STATE OF MICHIGAN

COURT OF APPEALS

AMY RAFFERTY,

Plaintiff-Appellee,

v

ALAN MARKOVITZ and ALMARK OF MICHIGAN, INC. d/b/a TRUMPPS,

Defendant-Appellants.

UNPUBLISHED
June 12, 1998

No. 198775
Wayne Circuit Court
LC No. 94-422451

Before: Hood, P.J., and MacKenzie and Doctoroff, JJ.

PER CURIAM.

Judgment was entered in favor of plaintiff in the amount of $159,350.21 on her claim of pregnancy discrimination in violation of the Civil Rights Act, MCL 37.2101 *et seq.;* MSA 3.548(101) *et seq.* Plaintiff claimed that she was wrongfully discharged from her employment as a waitress at defendant Trumpps due to her pregnancy. Following a six-day jury trial, plaintiff was awarded $75,000 in past and future economic damages. The trial court then added interest, costs, attorney fees, and mediation sanctions. Defendants appeal as of right, and we affirm.

Defendants first argue that the trial court erred by admitting highly prejudicial letters written by defendants' agent to the Michigan Employment Security Commission (MESC). Defendants argue that MCL 421.11(b)(1); MSA 17.511 (b)(1) creates an absolute privilege and strictly prohibits the use of information given to the MESC in subsequent civil proceedings where the MESC is not a party. Defendants failed to object at trial to the admission of the letters on the ground that their admission was contrary to MCL 421.11(b)(1); MSA 17.511(b)(1). Objections to the admission of evidence may not be raised for the first time on appeal absent manifest injustice. *Phinney v Verbrugge*, 222 Mich App 513, 558; 564 NW2d 532 (1997), *City of Troy v McMaster*, 154 Mich App 564; 398 NW2d 469 (1986). Here, defendants objected to the admission of the letters only on the ground that they constituted hearsay, which objection was overruled. This was insufficient to preserve the error defendant now claims. *McMaster*, *supra* at 567.

Defendant correctly points out that our courts have indicated that MCL 421.11(b)(1); MSA 17.511(b)(1) prohibits the use of MESC information at a subsequent civil proceeding where the MESC is not a party and grants an absolute privilege to statements made to the MESC, *Paschke v Retool Industries,* 445 Mich 502, 515-518; 519 NW2d 441 (1994); *Gonyea v Motor Parts Federal Credit Union,* 192 Mich App 74, 77; 480 NW2d 297 (1991); *Wojciechowski v General Motors Corp,* 151 Mich App 399, 406; 390 NW2d 727 (1986)[1]. However, we find that no manifest injustice will result from our refusal to review this unpreserved issue or reverse based on the fact that MESC information was used to impeach witness credibility. The offending letters were not the only evidence lending credence to plaintiff's claim that she was terminated because of her pregnancy. Plaintiff's allegations and testimony were supported by the testimony of two former employees of Trumpps, one of whom testified that everyone who worked at Trumpps knew that if you became pregnant and started "showing" you would be fired. That witness also testified that defendant Markovitz told plaintiff's supervisor to "get rid of the pregnant waitress." The other female witness testified that on the last night that plaintiff worked, defendant Markovitz asked plaintiff's manager if plaintiff was pregnant or just gaining weight, and that later that evening, plaintiff was upset and was crying. Because there was substantial other evidence supporting plaintiff's claim, the introduction of the letters did not amount to manifest injustice. Moreover, we also note with interest that while defendants claim that the use of the MESC information in any manner was inappropriate, defendants actually utilized MESC documents at trial and attempted to impeach plaintiff with information she had reported to the MESC. Our finding that no manifest injustice is present in this case is bolstered where defendants themselves took full advantage of the MESC findings to the extent that they were beneficial to their case. We find it disingenuous for defendants to now complain that the use of MESC documents was error requiring reversal.

Defendants next argue that it was improper and inflammatory to allow plaintiff's counsel to divulge information about another pregnancy discrimination lawsuit that was filed against defendants. Defendants have failed to support this argument with any citations to authority. We will not search for authority to support defendant's position that it was improper to allow plaintiff's counsel to introduce information about another lawsuit. *Wojciechowski, supra* at 405. We deem this issue abandoned by defendants because of their failure to cite to any applicable law. *Magee v Magee,* 218 Mich App 158, 161; 553 NW2d 363 (1996).

Defendants next argue that the jury's award of $75,000 to plaintiff for past and future lost income was not based upon a reasonable interpretation of the evidence. We disagree. Plaintiff was awarded $50,000 in past economic damages and $25,000 in future economic damages. The jury was presented with testimony from numerous waitresses who worked for or had previously worked for defendants. The testimony demonstrated a wide range for average tip incomes claimed by the waitresses. Plaintiff testified that she initially worked three to five nights per week and earned tips averaging $250 per night after paying a portion to the bartender and porter. Colleen Coniff testified that she earned tips averaging $200 to $250 per night. Robin Rumsey testified that her tips averaged $300 per night, but could be as little as $100 or as much as $1,000. LaDawn Bingamen testified that she had been tipped as much as $350 per night, but an average night resulted in $100 in tips. Four other witnesses testified that their average tips were $100 per night; $150 per night; $125 per day; and

between $100 and $130 per day. The jury awarded plaintiff $50,000 for the 26-month period between the time she was fired and the time of trial. This figure amounts to approximately $23,077 per year and is well within the range of proofs offered at trial for past economic damages, even assuming that plaintiff made approximately $11,000 during that 26-month time period[2]. In addition, the jury's award of $25,000 in future damages was also supported where there was evidence that at the time of trial plaintiff was working full time for $7.50 per hour, which was below her lowest possible wages while employed by defendants.

Defendants also argue that the trial court erred by awarding plaintiff attorney fees under both the Civil Rights Act, MCL 37.2802; MSA 3.548(802), and the mediation sanction court rule, MCR 2.403(O). We disagree. This issue was settled in *Howard v Canteen Corp,* 192 Mich App 427; 481 NW2d 718 (1991). In *Howard,* this Court held that attorney fees could properly be awarded under both provisions in a gender-based discrimination case because each provision served an independent policy or purpose. *Id.* at 441. Defendants' argument that *Howard* was incorrectly decided is not persuasive. We believe that *Howard* was correctly decided. Moreover, we are bound to follow this Court's ruling in *Howard.* See MCR 7.215(H).

Finally, defendant Markovitz argues that he should not have been held individually liable for any discrimination that may have occurred. He claims that even if he had ordered plaintiff's termination, a fact that he continues to deny on appeal, he did so in his capacity as a representative of defendant corporation and thus, cannot be sued as an individual. Defendant Markovitz is incorrect that he cannot be held liable as an individual if he was acting as a shareholder, officer, and employee of the corporation. MCL 37.2201; MSA 3.548(201) defines an "employer" for purposes of the Civil Rights Act as "a person who has 1 or more employees, *and includes an agent of that person*" (emphasis added). Under the Act, an employer is prohibited from engaging in discriminatory practices based on pregnancy, MCL 37.2202; MSA 3.548(202)[3], and a plaintiff is entitled to file a civil action for damages where an employer violates the Act, MCL 37.2801; MSA 3.548(801). In *Jenkins v Southeastern Michigan Chapter, American Red Cross,* 141 Mich App 785, 799-800; 369 NW2d 223 (1985), this Court ruled that if a person has responsibility for making personnel decisions for the company, he is an agent of an employer for purposes of the Act. This Court held that the trial court did not err in failing to dismiss individual defendants from the case because they were agents of the employer. *Id.* at 799. The individuals were held liable by the jury. Markovitz was an employer or agent of the employer, as defined under the Act, and could be held liable as an individual for violating the provisions of the Act.

Affirmed.

/s/ Harold Hood
/s/ Barbara B. MacKenzie
/s/ Martin M. Doctoroff

[1] We note that in *Paschke, supra,* while the Supreme Court indicated that the statute provides for an absolute privilege, it did not rule on whether it was possible to use representations made to the MESC for evidentiary purposes at subsequent trials where MESC is not a party. *Paschke, supra* at 515, n

12. In light of our ultimate ruling on this issue, we need not address whether the MESC documents and information were properly used to impeach the credibility of defense witnesses.

[2] For example, calculating plaintiff's tips using the low end of the scale testified to by the witnesses, $100 per night, plaintiff's annual gross income for four nights of work per week would have been $20,800. Calculating plaintiff's tips using her claimed earned average of $250 per night, her annual gross income for four nights of work per week would have been $52,000.

[3] Pregnancy discrimination is included within the meaning of "sex" contained in the Act. See MCL 37.2201(d), MSA 3.548(201)(d); 37.2202(1); MSA 3.548(2202)(1). *Dep't of Civil Rights v Brighton Area Schools,* 171 Mich App 428, 436-437; 431 NW2d 65 (1988).