STATE OF MICHIGAN

COURT OF APPEALS

MARY TEMPEST,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION, INC., and MICHAEL CHOPP,

Defendants-Appellees.

UNPUBLISHED
November 10, 1998

No. 198223
Oakland Circuit Court
LC No. 94-470726 CZ

MARY TEMPEST,

Plaintiff-Appellee,

v

CHRYSLER CORPORATION, INC., and MICHAEL CHOPP,

Defendants-Appellants.

No. 198346
Oakland Circuit Court
LC No. 94-470726 CZ

Before: Young, Jr., P.J., and Wahls and White, JJ.

PER CURIAM.

These appeals stem from a sex discrimination and retaliation case brought under the Elliott-Larsen Civil Rights Act, MCL 37.2202(1)(a); MSA 3.548(202)(1)(a); MCL 37.2701(a); MSA 3.548(701)(a). In Docket No. 198346, defendants appeal as of right from a jury verdict awarding plaintiff $1.00 on her discrimination claim, and $3,919 on her retaliation claim; and from the trial court's order awarding plaintiff $2,860 in attorney fees incurred up to and including trial, plus $3,920 in post-trial attorney fees. In Docket No. 198223, plaintiff cross-appeals as of right challenging the amount of attorney fees awarded, the trial court's award of mediation sanctions, and the trial court's failure to award reinstatement. We affirm.

Docket No. 198346

Defendants first argue that the trial court should have granted their motion for a directed verdict or judgment notwithstanding the verdict because plaintiff's discrimination claim was untimely and unsupported by the evidence. We disagree. We review the question whether a claim is within the period of limitation de novo. *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 324; 577 NW2d 881 (1998). The three-year period of limitation for injuries to a person found in MCL 600.5805(8); MSA 27A.5805(8)[1] is applicable to an employee alleging discrimination in employment practices. *Slayton v Michigan Host, Inc*, 144 Mich App 535, 553; 376 NW2d 664 (1985).[2]

Here, it is clear that one of defendants' discriminatory acts occurred within the limitation period.[3] Thus, under the continuing violation doctrine, recovery was not barred by the statute of limitations. *Slayton*, *supra* at 555-556.[4] While plaintiff's recovery should have been limited to damages occurring within the limitation period, *id.*, any error in this regard was harmless, since the jury only awarded plaintiff $1 on this claim.[5]

As to the retaliation claim, defendants argue that plaintiff failed to establish a *prima facie* case. First, defendants contend that plaintiff's transfer to the plastics division was voluntary and resulted in no reduction in wages, benefits, or responsibilities. Second, they argue that the subsequent sale of the plastics division, which resulted in a reduction of plaintiff's retirement benefits,[6] was unrelated to the alleged discrimination. Finally, defendants argue that plaintiff could have chosen to remain with Chrysler, albeit on lay-off, and therefore may not claim damages as a result of her decision to go work for the division's new owner. We disagree with each of these arguments.

It is undisputed that Chrysler knew that plaintiff complained about the alleged discrimination. Therefore, the remaining question is whether "defendant took an employment action adverse to the plaintiff," and whether "there was a causal connection between the protected activity[, i.e., her complaints,] and the adverse employment action." See *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436, 440-441; 566 NW2d 661 (1997). Contrary to defendant's argument, plaintiff presented evidence from which a reasonable jury could infer that the situation with her supervisor had become so intolerable that any reasonable person would have taken the transfer, and therefore that the transfer was not truly voluntary. Further, because the reduction in retirement benefits was the result of that transfer, and because a reasonable jury could conclude that accepting a lay-off was not a reasonable option, plaintiff's case was properly submitted to the jury. Thus, we affirm in Docket No. 198346.

Docket No. 198223

First, plaintiff argues that the trial court abused its discretion in awarding her only a small portion of her actual attorney fees, despite the reasonableness of those fees and despite her having prevailed on both civil rights claims, merely because her damages were low. We disagree.

An award of attorney fees under MCL 37.2802; MSA 3.548(802), is reviewed for an abuse of discretion. *Howard v Canteen Corp*, 192 Mich App 427, 437; 481 NW2d 718 (1992). That section reads as follows:

> A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate. [MCL 37.2802; MSA 3.548(802).]

In making such an award, a trial court must consider the following factors, although it need not detail its findings on each:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. [*Wood v Detroit Automobile Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982); see also *Howard, supra* at 437.]

Plaintiff essentially ignores these factors, and argues that the remedial nature of the Elliott-Larsen Civil Rights Act required the trial court to award the full lodestar amount[7] of attorney fees. Plaintiff's argument appears to assume that a prevailing plaintiff is entitled to all of her reasonable attorney fees.[8] However, our prior decisions make it clear that a court, in its discretion, may award less than the full lodestar amount of attorney fees, or even no attorney fees at all. See *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 482-484; 442 NW2d 705 (1989) (where jury found that supervisor had sexually harassed plaintiff, but awarded her no damages, she was not entitled to collect attorney fees from him); *Riethmiller v Blue Cross & Blue Shield*, 151 Mich App 188, 203; 390 NW2d 227 (1986) (trial court did not abuse its discretion in awarding plaintiff only a portion of his attorney fees, no specific explanation was given); *Jenkins v American Red Cross*, 141 Mich App 785, 800-801; 369 NW2d 223 (1985) (trial court did not abuse its discretion in refusing to award attorney fees to a plaintiff who recovered $850,000 for race discrimination, no other explanation was given). Indeed, any other conclusion would make MCL 37.2802; MSA 3.548(802) mandatory, rather than discretionary. While none of the above cases adopts a proportional reduction formula like that used by the trial court in the present case,[9] we find no abuse of discretion. Under the circumstances presented in this case, we believe that the trial court properly declined to award plaintiff the full amount of her fees, and that the court's method for determining the amount of the award was reasonable.

Plaintiff also argues that the trial court abused its discretion in assessing $72,660.75 in mediation sanctions against her. She argues that the trial court should have awarded her a higher amount of attorney fees for the trial, and should have added her post-trial attorney fees to the jury verdict. She notes that either of these actions would have produced a combined total of damages, interest, costs and attorney fees that would have been more than 10% better than the mediation award. We find no merit in this argument. As noted above, the trial court's award of attorney fees for the trial did not constitute an abuse of discretion. In addition, we conclude that the trial court properly declined to consider post-trial attorney fees as part of the verdict when it determined whether to award mediation sanctions.

The mediation rule states that, "[i]f a party has rejected an evaluation and the action proceeds to verdict, that party *must* pay the opposing party's actual costs *unless* the verdict is more favorable to the rejecting party than the mediation evaluation." MCR 2.403(O)(1) (emphasis added). The rule goes on to define the term "verdict":

> (2) For the purpose of this rule "verdict" includes,
>
> (a) a jury verdict,
>
> (b) a judgment by the court after a nonjury trial,
>
> (c) a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation. [MCR 2.403(O)(2).]

Under the rule, where attorneys fees are awarded by the jury as part of the verdict, they are to be considered in deciding whether the rejecting party sufficiently improved its position. See *Dresselhouse,* 177 Mich App at 481. The rule also provides that, to determine if the rejecting party sufficiently improved its position, "a verdict must be adjusted by adding to it assessable costs and interest on the amount of the verdict from the filing of the complaint to the date of the mediation evaluation." MCR 2.403(O)(3). No other applicable adjustments are mentioned.[10]

We find no merit in plaintiff's argument that, because the post-trial attorney fees were awarded as the "result of a ruling on a motion," they should have been added to the verdict pursuant to MCR 2.403(O)(2)(c). We think it clear that the three definitions of a verdict found in MCR 2.403(O)(2) simply represent three different ways to obtain a final judgment, rather than a list of things that, when added together, would constitute a final judgment. Thus, we conclude that the post-trial attorney fees in this case were also "post-verdict" costs. Under these circumstances, the trial court properly refused to consider the award of post-trial attorney fees in determining whether plaintiff sufficiently improved her position to avoid paying mediation sanctions.

Plaintiff also argues that the trial court erred in awarding her only a portion of her post-trial attorney fees. Again, plaintiff's argument seems to assume that she was entitled to have defendants pay all of her reasonable attorney fees. We find no merit in this argument. Under the circumstances of this case, the trial court's decision to award plaintiff only part of her post-trial attorney fees was not an abuse of discretion.

Finally, plaintiff argues that she should have been awarded reinstatement because it would have allowed the trial court to fashion a precise remedy to redress wrongs to plaintiff as found by the jury. A trial court's determination to grant or deny reinstatement is a matter of equity and is reviewed de novo. *Rancour v Detroit Edison Co,* 150 Mich App 276, 292; 38 NW2d 336 (1986), overruled on other grounds by *Carr v GM Corp,* 425 Mich 313, 318-320; 389 NW2d 686 (1986) and by 1990 amendments to the Handicappers' Civil Rights Act. MCL 37.1101 *et seq.*; MSA 3.550 (101) *et seq.* We find no error. The jury in this case apparently concluded that

plaintiff would not have remained at Chrysler after her division was sold. Under these circumstances, we will not disturb the trial court's ruling on reinstatement.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Myron H. Wahls

[1] Formerly MCL 600.5805(7); MSA 27A.5805(7).

[2] While the parties agree that a three-year period of limitation applies, they have not cited the statute, which reads in part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (8) The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property. [MCL 600.5805(8); MSA 27A.5805(8).]

[3] Plaintiff filed suit on August 9, 1993. One of the discriminatory acts was the writing and sending of a memorandum by plaintiff's supervisor, defendant Chopp, on August 10, 1990.

[4] We also note that there is some authority for the proposition that the statute of limitations did not begin to run until plaintiff's transfer. See *Jacobson, supra* at 327-329. Because plaintiff filed her complaint within three years of her transfer, *Jacobson* suggests that her claims were timely. Because the parties have not had the opportunity to address *Jacobson*, we decline to rest our holding on it.

[5] The introduction of evidence regarding acts outside the limitation period was not error. This evidence was relevant to plaintiff's claims regarding acts within the limitation period. See *Jacobson, supra* at 325, n 15.

[6] As a result of leaving Chrysler when the plastics division was sold, instead of eleven months later when the wiring division was also sold, plaintiff lost eleven months of creditable pension service with Chrysler at a present value of $3,919, which was the amount of the verdict on the retaliation claim.

[7] The lodestar amount is calculated by multiplying the number of hours reasonably expended by a reasonable hourly rate. *Howard, supra* at 439.

[8] Plaintiff accuses the trial court of "punishing" her by failing to award more attorney fees.

[9] Plaintiff was awarded only 2.2% of the lodestar amount because she recovered as damages only 2.2% of her last settlement demand.

[10] There is an adjustment for future damages, which is not relevant here.