a court should look to (1) whether reinstatement would be a feasible remedy, (2) the employee's prospects for other employment, and (3) the number of years remaining before the employee would be faced with mandatory retirement. The trial court has the discretion, based on the circumstances of the case before it, in deciding whether to award future damages. *Id*. at 200-201.

Our review of the record reveals sufficient testimony to support a jury award of front pay. The testimony of a vocation rehabilitation counselor who interviewed plaintiff and reviewed her history and personnel file indicated the impracticability of reinstatement due to plaintiff's emotional problems stemming from her discharge. The counselor further testified that plaintiff's prospects for comparable work were likewise diminished due to her emotional condition. The counselor explained that plaintiff's best potential for employment involved a less stressful, less demanding position than that from which defendant had terminated her. Plaintiff possessed a high school diploma, which also limited the potential jobs for which she could qualify. Plaintiff was thirty-seven years of age at the time defendant terminated her, leaving approximately thirty years until her retirement. While defendant maintains that at best

plaintiff's future damages are speculative, this Court has explained that the mere fact that future damages may be speculative should not exonerate a wrongdoer from liability. *Id*. at 201. Under these circumstances, we cannot conclude that the trial court abused its discretion in permitting the jury to consider front pay.

Defendant also claims that the trial court abused its discretion in refusing to instruct the jury according to the following proposed, supplemental future wage loss instruction:

> In deciding whether plaintiff is entitled to future wage loss, such damages must be proven with reasonable certainty and cannot be based on speculation.
>
> If you decide plaintiff is entitled to future wage loss, in determining the amount you should consider the following factors: the plaintiff's duty to mitigate, the availability of employment opportunities, the period in which one by reasonable efforts may be re-employed, the employee's work and life expectancy and the discount tables to determine the present value of the future damages.

Regarding future damages, the trial court instructed the jury that it must base any award on the evidence and not on speculation or conjecture, that any future damages award must be reduced to its present cash value, that plaintiff "must make every reasonable effort to minimize or reduce her damages for loss of compensation by seeking employment," that the jury must reduce any damage award "by what the plaintiff earned and what the plaintiff could have earned with reasonable effort during the period for which [the jury] determine[s] she is entitled to damages," that in the event the jury finds a continuing injury it must determine the length of time during which the continuing injury will exist, and that in the event the jury finds a permanent injury it must decide how long plaintiff will live. Because defendant's proposed instructions added nothing to the trial court's balanced and fair instructions concerning future damages, and would not have enhance the jury's ability to decide the case, we conclude that the trial court did not abuse its discretion in refusing defendant's requested supplemental instruction. *Nabozny*, *supra* at 217.

III

Next, defendant raises several alleged trial court evidentiary errors. The decision whether to admit evidence rests within the trial court's sound discretion, and will not be set aside on appeal absent an abuse of that discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Gore v Rains & Block*, 189 Mich App 729, 737; 473 NW2d 813 (1991).

Defendant contends that certain witness statements admitted by the trial court were irrelevant and prejudicial. Relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence is generally admissible, MRE 402, unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

A

Defendant first argues that because the instant case involved plaintiff's alleged wrongful discharge, the trial court erred in admitting testimony concerning defendant's alleged discrimination in its hiring practices. The numerous statements attributed to defendant's managers, supervisors, assistant vice president and vice president, to the effect that only younger, thinner and energetic employment applicants should be hired while older, overweight and ugly applicants should only be enrolled as health club members, were relevant. Defendant's employees' statements reflecting their value of youth in hiring "is evidence as to the atmosphere in which [defendant] was motivated" to fire plaintiff. *Weiss v Ford Motor Co*, 64 Mich App 519, 527; 236 NW2d 124 (1975). These statements certainly tend to strengthen plaintiff's claim that defendant dismissed her because of her age. *Downey*, *supra* at 633-635; *Featherly*, *supra* at 359-360. While, from defendant's perspective, these statements were damaging to its case, their admission did not unfairly prejudice defendant. *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996), aff'd 457 Mich 593; 580 NW2d 817 (1998). Because we find no unfair prejudice that substantially outweighs the statements' significant probative value, we conclude that the trial court did not abuse its discretion in admitting evidence concerning defendant's hiring practices.

B

Defendant also asserts that, contrary to the trial court's ruling on defendant's motion in limine to exclude any evidence of defendant's alleged sex discrimination, the trial court subsequently admitted testimony to this effect. In response to plaintiff's counsel's inquiry on redirect examination, one witness testified that while employed with defendant she took a maternity leave, and "was denied a promotion because of [] being pregnant." A review of the record reveals that during cross-examination defense counsel introduced the topic of the witness' maternity leave, and that defense counsel did not later object to or move to strike the witness' response to plaintiff's counsel's maternity leave inquiry. With respect to another witness' statement that defendant prevented her from earning as much as men, this remark constituted part of the witness' response to defense counsel's own inquiry whether she quit her employment with defendant because she was "unable to work the hours that it took." Defendant opened the door to these areas of inquiry, and cannot now on appeal assert error in these respects. *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993) (A party cannot seek reversal on the basis of an error that the party caused by either plan or negligence.).

C

Defendant further alleges that evidence of violations of defendant's internal policies improperly came before the jury, again violating the trial court's ruling concerning defendant's motion in limine. The record indicates that the trial court initially granted defendant's motion as it related to violations of defendant's internal policies on the basis that any such violations were irrelevant to the instant case. During plaintiff's counsel's redirect examination, a former employee of defendant testified, however, that

she quit her employment with defendant because some spa managers had instructed their assistants to lie about prospective members' incomes in order to increase the spa managers' commissions. Defense counsel invited the witness' testimony to this effect by repeatedly suggesting that defendant had terminated her "for low production." The witness' statements concerning her reason for leaving defendant's employ tended to dispel defendant's suggestion that she was terminated and presumably might harbor some ill will against defendant, and were therefore relevant and admissible.[3] MRE 401, 402. Because we discern no unfair prejudice arising from the witness' remarks, and defendant fails to specifically explain how these remarks resulted in such prejudice, we conclude that the trial court did not abuse its discretion in permitting the witness' testimony.

Defendant also maintains that the trial court erroneously failed to prevent another witness from recalling that "during contest time . . . managers short[ed] hours . . . to make a contest or to make (indistinct) payroll." We initially note that defendant did not object to this testimony, as required under MRE 103. Furthermore, this testimony was relevant to plaintiff's theory of the case that her sales figures were low because she refused to engage in improper numbers manipulation even though other staff members did so. The evidence directly bears on the credibility of defendant's position. Because defendant theorized that plaintiff was fired on the basis that she achieved low sales figures, the jury was entitled to hear this evidence to aid in its determination whether defendant offered a satisfactory reason for plaintiff's discharge, or whether such reason was merely a pretext. This evidence, although damaging, was not substantially more prejudicial than probative. We therefore again conclude that the trial court did not abuse its discretion in admitting this testimony.

D

Defendant additionally suggests that the trial court erred in admitting testimony that defendant required its staff to solicit club members from topless and nude dance bars. This testimony first surfaced after defense counsel had elicited from a witness who had worked for defendant that plaintiff's sales were down when defendant terminated her and that defendant had replaced plaintiff with someone who would "do anything to get a deal" and make sales. On redirect examination, plaintiff's counsel inquired concerning the meaning of this phrase, "do anything" for sales. The witness provided several examples, explaining that she had been to "Boscoe's, strip places. I had to hang out in K-Mart parking lot. I've been to Friday night places where I've never been before" to try to enroll new club members. To the extent that defense counsel's inquiries of the witness suggested deficient performance by plaintiff because she would not "do anything" to make a deal and get a sale, the witness' statement concerning her recruiting efforts was relevant to substantiate what constituted "anything." Defendant again fails to specifically explain how the admission of these statements substantially and unfairly prejudiced it. Accordingly, we conclude that the trial court did not abuse its discretion in admitting these statements, nor the two subsequent witness' brief descriptions of recruiting club members from nude and/or topless bars.

E

Defendant finally claims that while the Supreme Court resolved that plaintiff's counsel's remarks concerning defendant's wealth and greed did not alone deprive defendant of a fair trial, we should find

that plaintiff's counsel's conduct, when considered together with the trial court's various evidentiary errors, warrants our grant of a new trial. Because we have found no evidentiary errors by the trial court, however, we need not consider defendant's argument.

IV

Lastly, defendant contends that the trial court improperly awarded plaintiff attorney fees. The ELCRA provides that "[a] court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." MCL 37.2802; MSA 3.548(802). In calculating a reasonable fee, a court should consider (1) the professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and the results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship with the client. *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982). This Court will reverse a trial court's determination of reasonable attorney fees only for an abuse of discretion. *Id*.

While defendant contends on appeal that the trial court failed to recognize that it could in its discretion refuse plaintiff's request for attorney fees, we note that at the hearing defendant essentially conceded to some award of attorney fees. Our review of the lower court record and hearing transcript reveals some evidence tending to establish *Wood* elements (1) through (5). While the trial court did not explicitly state its findings concerning each of these elements, it need not do so. *Wood*, *supra*. The trial court did specifically observe that plaintiff's "adversaries in this case were so much more prepared and [plaintiff's counsel] had to do so much more preparation," and, having presided over the trial and entered the $225,000 judgment for plaintiff, the trial court clearly was well aware of the difficulty of the case, the time and labor involved, and the amount in question and result achieved by plaintiff's counsel. Furthermore, in reducing the hourly fees requested by plaintiff's counsel, the trial court implicitly considered plaintiff's attorneys' professional standing and experience. Given the trial court's apparent awareness of most of the *Wood* factors and the trial court's exercise of discretion in reducing both plaintiff's requested number of hours and hourly rate, we cannot conclude that no justification or excuse supported the court's award of attorney fees and costs. *Gore*, *supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Defendant cited, among other cases, *O'Connor v Consolidated Coin Caterers Corp*, 517 US 308, 116 S Ct 1307, 134 L Ed 2d 433 (1996), *LaPointe v United Autoworkers Local 600*, 8 F3d 376, 378 (CA 6, 1993), and *Maxfield v Sinclair Int'l*, 766 F2d 788, 792 (CA 3, 1985).

[2] In *LaPointe, supra*, the Sixth Circuit concluded that an ADEA plaintiff must show replacement by someone outside the protected class. *LaPointe, supra* at 379. *LaPointe* did not address which inferences should arise from the age differences between an ADEA plaintiff and his replacement.

[3] The trial court explained his decision to permit the witness' testimony as follows:

> The method of cross-examination that the defense undertook this morning as it related to putting up the discharge of [sic] the termination letter of witnesses and then forcing the witness to stick with the wording that was on the exhibit [stating that defendant based the termination on the witness' inadequate production]. That, in my view, is unfair in light of my in limine rulings that the internal policies and procedures of the defendant were not to be gone into, and I gave them that ruling purposely, because I don't think liability ought to be established through those types of documents.
>
> However, I also told counsel at the sidebar that, in my view, it was absolutely unfair to require the witness to stay within the corners of the document, and that I would permit [plaintiff's counsel] on redirect examination to go into the specific details, whether it dealt with violating rules or procedures or any other thing, then as long as that method of examination was going to be used.