STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL BLACK,

Plaintiff-Appellee,

v

KING OF LONG LAKE, INC., LISA BALSAMO, and TONY BARBOUR,

Defendants,

and

MICHIGAN MULTI KING, INC.,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 211891
Oakland Circuit Court
LC No. 95-510709-CZ

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant, Michigan Multi King, Inc. ("defendant"), appeals as of right from the judgment entered in favor of plaintiff following a jury verdict in this handicap discrimination claim brought under the Handicappers' Civil Rights Act (HCRA),[1] MCL 37.1101 *et seq*.; MSA 3.550(101) *et seq*. Defendant challenges the trial court's order denying defendant's motion for entry of judgment notwithstanding the verdict (JNOV) or a new trial. We affirm.

In reviewing a decision on a motion for JNOV, we view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 826 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate. *Forge, supra* at 204.

This Court reviews the denial of a motion for a new trial for an abuse of discretion. *Setterington v Pontiac General Hosp,* 223 Mich App 594, 608; 568 NW2d 93 (1997). An abuse

of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Alken-Ziegler, Inc v Waterbury Headers Corp,* 461 Mich 219, 227-228; 600 NW2d 638 (1999).

I

To establish a prima facie case of discrimination under the HCRA, the plaintiff must show: "(1) that he is handicapped as defined in the act, (2) that the handicap is unrelated to his ability to perform his job duties, and (3) that he has been discriminated against in one of the ways delineated in the statute." *Chmielewski v Xermac, Inc*, 457 Mich 593, 601; 580 NW2d 817 (1998); *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998). In this case, viewing the evidence in a light most favorable to plaintiff, there was evidence introduced at trial to establish a prima facie case of handicap discrimination.

The HCRA, MCL 37.1103(e); MSA 3.550(103)(e), defines "handicap" as:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
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> (A) For purposes of article 2, substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (ii) A history of a determinable physical or mental characteristic described in subparagraph (i).
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> (iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i).

II

Plaintiff testified that he had a congenital disease that necessitated four hip replacement surgeries and, at times, caused him pain. Plaintiff stated that, in early August 1995, the hip condition caused a cervical strain in his neck that necessitated the use of crutches and a neck brace. Orthopedic surgeon, Dr. Jer-Fu Yeh, testified that he examined plaintiff and opined that plaintiff had a loosening of his prosthetic hip, which caused the strain. Dr. Yeh stated that plaintiff suffered pain and discomfort due to the condition and should not engage in "a lot of heavy lifting" or "excessive walking." Therefore, it was reasonable for the jury to conclude that plaintiff's congenital hip condition substantially limited his ability to engage in strenuous physical activity without pain and, thus, that plaintiff was "handicapped" as defined by the HCRA.

There was also evidence that plaintiff's handicap was unrelated to his performance as an assistant manager at the Long Lake Burger King restaurant where he was employed in August 1995.[2] Plaintiff testified that he wanted to return to work on August 11, 1995, after receiving treatment for the cervical strain. Despite doctors' slips indicating that plaintiff should be restricted from "heavy lifting, pushing, pulling" and "excessive walking," plaintiff testified that he was able to perform his duties as assistant manager at that time.

Plaintiff returned to work two full shifts at the Long Lake store on the weekend of October 21 and 22, 1995, unbeknownst to plaintiff's manager, defendant Tony Barbour, and Barbour's immediate supervisor, defendant Lisa Balsamo. According to plaintiff, he had no problem performing his duties during the seventeen hours that he worked that weekend. He worked without the aid of crutches or a neck brace. Balsamo received no complaints from other employees concerning plaintiff's ability to perform his duties during that time. Both plaintiff and Barbour testified that plaintiff worked for a period prior to August 11, 1995, while wearing a neck brace and using crutches and effectively performed his duties. Barbour admitted that plaintiff performed as well as any assistant manager on his staff. Dr. Yeh testified that plaintiff's condition would not preclude him from standing for long periods of time.

Evidence presented at trial also supported plaintiff's claim that defendant discriminated against him on the basis of his handicap. MCL 37.1202(1); MSA 3.550(202)(1) provides, in part:

> An employer shall not:
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> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.

There was evidence from which the jury could reasonably conclude that defendant constructively discharged plaintiff. "[A] constructive discharge occurs only where an employer or its agent's conduct is so severe that a reasonable person in the employee's place would feel compelled to resign." *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 325-326; 577 NW2d 881 (1998). It was undisputed that plaintiff was placed on medical leave and was not allowed to work at the Long Lake store between mid-August 1995 and mid-October 1995. It was also undisputed that defendant terminated plaintiff's medical insurance benefits on August 9, 1995. According to plaintiff, when he attempted to return to work in August 1995, Barbour told him that he was a "liability" to the restaurant and would not be permitted to work until he underwent surgery. Plaintiff testified that he could not afford to pay for an operation. Dr. Yeh testified that surgery was unnecessary.

On October 23, 1995, plaintiff was confronted by Barbour regarding a discrepancy in receipts during plaintiff's weekend shifts and was told he must repay approximately $120 or his employment would be terminated. Plaintiff denied any wrongdoing and refused to repay the money.

Thereafter, plaintiff received a telephone call, via a speakerphone, from Barbour, Balsamo and defendant's corporate controller, Sharon Van Tiem. According to plaintiff, he was told that he would be required to submit to an independent medical examination and to provide his medical records from the time of his birth.

In regard to the discrepancy in funds, plaintiff was allegedly called a "thief" and a "liar." Plaintiff testified that he was humiliated by the conversation and was "in tears." He admitted that he hung up the phone and left the Long Lake restaurant.

Plaintiff did not allege that any of the defendants or any agent of defendant specifically told him that his employment was terminated. However, viewing the circumstances surrounding the final months of plaintiff's employment in a light most favorable to plaintiff, reasonable jurors could conclude that plaintiff's facially voluntary act of leaving the restaurant was actually an involuntary termination. See *Mollett v City of Taylor*, 197 Mich App 328, 336; 494 NW2d 832 (1992). Moreover, plaintiff's testimony regarding Barbour's statement that plaintiff was a "liability, not an asset" to the restaurant, as well as his testimony that Barbour told him that he would not be allowed to return to work unless he underwent surgery, was evidence that plaintiff was discharged as a direct result of his handicap.

Accordingly, the issue of defendant's liability was a matter for the jury, and, thus, the court did not err in denying defendant's JNOV motion. *Forge*, *supra* at 204; *Central Cartage Co*, *supra* at 524.[3] We conclude further that plaintiff's and Dr. Yeh's testimony established a prima face case of handicap discrimination and that, therefore, the jury's verdict was not against the great weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

III

Defendant's claim that the jury's verdicts were inconsistent is without merit. If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent. *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998). Only if the verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside. *Id.*; *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 516; 556 NW2d 528 (1996), aff'd 458 Mich 582; 581 NW2d 272 (1998). Here, it was neither legally nor logically inconsistent for the jury to find that defendant discriminated against plaintiff and was liable for damages given its finding that the conduct of defendant's agent, Barbour, was discriminatory.

As discussed *supra*, there was evidence that a reasonable person in plaintiff's position would have felt compelled to resign. Thus, there is also no merit to defendant's second argument on appeal, challenging the finding that plaintiff was constructively discharged.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ Henry William Saad

[1] This act has since been amended and is now known as the Persons with Disabilities Civil Rights Act. *Lown v JJ Eaton Place*, 235 Mich App 721, 723, n 1; 598 NW2d 633 (1999); see 1998 PA 20. This appeal is considered under the former statutory provisions.

[2] The Long Lake restaurant was owned by defendant King of Long Lake, Inc. Defendant Michigan Multi King, Inc., was the parent corporation of King of Long Lake, Inc.

[3] Defendant has, at all times, contended that it did not discharge plaintiff. Thus, whether defendant articulated a legitimate, nondiscriminatory reason for plaintiff's discharge to rebut plaintiff's discrimination claim was not an issue below and is not considered on appeal. See *Rollert, supra* at 538.