

STATE OF MICHIGAN

COURT OF APPEALS

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DONNA ROBERTS,

Plaintiff-Appellant,

v

AUTOALLIANCE INTERNATIONAL, INC,  
f/k/a MADZA

Defendant-Appellee.

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UNPUBLISHED

July 9, 1996

No. 175820

LC No. 90 026380

Before: O'Connell, P.J., and Reilly and D. E. Shelton,\* JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

Plaintiff began working on defendant's assembly line on February 28, 1988. Approximately three months later, she claimed it was impossible to continue working at that position because of carpal tunnel syndrome. She applied for and received benefits under defendant's salary continuation program, which is established by her collective bargaining agreement. Under the program, employees receive sixty percent of their base wages for "long-term illnesses, not to exceed fifty-two consecutive weeks." According to an affidavit filed by defendant, union employees who cannot return to active employment at the conclusion of fifty-two consecutive weeks of paid leave are terminated pursuant to Article VIII, section 5(1) of the collective bargaining agreement. The affidavit also indicated that from January 6, 1986 through September, 1990, "all Mazda Union employees were terminated who failed to return to work within 3 consecutive working days after expiration of a leave of absence or 52 week salary continuation period."

Plaintiff also filed a claim for worker's compensation benefits on September 14, 1988. Defendant

disputed the claim, and on May 24, 1991, the worker's compensation magistrate determined that plaintiff was disabled due to a work related injury from June 7, 1988 to February 13, 1989. This decision was affirmed by the worker's compensation appellate commission. This Court and the Michigan Supreme Court denied plaintiff's applications for leave to appeal. *Roberts v Autoalliance Int'l*, unpublished order of the Court of Appeals, issued January 25, 1994 (Docket No. 167866); *Roberts v Mazda Motor Manufacturing Corp*, 446 Mich 876 (1994).

Plaintiff concedes that she remained unable to work until February, 1989, but asserts that she was capable of working within certain restrictions after that time. In August, 1989, plaintiff's employment was terminated pursuant to the provisions in the collective bargaining agreement because plaintiff did not return to work within three days after the expiration of her eligibility for the salary continuation program. According to plaintiff, The reason she did not return to work before the expiration of the salary continuation program was because defendant discriminated against her and did not offer her work within her restrictions.

Plaintiff filed this action in Wayne County circuit court on October 16, 1990. Although the action originally contained three counts, only the disposition of Count I, "Worker's Compensation Discrimination MCLA 418.301(11)" is at issue.<sup>1</sup> Plaintiff alleged that defendant "terminated Plaintiff as a result of her assertion of a work-related medical condition" and "[i]n the alternative, Defendant[] discriminated against Plaintiff by failing or refusing to offer her work within her restrictions, whereas other persons without a work-related condition were accommodated at the plant."

Defendant's motion for summary disposition asserted several bases for dismissing plaintiff's complaint. It is not clear from the trial court's statements at the hearing on the motion which of the arguments the court found persuasive. Having considered each of the arguments as discussed below, we conclude that none of them entitled defendant to judgment as a matter of law.

First, defendant argued that plaintiff's Count I is defective because it states that defendant discriminated against her as a result of "her assertion of a work related medical condition", rather than because she filed a worker's compensation claim. Although we agree with defendant that only the latter is protected under MCL 418.301(11); MSA 17.237(301), and the complaint could have been drafted more clearly, we are not persuaded that the imprecise drafting entitles defendant to judgment as a matter of law.

Second, defendant argued that plaintiff was bound by her deposition testimony that she did not know of any job that she could perform.<sup>2</sup> The importance of this testimony to defendant seems to be that if plaintiff was incapable of performing in any position, then defendant's failure to offer her work was not wrongful. However, plaintiff's testimony was not that she was unable to perform any job, but rather that at the time of her deposition she was not aware of positions within the company that were consistent with her restrictions:

Q. What jobs does Mazda have today that you could perform?

A. I don't really know, but I am sure if they tried hard enough maybe they could find something.

\* \* \*

Q. What job, if any comes to mind, that you think that maybe you could perform if you had an opportunity to do it?

A. Perhaps delivering messages. That is off the top of my head. I can't, you know, maybe -- like I said, there is nothing wrong with my legs.

Q. Any other job?

A. Right now thinking I can't think of any, but I am sure there must be something.

Plaintiff later stated in an affidavit that she was capable of performing certain jobs that she identified as being consistent with her restrictions. Defendant correctly sets forth the general rule that a party may not create factual issues by contradicting deposition testimony. *Downer v Detroit Receiving Hosp*, 191 Mich App 232, 234; 477 NW2d 146 (1991). However, the difference in plaintiff's statements is not a contradiction, but rather reflects an increased knowledge of positions within the company as a result of discovery.

Third, defendant argued that plaintiff was judicially estopped from asserting that she was able to return to work. As set forth by defendant in its brief in support of the motion for summary disposition, under the doctrine of judicial estoppel, "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding." *Lichon v American Universal Ins Co*, 435 Mich 408, 416; 459 NW2d 288 (1990) (emphasis added). Defendant seeks to apply this doctrine with regard to plaintiff's pleadings in the worker's compensation action in which she pleaded that she was permanently disabled.

Judicial estoppel does not preclude plaintiff from asserting that she was able to return to work from February to August, 1989, because she was not successful in arguing that she was disabled during this period. With respect to plaintiff's capability of working, the time period that is relevant in this litigation is from February 1989, when plaintiff contends she was able to return to work, to August 1989, when her unemployment was terminated. Although plaintiff asserted she was disabled during that period in the worker's compensation action, the worker's compensation magistrate determined that plaintiff was disabled only from June 7, 1988 to February 13, 1989. Thus, to the extent that plaintiff argued that she was disabled after February, 1989 in the worker's compensation action, she was not successful. Because judicial estoppel applies when a party has successfully asserted a position in a prior proceeding, and plaintiff was not successful with respect to the relevant time period, defendant was not entitled to summary disposition on the basis of judicial estoppel.

Fourth, defendant argued that plaintiff's complaint must be dismissed because she failed to mitigate her alleged damages. The cases cited by defendant, *Sangster v United Airlines, Inc*, 633 F 2d

864 (CA 9, 1980) and *Sellers v Delgado College*, 902 F 2d 1189 (CA 5, 1990), do not support its argument. In each case, the plaintiff's economic damages in a Title VII action were limited because the plaintiff did not seek other employment. Neither case suggests that a failure to mitigate damages precludes all relief. We are not persuaded that defendant is entitled to summary disposition because plaintiff allegedly did not mitigate her damages.

Because none of the arguments raised by defendant demonstrated that it was entitled to judgment as a matter of law, the order granting its motion for summary disposition is reversed.

Reversed.

/s/ Maureen Pulte Reilly

/s/ Donald E. Shelton

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<sup>1</sup> Plaintiff's complaint also contained counts labeled "Handicap Discrimination" and "Handicap Discrimination – Federal Rehabilitation Act of 1973." Defendant removed the case to federal district court. All counts were dismissed in a judgment entered March 25, 1992. The Sixth Circuit affirmed the dismissal of Counts II and III, but reversed the summary judgment entered on Count I. The federal district court remanded the case to the Wayne County Circuit Court.

<sup>2</sup> Defendant also argued that plaintiff stated in her deposition that she did not know whether defendant treated workers with work-related injuries in a discriminatory fashion. That statement is not contained in the excerpts of plaintiff's deposition submitted to this Court. In any event, assuming that plaintiff made the statement, it would not have entitled defendant to judgment as a matter of law. Her uncertainty does not mean that the issue should not be submitted to a jury.