STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA MORALES,

Plaintiff–Appellee,

v

CITIZENS INSURANCE CO.,

Defendant–Appellant.

UNPUBLISHED
December 13, 1996

No. 186582
Wayne County
LC No. 93-301655 CZ

Before: Markman, P.J., and McDonald and M. J. Matuzak*, JJ.

PER CURIAM.

Defendant appeals as of right from the jury verdict awarding plaintiff $43,500 in this employment discrimination action brought pursuant to Michigan Handicapper's Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.* We affirm.

Defendant raises several issues on appeal. First, defendant argues that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict because the evidence presented at trial was insufficient to establish the intent element of a prima facie case of handicap discrimination. We disagree. "Discriminatory intent may be inferred from the evidence presented." *Hickman v General Motors Corp,* 177 Mich App 246, 249; 441 NW2d 430 (1989). The evidence presented at trial established that plaintiff was highly evaluated following her interviews with defendant's employees, Lotoczky and Palarski, and that plaintiff demonstrated a good understanding of Michigan's no-fault laws and the process for handling insurance claims. Although both Lotoczky and Palarski thought plaintiff was a good candidate, Lotoczky hired another person, Horbal, for the position after receiving plaintiff's background check which indicated that plaintiff was receiving disability benefits. Moreover, when Lotoczky spoke with plaintiff she told plaintiff that her reported disability raised a question in her mind. Viewing all the evidence and inferences reasonably drawn therefrom in a light most favorable to plaintiff,

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* Circuit judge, sitting on the Court of Appeals by assignment.

we find that plaintiff presented sufficient evidence from which defendant's intent to discriminate could be inferred.

Alternatively, defendant argues that even if plaintiff can establish a prima facie case of discrimination, defendant articulated two nondiscriminatory reasons for its employment decision, which plaintiff could not prove to be pretextual. We disagree. Pursuant to the shifting burden analysis utilized in handicap discrimination cases, once defendant articulates a legitimate nondiscriminatory reason for refusing to hire plaintiff, the burden shifts back to plaintiff to prove that the reason articulated was pretextual. *Crittenden v Chrysler Corp,* 178 Mich App 324, 331; 443 NW2d 412 (1989). In proving pretext, however, plaintiff need not show that defendant was solely motivated by a discriminatory intent; "it is enough to show that the discrimination was a determining factor in defendant's conduct." *Id.* at 331. Although defendant alleges that three years experience was required, neither the advertisement for that position nor the testimony of Palarski supports defendant's proposition. Moreover, applicants were evaluated on numerous factors beside experience, and plaintiff scored higher than Horbal on almost every criterion used. Further, although defendant alleges that it questioned plaintiff's veracity based on erroneous information contained in her resume and application, the evidence presented at trial demonstrates that Horbal's application also had inaccuracies. Thus, we find that plaintiff presented sufficient evidence to establish that defendant's articulated reasons were pretextual, and that the trial court did not err in denying defendant's motion for judgment notwithstanding the verdict.

Defendant also argues that plaintiff's counsel's comments referring to the "natural tendency to discriminate" made during his opening statement and closing argument were improper; therefore, the verdict should be reversed. We disagree. Because plaintiff's comments regarding the natural tendency to discriminate were not supported by any evidence presented at trial, the trial court erred in allowing plaintiff's counsel to mention this in his opening statement and closing argument. *See Gonzalez v Hoffman,* 9 Mich App 522, 526; 157 NW2d 475 (1968). However, reversal is not required. "A lawyers comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial." *Wilson v General Motors Corp,* 183 Mich App 21, 26; 454 NW2d 405 (1990). Given the context, plaintiff's counsel was not attempting to prejudice defendant, but was attempting to highlight for the jury the motivation behind and purpose of the Michigan civil right's laws. *See Wilson, supra* at 27. Moreover, the trial court also expressly instructed the jury that the arguments and remarks of the attorneys were not evidence. Thus, any prejudice plaintiff's counsel's argument may have had on the jury was cured. *See Guider v Smith,* 157 Mich App 92, 102; 403 NW2d 505 (1987).

Lastly, defendant argues that the trial court erred in refusing to cut off defendant's damages as of May 23, 1993, pursuant to the after acquired evidence rule. We disagree. The after acquired evidence rule provides that plaintiff's claim of discrimination is not precluded by the discovery, subsequent to the discriminatory conduct, of wrong doing by plaintiff, but that that evidence can be considered in fashioning a remedy. *Wright v Restaurant Concept,* 210 Mich App 105; 532 NW 2d 889 (1995). However, in order for the after acquired evidence rule to come into effect, the after

acquired evidence must relate to misconduct by plaintiff so grave as to result in her immediate termination. *McKennon v Nashville Banner Publishing Co*, 531 US ___, 115 S Ct 879; 130 L Ed 2d 852, 860 (1995). In light of the fact that the evidence presented at trial indicated that plaintiff did not intentionally provide erroneous information, that the dates and figures plaintiff provided were not substantially off, and that defendant did not fire Horbal who also had erroneous information on her application, we find that the evidence presented at trial was sufficient to support the jury's finding that defendant would not have terminated plaintiff upon learning of these errors; thus, the trial court did not clearly err in refusing to cut off defendant's damages at May 23, 1993.

Affirmed. Costs to plaintiff.

/s/ Gary R. McDonald
/s/ Michael J. Matuzak