STATE OF MICHIGAN

COURT OF APPEALS

MARCIA SNIECINSKI,

Plaintiff-Appellee,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
March 9, 2001

No. 212788
Wayne Circuit Court
LC No. 96-616254-CZ

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right from the order denying its motion for new trial, judgment notwithstanding the verdict (JNOV) or remittitur in this sex (pregnancy) discrimination action. We affirm.

Defendant argues that it was entitled to a directed verdict or JNOV because plaintiff failed to prove a prima facie case of pregnancy discrimination. We disagree. This Court reviews a trial court's denial of a motion for a directed verdict or a motion for JNOV de novo. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When examining either motion, a court views the evidence, and any legitimate inferences, in the light most favorable to the nonmoving party and determines whether a factual question exists about which reasonable minds could differ. A motion for directed verdict or JNOV should be granted only when there is insufficient evidence to create an issue for the jury. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000); *Meagher*, *supra*.

Plaintiff alleged that defendant engaged in intentional discrimination in violation of the Michigan Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. In order to establish a prima facie case of intentional sex (pregnancy) discrimination, a plaintiff must show that she was a member of a protected class, that she was discharged or otherwise discriminated against with respect to employment, that the defendant was predisposed to discriminate against persons in the class, and that the defendant acted upon that disposition when the employment decision was made. *Downey v Charlevoix County Board of Road Comm'rs*, 227 Mich App 621, 632; 576 NW2d 712 (1998); *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994).

Intentional discrimination may be established by direct or indirect evidence. *Graham v Ford*, 237 Mich App 670, 676; 604 NW2d 713 (1999); *Harrison v Olde Financial Corp*, 225 Mich App 601, 606; 572 NW2d 679 (1997). Direct evidence is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor. *Harrison*, *id.*, 610. In a case involving direct evidence of discrimination, the plaintiff bears the burden of persuading the trier of fact that the employer acted with illegal discriminatory animus, and that the discriminatory animus was causally related to the decision maker's action. *Id.*, 612. Once a plaintiff has met the initial burden of proving that the illegal conduct was more likely than not a substantial or motivating factor in the defendant's decision, a defendant has the opportunity to demonstrate by a preponderance of the evidence that it would have reached the same decision without consideration of the protected status.[1] *Id.*, 611. However, once the plaintiff has submitted direct evidence of discrimination, the case ordinarily must be submitted to the factfinder for a determination whether the plaintiff's claims are true. *Id*., 613. This Court has held, for example, that racial slurs by a decision maker constitute direct evidence of racial discrimination that is sufficient to get the plaintiff's case to a jury. *Id*.; *Downey*, *supra*.[2]

Here, viewed in a light most favorable to plaintiff, there was sufficient direct evidence of defendant's discriminatory predisposition and animus based on plaintiff's pregnancy and pregnancy-related complications to submit the case to the jury. Plaintiff testified that when she announced her second pregnancy in 1992, supervisor Michael Curdy seemed upset and stated, "I'm not going [to] let anyone sit here again. It seems to be the pregnancy chair." Another worker had just returned from maternity leave. The Human Resources (HR) manager confirmed that plaintiff complained about Curdy's "pregnant chair" comment, but nothing was placed in Curdy's file as a result of that comment. Plaintiff also testified that Curdy said that she was not going to be allowed to use any sick time or unpaid leave for pregnancy. In addition, with regard to her 1992 pregnancy, Curdy asked her if she was going to have more problems with her pregnancy "like [she] had in 1989." When plaintiff returned after having a miscarriage in February 1993, Curdy raised the issue of her pregnancies and indicated with regard to future pregnancies that, "if [she has] this, we'll have to deal with that problem if it comes." Plaintiff also indicated that Curdy tried to have her "written up," but after plaintiff complained to an HR manager, the memo was removed from her file. In addition, at the end of the first interview for the Account Representative (AR) position, Curdy told her to have a seat so they could "discuss an issue." He then allegedly said, in the presence of the two other interviewers, "You have problems with the pregnancies and we need to discuss the attendance of that." According to plaintiff, Curdy also asked her if she thought her pregnancies would be a problem in the future. Plaintiff further indicated that, after learning that plaintiff was pregnant a third time in August 1993, Curdy told plaintiff, "I guess I shouldn't hire women in their childbearing years." We find

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[1] Defendant maintained that plaintiff lost the AR position under BCN's long-term disability policy, and that she was not hired into the position when she returned because of a Medicare hiring freeze.

[2] Contrary to defendant's claim, plaintiff was not required to submit evidence that she was treated differently than other non-pregnant disabled workers to prove a prima facie case of discrimination where she submitted direct evidence of discrimination. *Downey*, *supra*; *Harrison*, *supra*.

that the remarks by Curdy, a supervisory or managerial level employee involved in plaintiff's interview process, constitute sufficient evidence to allow a jury to conclude that unlawful discrimination was at least a motivating factor in defendant's decision to discharge plaintiff from the AR position. *Downey, supra*.

Contrary to defendant's claims, viewing the evidence in plaintiff's favor, there was evidence that Curdy was a decision maker for Blue Cross and Blue Shield of Michigan (BCBSM). The evidence also showed that Blue Care Network of Eastern Michigan (BCN) is a wholly owned subsidiary of defendant BCBSM. BCBSM Regional Sales Director Donald Whitford testified that the sales unification process for BCN and BCBSM was a tripartite decision and process by him, Curdy, and Donald Roseberry, a BCN regional sales manager. Curdy and Whitford worked together on the unification plan on a daily basis and, even before the merger actually occurred, Curdy was acting as an employee of BCBSM. Curdy testified that he needed no special permission to perform essentially all of his work for the sales effectiveness project because BCN and BCBSM were "run as one." The AR hiring decision was made by Whitford, Roseberry and Curdy.

In addition, the evidence was sufficient to show that Curdy acted on a discriminatory predisposition when plaintiff was discharged from the AR position. There was evidence that, after hearing that plaintiff was pregnant in August 1993, Curdy and Whitford called an HR manager to inquire about placing a discipline notice regarding absenteeism in plaintiff's file dating back to January 1993. There was evidence of at least three calls to the HR manager between August 31, 1993 and September 3, 1993, attempting to place a "threat" in plaintiff's file regarding a January 1993 matter. On September 16, 1993, after plaintiff was on maternity leave, the HR manager had a conference call with Whitford and Curdy regarding the same issue. In addition, there was evidence that, while on medical leave, plaintiff left numerous messages for Curdy, Whitford and Roseberry to inquire about her AR position, but did not receive any return calls. Accordingly, we find that plaintiff presented sufficient evidence to submit the case for jury determination and, thus, the trial court properly denied defendant's motions for a directed verdict and JNOV.

Defendant next claims that plaintiff is not entitled to any compensatory damages after September 20, 1996, because she failed to prove that she was constructively discharged from the non-marketing BCN position on that date. Defendant correctly argues that there is no evidence to support a finding that plaintiff was compelled to resign from BCN in September 1996. See *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 796; 369 NW2d 223 (1985). The record, however, does not support defendant's claim that plaintiff ever argued that she was constructively discharged in September 1996, and defendant has not provided any citation to the record to support this claim. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). Accordingly, this argument is misplaced.

Defendant also argues that plaintiff's claim for economic damages should have been "cut off" in September 1996, when she resigned, because she never made any effort to find other employment at that time. In determining a motion for remittitur, a trial court must decide whether the jury award was supported by the evidence. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). This Court reviews the trial court's decision for

remittitur for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533-534; 443 NW2d 354 (1989). If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989).

With regard to this issue, defendant first contends that plaintiff failed to sufficiently mitigate her damages because her 1994 job search was not sufficiently diligent. It is well established that a wrongfully discharged plaintiff must make reasonable efforts to mitigate damages by seeking and accepting replacement employment. *Morris v Clawson Tank Co*, 459 Mich 256, 265; 587 NW2d 253 (1998). It is the defendant's burden to show that the plaintiff failed in her duty to mitigate. *Id*.

Plaintiff testified that, from May 1994 until December 1994, she looked for a comparable job, by contacting BCN's HR department "frequently" to inquire about openings, looking in the yellow pages, and contacting insurance agencies and individuals that she knew. Defendant has failed to demonstrate that plaintiff's job search in 1994 was not diligent. See, e.g., *Odima v Westin Tucson Hotel*, 53 F3d 1484, 1497 (CA 9, 1995) ; *Hanna v American Motors Corporation*, 724 F2d 1300, 1309 (CA 7, 1984).

Defendant next argues that plaintiff's decision to attend school full time as opposed to searching for employment in September 1996, precludes any economic damage award after her resignation date. Courts have generally held that an individual who abandons her willingness to search for and return to work and opts to attend school to "reap greater future earnings" generally does not meet her duty to mitigate damages during the time she is in school. See, e.g., *Taylor v Safeway Stores, Inc*, 524 F2d 263, 267-268 (CA 10, 1975); see also *Miller v Marsh*, 766 F2d 490, 492 (CA 11, 1985). A decision to attend school only when diligent efforts to find work prove fruitless, however, or to continue to search for work even while enrolled in school, does meet the duty. See e.g., *Smith v American Service Co*, 796 F2d 1430, 1431-1432 (CA 11, 1986), *Hanna, supra*, 1307-09, and *Brady v Thurston Motor Lines, Inc*, 753 F2d 1269, 1274-1275 (CA 4, 1985).

We find that the evidence supports a finding that plaintiff attended school as a means to acquire marketable skills to enter a particular labor pool, as opposed to simply abandoning the job market, as defendant claims. In other words, there was no evidence presented that plaintiff's decision to become a full-time student to obtain a bachelor's degree was undertaken for the purpose of reaping greater future earnings than she would have earned as an AR in the health insurance industry. Plaintiff testified that when she searched for a comparable job for seven months in 1994, all of the comparable positions required a bachelor's degree or an insurance license, neither of which she had. In the interim of 1994 and 1996, she accepted an inferior position with BCN in the same field, the health field. Indeed, when BCBSM posted for the AR position in August 1996, it, too, required a bachelor's degree. Thus, the jury could have concluded that plaintiff's decision to quit the lower paying job at BCN, which was a non-marketing position in the health field, with plans to attend school full time was not motivated by a desire to obtain access to an industry with greater compensation, but to ultimately find a job

comparable to the AR position.[3] Therefore, the trial court did not err in denying defendant's motion for JNOV or remittitur with regard to this issue.[4]

Defendant's final claim is that it was entitled to JNOV with respect to plaintiff's emotional distress claim. We do not agree. Emotional distress damages are among the broad range of remedies available under the civil rights act. *Hyde v University of Michigan Regents*, 226 Mich App 511, 522; 575 NW2d 36 (1997). Emotional distress damages are recoverable to compensate claimants for humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish that flow from discrimination prohibited by the act. *Id.*; *Jenkins, supra*, 799.

Here, plaintiff testified that she was humiliated and upset about returning to BCN in an inferior position. She explained that she was working side-by-side with people whom she had worked with for years and outperformed, but was making 50% less money and was in an inferior position. Plaintiff indicated that her coworkers asked her questions about why she did not get the job at BCBSM, which greatly upset and humiliated her. She also testified that she felt that her entire future had been "stripped away." We believe the evidence was sufficient to support plaintiff's claim of emotional distress.

Affirmed.

/s/ Roman S. Gribbs

I concur in result only.

/s/ Michael J. Kelly

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[3] Defendant notes that, as of the trial date, plaintiff had not enrolled in school full-time, but had only taken a couple of classes. This fact is irrelevant because plaintiff's damages were based on four years, i.e., the time it should take a full-time student to obtain a bachelor's degree.

[4] With regard to this issue, plaintiff argues that defendant failed to properly plead that she did not mitigate her damages in its first responsive pleading. However, the trial court denied this argument below and plaintiff has not properly appealed this issue. MCR 7.207