

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS E. McAULEY

Plaintiff–Appellant,

v

GENERAL MOTORS CORPORATION

Defendant,

and

MICHIGAN EMPLOYMENT SECURITY
COMMISSION,

Defendant–Appellee.

UNPUBLISHED

July 9, 1996

No. 184869

LC No. 88-95116-CZ

Before: Murphy, P.J., and O’Connell and M.J. Matuzak,* JJ.

PER CURIAM.

Plaintiff prevailed in a jury trial against the Michigan Employment Security Commission and the jury awarded him \$15,000. Plaintiff thereafter moved for costs and attorney fees. Costs and fees were awarded pursuant to the Michigan Handicappers’ Civil Rights Act, MCL 37.1101, *et seq.*; MSA 3.550(101), *et seq.* Costs and fees pursuant to the mediation sanction rule, MCR 2.403(O), were denied. Plaintiff appeals of right the denial of mediation sanctions. We reverse.

MCR 2.403(O) provides that attorney fees and costs be paid to a prevailing party where the other party did not accept the mediation evaluation and the prevailing party received a verdict that was more favorable than the mediation evaluation. Similarly MCL 37.1606; MSA 3.550(606) provides that attorney fees may be paid to prevailing parties in cases alleging violations of the handicappers’ act.

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

Here, plaintiff, a prevailing party, received a judgment at trial that was more favorable than the mediation award. He requested costs and fees under both provisions because both provisions applied to his case.

If each of the two provisions serves an independent policy, a prevailing party may be awarded fees under each provision even if such awards amount to a double recovery. *Howard v Canteen Corp*, 192 Mich App 427; 481 NW2d 718 (1992). The policy behind the award of fees in a handicappers' act case is the same as that in a case under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* *Yuhase v Macomb Co.*, 176 Mich App 9; 439 NW2d 267 (1989). That policy is "to encourage persons to ensure victims of employment discrimination access to the courts, and to obtain compliance with the act and thereby deter discrimination in the work force." *Howard, supra*, 440-441. The policy behind MCR 2.403(O) is to place the burden of litigation costs on the party who insists on trial by rejecting a proposed mediation award. *Howard, supra*, 441. The policies are different and thus plaintiff could have been awarded costs and fees under both.

The next inquiry is whether the court was obligated to award the costs and fees under each of the applicable provisions. An award of fees under the handicappers' act is discretionary and the court did not have to award fees under it. *Yuhase, supra*, 15. The trial court here, however, did award costs and fees under the handicappers' act. Because it had awarded costs under the handicapper' act provision, the trial court thereafter declined to award sanctions under MCR 2.403(O).

MCR 2.403(O), unlike the provision under the handicappers' act, MCL 37.1606; MSA 3.550(606) is not discretionary, however. *Sanders v Monical Machinery*, 163 Mich App 689, 692; 415 NW2d 276, 277 (1987). See also *Butzer v Camelot Hall*, 201 Mich App 275, 283; 505 NW2d 862, 865 (1993). The court therefore erred in determining that it had discretion to deny mediation sanctions pursuant to MCR 2.403(O). Mediation sanctions were required because plaintiff received a verdict that was more favorable than the mediation evaluation. We reverse and order the court to award mediation sanctions. Because the MESC did not appeal the order of costs and fees under the handicappers' act, that order will not be disturbed and plaintiff will receive a double recovery for some expenses.

The MESC cited *Dean v Tucker*, 205 Mich App 547; 517 NW2d 835 (1994), for the proposition that MCR 2.403(O) is discretionary. A proper reading of *Dean*, however, indicates that a trial court has the duty to determine if a prevailing party fits the criteria for being awarded attorney fees and if the criteria is met, the trial court, in its discretion, determines the amount of fees that are to be awarded. MCR 2.403(O) is mandatory in its application where the criteria are met. It is only the amount of sanctions awarded that is subject to the trial court's discretion.

Reversed and remanded for a determination of the amount of fees and costs to be awarded pursuant to MCR 2.403(O).

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak