STATE OF MICHIGAN

COURT OF APPEALS

DIANE THOMAS,

Plaintiff-Appellee/Cross-Appellant,

v

McLAREN HEALTH CARE CORPORATION,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
July 24, 1998

No. 201883
Genesee Circuit Court
LC No. 95-039603 CL

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Defendant McLaren Health Care Corporation appeals by right a jury verdict of $599,000 in favor of plaintiff Diane Thomas in her action for wrongful discharge. Plaintiff cross-appeals. We affirm.

I

Defendant became plaintiff's employer when it purchased the nursing home for which plaintiff had worked her entire adult life. Plaintiff's mother was ousted in the process, creating an uncomfortable working environment for plaintiff. Plaintiff began working in defendant's accounting department, but was later transferred, at her request, to physician billing.

Defendant's employee handbook describes an employee corrective action program, under which employees may be awarded from one to six points for various rules violations. If an employee accumulates twelve points within a twelve month period, the employee may be discharged. Plaintiff received thirteen points between January 3 and May 22, 1995, when she was discharged.

Plaintiff brought an action for wrongful discharge, claiming that virtually all of the points assessed against her were improper. For example, plaintiff asserted that six points were assessed in retaliation for her posting of a satirical note regarding her working environment, rather than for leaving work without permission, which was the reason stated by defendant. Plaintiff argued that another three points, allegedly assessed for insubordination, were really the result of her telephoning a software company regarding an alleged copyright violation by defendant. Plaintiff also challenged the imposition of four points for tardiness, insisting that she was told that defendant's rules regarding timeliness were the same

as the nursing home where plaintiff formerly worked, when in fact they were not. Plaintiff also argued that the language in defendant's employee handbook regarding the number of permissible tardies in a "30 calendar day period of time" was ambiguous.

Count II of plaintiff's complaint was for public policy discharge. This count was based on plaintiff's allegation that defendant had ordered her to use a computer and software that were still licensed to the nursing home. Plaintiff alleged that when she refused to engage in this allegedly illegal activity she was reprimanded, assessed disciplinary points, and eventually discharged. At the conclusion of plaintiff's case-in-chief, the trial court granted defendant's motion for directed verdict on this count, finding that plaintiff had failed to present any evidence of illegality regarding defendant's use of the computer or software at issue.

The jury returned a verdict for plaintiff on her claim of wrongful discharge, and awarded plaintiff $599,000 in past and future economic damages. This appeal followed.

II

Defendant argues that the trial court erred in denying its motions for directed verdict and judgment notwithstanding the verdict on Count I of plaintiff's complaint. Neither a directed verdict nor a judgment notwithstanding the verdict is appropriate if there are factual matters about which reasonable minds could differ. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

At issue in Count I was whether each of the CAP points assessed to plaintiff was proper in light of the guidelines contained in defendant's employee handbook. Defendant argues that reasonable minds could not help but conclude that each of the points was properly awarded. However, plaintiff presented evidence which, particularly when viewed in a light most favorable to plaintiff, called into question defendant's stated reasons for many of the CAP points assessed against her. As our Supreme Court has stated, the true motivation for an employer's discharge of an employee is a question for the jury. *Toussaint v Blue Cross & Blue Shield*, 408 Mich 579, 622; 292 NW2d 880 (1980).

After carefully reviewing the record, we conclude that the trial court correctly determined that plaintiff had presented sufficient evidence to raise a factual dispute regarding the propriety of virtually all of plaintiff's CAP points. Accordingly, the court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict on Count I of plaintiff's complaint.

III

Defendant next argues that the trial court abused its discretion in denying its motions for a mistrial and a new trial based on comments by plaintiff's counsel regarding unions and suggesting that defendant was "anti-union." We disagree.

The comments made by plaintiff's counsel during opening argument, though improper, were not so prejudicial that a curative instruction could not have remedied their effect. Although expressly invited to do so by the trial court, defendant chose not to tender a curative instruction for the jury regarding the

matter. *Sanders v Westin Hotel, Inc*., 172 Mich App 161, 165; 431 NW2d 414 (1988). The trial court's denial of defendant's motion for mistrial was not an abuse of discretion.

Our review of the challenged portion of plaintiff's closing argument leads us to conclude that it was not, as defendant insists, a reference to unions. Notwithstanding this, however, defendant neither objected to the remarks nor moved for a mistrial. Particularly in light of the harmless nature of the comments, we find no error in the trial court's denial of defendants' motion for new trial. *Szymanski v Brown*, 221 Mich App 423, 427; 562 NW2d 212 (1997).

IV

Defendant argues that the trial court erred in failing to direct a verdict after plaintiff's case-in-chief regarding plaintiff's failure to present sufficient evidence of the economic value of certain lost future benefits. We find that any error in the trial court's ruling was rendered harmless by the use of a general verdict form, to which defendant did not object. In her case in chief, plaintiff presented evidence of lost future wages. The amount of future economic damages awarded by the jury is well within the range of lost future wages, without regard to future benefits, claimed by plaintiff. Insofar as we are unable to determine how much, if any, of the jury's award was intended to compensate plaintiff for lost future benefits, we decline to disturb the jury's verdict. MCR 2.613(A). Substantial justice would not be served by setting aside the jury's verdict on this ground.

V

Defendant also argues that, in light of the trial court's grant of a directed verdict on Count II of plaintiff's complaint, defendant was entitled to a directed verdict on the issue of whether certain disciplinary points were properly awarded for insubordination. By failing to present this theory to the trial court, defendant has failed to preserve this issue for our review. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995). Notwithstanding this, however, we find defendant's argument is without merit.

VI

We find no error in the trial court's award of prejudgment interest pursuant to MCL 600 6013(6); MSA 27A.6013(6). *Phinney v Perlmutter*, 222 Mich App 513, 539-542; 564 NW2d 532 (1997); *Paulitch v Detroit Edison Co*, 208 Mich App 656, 662-663; 528 NW2d 200 (1995), lv gtd 451 Mich 899, lv vacated 453 Mich 967.

VII

On cross-appeal, plaintiff argues that the trial court erred when it granted defendant's motion for a directed verdict regarding plaintiff's claim of public policy wrongful discharge. We disagree. Plaintiff failed to present any evidence regarding the legality of defendant's use of the computer software at issue that would create a factual question upon which reasonable minds could differ. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997). Consequently, the trial court properly granted defendant's motion for a directed verdict.

The judgment of the trial court is affirmed in all respects.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski