STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF CIVIL RIGHTS,
ex rel BRENDA BAILEY,

Petitioner/Cross-Defendant-Appellant,

v

TWENTY-NINTH JUDICIAL CIRCUIT COURT,

Respondent/Cross-Plaintiff-Appellee.

UNPUBLISHED
May 12, 1998

No. 194850
Ingham Circuit Court
LC No. 95-080689 AA

Before: Holbrook, Jr., P.J., and Gribbs and R.J. Danhof,* JJ.

PER CURIAM.

Petitioner appeals by leave granted from a circuit court order affirming a decision of the Civil Rights Commission, which had concluded that respondent discriminated against petitioner Brenda Bailey in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., but had dismissed petitioner's constructive discharge claim. We affirm.

Petitioner first argues that the lower court erred when it affirmed the commission's decision dismissing her claim of constructive discharge and, as a consequence, limiting her wage loss, without reviewing the whole record. While a circuit court's review of the final decision or order of the Civil Rights Commission is de novo, *Dep't of Civil Rights ex rel Johnson v Silver Dollar Café,* 441 Mich 110, 116; 490 NW2d 337 (1992), this Court reviews the circuit court's decision under the clearly erroneous standard and "can substitute [its] judgment for the circuit court's where, on review of the whole record, [it is] left with the definite and firm conviction that a mistake has been made," *Michigan Dep't of Civil Rights ex rel Johnson v Silver Dollar Café (On Remand),* 198 Mich App 547, 549; 499 NW2d 409 (1993).

A constructive discharge is established where "an employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation or, stated differently, when working conditions become so difficult or unpleasant that

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

a reasonable person in the employee's shoes would feel compelled to resign." *Vagts v Perry Drug Stores*, 204 Mich App 481, 487; 516 NW2d 102 (1994), quoting *Mourad v Automobile Club Ins Ass'n*, 186 Mich App 715, 721; 465 NW2d 395 (1991). In *Jenkins v American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985), this Court stated:

> Constructive discharge requires inquiry into the intent of the employer and the reasonable foreseeable impact of the employer's conduct on the employee. *Held v Gulf Oil Co*, 684 F2d 427, 432 (CA 6, 1982). An employer is held to intend the reasonable foreseeable consequences of his conduct. *Id*. Plaintiff can make a jury-submissible case for constructive discharge by showing discrimination plus aggravating circumstances. See *Bourque v Powell Electrical Manufacturing Co*, 617 F2d 61 (CA 5, 1980), *Clark v Marsh*, 214 US App DC 350, 355-356; 665 F2d 1168 (1981).

Here, petitioner testified that, in addition to the discrimination, there were three specific incidents that caused her distress and finally induced her to write a letter of resignation. One incident occurred when petitioner was not notified by the assignment clerk of a change in the location of court proceedings. The assignment clerk testified that it was her mistake, that the judge was not involved in any way, and that there was no vindictive reason for failing to notify petitioner. On another occasion, petitioner came into the courthouse to work on a transcript and, once there, was advised that she was supposed to appear in court. The court administrator testified that the incident was the result of a mutual mistake—petitioner did not check the folder in which changes were logged, and the court administrator did not bring it to petitioner's attention—that the action was in no way vindictive, and that the judge was not involved in any way. Regarding the third incident, petitioner testified that on a day that she was scheduled to appear in court she received a telephone call informing her that proceedings had been canceled, only to learn later that proceedings were held and that another court reporter filled in for her at the scheduled time. A nonjury divorce trial had been scheduled for that day but in actuality an unscheduled brief divorce hearing was heard by the judge. He testified that another court reporter was used for this five-minute proceeding as a matter of expedience and cost savings. The circuit court found that the first two incidents were attributable primarily, if not totally, to someone other than the judge, and that the third incident reflected a routine practice of using court reporters from other courtrooms for short proceedings instead of paying the per diem rate.

In light of the evidence and the demanding burden of proof required of petitioner to establish a constructive discharge, *Jenkins*, *supra* at 796, we are not left with the firm conviction that a reasonable person in petitioner's shoes would have felt compelled to resign, *Vagts*, *supra* at 487. Accordingly, the circuit court did not clearly err in affirming the commission's dismissal of this claim.

Petitioner next argues that the circuit court erred when it affirmed the commission's decision limiting petitioner's damages for humiliation, outrage, embarrassment, and pain and suffering. In *Silver Dollar Café (On Remand)*, *supra* at 549, the Court stated:

> There is no question that emotional distress damages are recoverable under the MCL 37.2101 *et seq*.; MSA 3.548(101) *et seq*., to compensate a claimant for

"humiliation, embarrassment, and outrage" resulting from discrimination prohibited by the act. *Eide v Kelsey-Hayes Co*, 431 Mich 26, 36; 427 NW2d 488 (1988); see also *Slayton v Michigan Host, Inc*, 122 Mich App 411, 416-417; 332 NW2d 498 (1983) ("a victim of discrimination may bring a civil suit to recover for damages, any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which flow from the discrimination injury"). Exemplary damages for these same injuries, however, may not be recovered. *Eide*, *supra* at 28-29.

Accepting that there is no absolute standard by which to determine the amount of damages, *Silver Dollar Café, supra* at 129-130, a verdict "within the range of the evidence produced at trial, . . . should not be reversed as excessive." *Brunson v E&L Transport*, 177 Mich App 95, 106; 441 NW2d 48 (1989). Here, petitioner testified that for approximately four years she had to listen to discriminatory comments regarding her pregnancies. After her employment had ceased with the court, petitioner had trouble sleeping, was crying all the time, was vomiting and felt nauseous, could not eat, and had a constant headache. She sought the services of a medical doctor, who prescribed medication and counseling. Petitioner also counseled with her mother, a psychotherapist, on a professional basis for a two-month period. A fellow employee testified that following petitioner's resignation, petitioner cried all the time and was very emotional, but the severity of petitioner's reactions lessened after approximately six months.

The circuit court found that an award of $6,000 for mental anguish was appropriate in light of her employer's conduct and the duration and severity of petitioner's symptoms. Because the verdict was within the range of evidence, it was not clearly erroneous. *Brunson*, *supra* at 106.

Petitioner next argues that the lower court erred when it affirmed the commission's decision limiting petitioner's award of attorney fees to $11,713 plus $728.20 in costs. We disagree. Pursuant to MCL 37.2802; MSA 3.548(802), a court rendering a judgment in a civil rights action "may award all or a portion of the costs of litigation, including reasonable attorney fees, . . . if the court determines that the award is appropriate." Hence, an award of attorney fees under the civil rights act is within the discretion of the court, and will not be reversed on appeal absent an abuse of that discretion. *Howard v Canteen Corp,* 192 Mich App 427, 437; 481 NW2d 718 (1991). Contrary to petitioner's argument, Michigan has not followed federal precedent which allows a prevailing party to recover the full amount of attorney fees, even if the party did not prevail on every claim or issue. *Schellenberger v Rochester Michigan Lodge*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 185598, 186646, 191951, issued 2/10/98) slip op at 11-14. Our review of the record in this case indicates no abuse of discretion by the commission in determining an appropriate award of attorney fees based on the guidelines set forth in *Wood v Detroit Automobile Inter-Ins Exchange*, 413 Mich 573, 587-589; 321 NW2d 653 (1982). Accordingly, the circuit court did not err in affirming the award.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Roman S. Gribbs
/s/ Robert J. Danhof