STATE OF MICHIGAN

COURT OF APPEALS

DAWN SHAWEN-WORDE and STEVEN WORDE,

Plaintiffs-Appellees/Cross-Appellants,

v

CODE ALARM, f/k/a FLUIDICS MANUFACTURING COMPANY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
August 2, 1996

No. 174112
LC No. 90-391110-CZ

Before: Neff, P.J., and Jansen and G.C. Steeh III,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury verdict in plaintiffs' favor in this sex discrimination case. The jury returned a verdict for plaintiffs, awarding plaintiff[1] Dawn Shawen-Worde $15,000 in economic damages and $4,000 in noneconomic damages. Her husband Steven Worde was awarded $1,000 for loss of consortium. Plaintiffs were also awarded $22,404.17 in attorney fees and $3,197.36 in costs. Plaintiffs have also cross-appealed from the judgment. We affirm in part, reverse in part, and remand for a new trial on the issue of damages only.

Plaintiff began working for defendant in September 1987 as a temporary employee while she was attending night school. Plaintiff began working for defendant as a telemarketer, which involved her making telephone calls to car dealerships regarding the sale of defendant's car alarms. In December 1987, plaintiff became a permanent employee. In February 1988, plaintiff was promoted to the position of original equipment manufacturer coordinator. In May 1988, plaintiff was promoted to the position of inside sales manager. Plaintiff, however, was interested in becoming a district manager, but knew that she would have to learn how to install the car alarms if she wanted to be a district manager. Plaintiff learned, on her own time, how to install car alarms.

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

Plaintiff's direct supervisor, David Miller, was aware that plaintiff knew how to install alarms and admitted that she was proficient at it. Miller told plaintiff that when a district manager position became available, plaintiff would have the position. In June 1988, plaintiff learned that Tom Kreft was made a district manager in Detroit. Plaintiff was not aware that the position was open. Miller told plaintiff that Kreft was given the job because he had substantial technical experience. Miller again promised the next district manager position to plaintiff when it became available.

Plaintiff was later promoted to Ziebart program manager. This position was specifically created for plaintiff. Plaintiff was successful in this position and significantly increased sales of alarms to Ziebart shops. The job descriptions for plaintiff's position and the position of district manager were similar, but plaintiff's job responsibilities were even greater. Plaintiff's salary in 1988 was $20,000 plus a 1% commission on her total sales. District managers earned a base pay of $24,000 in 1988 and received a commission of 3% for sales above $30,000 per month. District managers could also earn monthly bonuses and trips based on peer rankings, while plaintiff could not.

In December 1988, plaintiff learned that Brett Gotti was made district manager for western Detroit and Toledo. Plaintiff had been aware of this position before it was filled and talked to Miller about it, however, she was not promoted to this position. Plaintiff was again upset at being passed over for a promotion to district manager, but she continued to work on Ziebart's accounts.

In April 1989, plaintiff became pregnant. She informed defendant about her pregnancy. Plaintiff was informed by her doctor that the fumes from Ziebart's undercoating process could be toxic to her baby. When plaintiff told Miller of her concern, she was told that they could work around it. Plaintiff was then put to work on a new home security program, although these changes were already planned before plaintiff announced that she was pregnant. In early May 1989, plaintiff's salary was reduced to $9.65 an hour because she could no longer work outside the office. However, plaintiff was told that she had chosen a different career path as a result of her pregnancy and that she would no longer be considered a career-minded individual because work would never be her priority.

In a subsequent meeting, plaintiff was told that she had a few choices: (1) she could go back to working on the Ziebart accounts (including exposure to fumes in the shop); (2) she could take a position as an engineering secretary; or (3) she could quit. In a letter expressing her protest to the choices given her, plaintiff agreed to work as an engineering secretary. At a May 23, 1989, meeting, plaintiff was given the following options: (1) work in the Ziebart shops; (2) work as an engineering secretary; (3) work in production at $5.00 an hour; or (4) work in telemarketing where she started. Plaintiff agreed to work as an engineering secretary because it involved the least drastic pay cut.

After working as a secretary for three days, plaintiff decided to take a layoff, which was what defendant's president originally wanted her to do. Plaintiff was told that the layoff was only temporary, and that she could return. Plaintiff's last day of work was May 31, 1989. On May 24, 1989, plaintiff saw an advertisement in the newspaper for a personnel manager with defendant. Plaintiff had not been

notified of this position, and she was later informed that she could not apply for the position because she would be taking time off because of her pregnancy.

While on layoff, plaintiff collected unemployment benefits and worked part-time in a clothing store earning minimum wage. She continued to contact defendant about job openings during her layoff. When she contacted defendant after her unemployment benefits ran out (about one month before the baby was born) she was informed by defendant's personnel department that her layoff was permanent. Immediately after the baby was born, plaintiff contacted defendant, but defendant would not rehire her because there were no positions open. She was again told that she was on permanent layoff and that she would not be returning to work there.

Plaintiff began working for Pacific Telesys Company in March 1990, and in August 1990, she began working for Modern Research. At Modern Research, plaintiff worked strictly on a commission, and she earned $31,171 in 1991 and she earned $36,356 in 1992. Plaintiff presented other evidence from female employees at defendant where they too were not promoted. The defense included claims that plaintiff did not formally apply for the position of district manager and that defendant hired two other men for the job because they were thought to be well-qualified for the job.

Plaintiff then filed this action for sex discrimination involving the failure to pay her the same as male employees in comparable positions and the failure to promote her. She also claimed discrimination as the result of her pregnancy. Plaintiff's husband included a claim for loss of consortium. The jury awarded plaintiff $15,000 in economic damages and $4,000 in noneconomic damages. Plaintiff's husband was awarded $1,000 for his loss of consortium claim.

On appeal, defendant argues that the trial court abused its discretion in failing to allow evidence of plaintiff's extramarital affair with an employee of defendant, and that the trial court erred in failing to prevent the submission of evidence regarding future damages. In the cross-appeal, plaintiffs raise five issues. They claim that the trial court abused its discretion in denying evidence of sexual harassment and other sexist remarks made by defendant's president, that the trial court erred in prohibiting plaintiffs from claiming a constructive discharge, that the trial court erred in prohibiting evidence of future damages, that the trial court erred in refusing to grant their motion for additur, and that the trial court erred in its award of attorney fees. We find merit with respect to the damages issues raised by the parties and we remand for a new trial on the issue of damages only.

DEFENDANT'S APPEAL

Defendant first argues that the trial court abused its discretion in failing to allow evidence of plaintiff's extramarital affair with a regional manager. Defendant argues that the evidence was relevant and probative of the proximate cause of plaintiff's husband's claim for loss of consortium.

Before trial, plaintiff moved in limine to exclude evidence that she had had an extramarital affair with a coemployee (not a supervisor) on one occasion. Plaintiff argued that the evidence was not relevant to the issues, that the probative value was outweighed by the prejudicial effect, and that

defendant was seeking to impeach plaintiff's credibility on a collateral matter. The trial court granted plaintiff's motion to exclude the evidence, ruling that the evidence was more prejudicial than probative and that it only involved a collateral matter.

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Foehr v Republic Automotive Parts, Inc*, 212 Mich App 663, 669; 538 NW2d 420 (1995). Under MRE 402, all relevant evidence is admissible, except as otherwise provided, and evidence which is not relevant is not admissible. Evidence which is relevant may still be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow the use of such evidence. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

The trial court did not abuse its discretion in excluding evidence of plaintiff's extramarital affair with a coemployee on one occasion. Plaintiff's claims were that of sex and pregnancy discrimination. Here, there is no indication that plaintiff's extramarital affair with a coemployee had any bearing on her transfer from the Ziebart accounts to the lower paid position of engineering secretary. Further, plaintiff's affair does little or nothing to disprove the sex and pregnancy discrimination claims. Nor does this evidence rebut any allegation of a hostile work environment. There is no indication that plaintiff's supervisors who allegedly harassed her even knew about her affair with the coemployee. Therefore, the evidence does not even appear to be relevant since it does not have the tendency to make the existence of any fact *of consequence* to the determination of the action more probable or less probable than it would be without the evidence. MRE 401.

Defendant also argues that evidence of the affair is relevant to the questions of causation and damages with respect to the loss of consortium claim. This argument was never raised below. Issues not raised at trial may not be raised on appeal absent unusual circumstances. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). There are no unusual circumstances in this case warranting our review of this unpreserved issue[2].

Defendant next claims that the trial court erred in not allowing evidence regarding lost wages which accrued after her employment ended with defendant. Defendant argues that plaintiff's damages for lost wages should have been limited to the amount that accrued at the time that plaintiff's employment ended in May 1989. Defendant moved in limine before trial to exclude evidence of backpay, or the amount of wages lost from the last date of plaintiff's employment to the date of trial. The trial court denied the motion.

The trial court did not err in allowing evidence of lost wages from the last date of plaintiff's employment to the date of trial. Backpay includes all monetary awards based on earnings and other fiscal benefits that the plaintiff would have received but for the unlawful employment practice. *Rasheed v Chrysler Corp*, 445 Mich 109, 117, n 8; 517 NW2d 19 (1994), citing 2 Larson, Employment Discrimination, § 55.31, p 11-96.1. However, a plaintiff is required to mitigate her damages. *Rasheed,*

supra, p 123. Here, plaintiff did obtain a job in March 1990 for Pacific Telesys Company and in August 1990 with Modern Research. Thus, plaintiff mitigated her damages and her damages would have been reduced by the amount she earned. SJI2d 105.41.

The trial court's decision to permit evidence of the amount of wages lost from the last date of her employment to the date of trial was well within its discretion. See *Rasheed*, *supra*, pp 124-125; MCL 37.2801(1); MSA 3.548(801)(1).

PLAINTIFFS' CROSS-APPEAL

In their cross-appeal, plaintiffs raise five issues. They first argue that the trial court abused its discretion in preventing them from presenting evidence of sexual harassment and sexist remarks made by defendant's president.

We find that the trial court abused its discretion in excluding this evidence. Plaintiffs attempted to admit certain statements made by defendant's CEO and president, Rand Mueller. These statements were allegedly that, "the gods had reached down and made Dawn a mother," and that if plaintiff was exposed to the toxic undercoating fumes and "if it fucks up your baby, oh well, that's life." There were also alleged comments made concerning plaintiff's legs and clothing.

The trial court ruled that the statements were inadmissible, referring to MRE 403. Apparently, the trial court's ruling was that the statements were not relevant and were unfairly prejudicial. We find that the trial court abused its discretion in excluding the statements because they were relevant and cannot be viewed as unfairly prejudicial. Mueller's statements about plaintiff's pregnancy are clearly relevant regarding her claim of pregnancy discrimination because the statements showed defendant's attitude toward plaintiff's pregnant state. Moreover, as this Court has stated, unfair prejudice does not mean damaging evidence. *Haberkorn*, *supra*, p 362. The statements made by Mueller are clearly relevant to plaintiff's case and should have been admitted at trial.

Because we are remanding for a new trial on damages only, this evidence may be admitted on retrial because it is relevant in determining the amount of plaintiff's noneconomic damages, such as mental anguish, humiliation, and embarrassment.

Next, plaintiffs argue that the trial court erred in not allowing them to argue that plaintiff was constructively discharged. We agree.

The trial court erred in ruling that a constructive discharge may not be relied on in a sex discrimination case. Our Supreme Court has recently recognized that a constructive discharge may occur in a sexual harassment case. *Champion v Nationwide Security, Inc*, 450 Mich 702, 710-711; 545 NW2d 596 (1996). The court stated that, "[i]t is well established that the law does not differentiate between employees who are actually discharged and those who are constructively discharged." Once individuals prove that they are constructively discharged, they are treated as if their employer actually fired them. *Id.*, p 710.

A constructive discharge occurs where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to involuntarily resign or when working conditions become so difficult that a reasonable person in the employee's place would feel compelled to resign. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). Constructive discharge is not itself a cause of action, but is a defense against an employer's argument that there is no liability because the plaintiff left the job voluntarily. *Id.* Therefore, a constructive discharge may be argued in any type of employment discrimination case where the employee is attempting to show that she did not leave her position voluntarily. See *Jenkins v Southeastern Michigan Chapter, American Red Cross*, 141 Mich App 785, 795; 369 NW2d 223 (1985) (constructive discharge in a race discrimination case); *Howard v Canteen Corp*, 192 Mich App 427, 434-435; 481 NW2d 718 (1992) (constructive discharge in a sex discrimination and sexual harassment case).

There was adequate evidence presented by plaintiff to show that she was constructively discharged. In May 1989, plaintiff was given the following choices: (1) go back to working on the Ziebart accounts, (2) take a position as an engineering secretary, or (3) resign. Plaintiff was later given the options of working in production at $5 an hour, or working in telemarketing at $8 an hour. Plaintiff chose the engineering secretary position because it offered the least drastic pay cut and did not expose her to toxic fumes during her pregnancy. Further, after plaintiff decided to take a layoff, as Mueller originally wanted, she was never offered a position despite the fact that there were openings. Accordingly, there was ample evidence presented by plaintiff that she was constructively discharged.

Further, we reject defendant's argument that it had no notice that plaintiff was going to argue that she was constructively discharged. In plaintiff's complaint, she alleged facts showing that she attributed her decision to being laid off based on the unreasonable conditions under which she was forced to work.

Therefore, we conclude that the trial court erred in not allowing plaintiff to argue that she was constructively discharged. This issue can also be handled on retrial relating to damages only. On retrial, plaintiff should be permitted to argue that she was constructively discharged and that this affected her damages relating to her claim of sex discrimination.

Next, plaintiff argues that the trial court abused its discretion in prohibiting evidence of future damages. We agree.

The trial court would not allow plaintiff to present expert testimony regarding the amount of future damages resulting from defendant's discrimination. Plaintiff had an expert witness who was going to testify regarding how the discharge affected plaintiff's future earnings even if she was able to obtain a new position at comparable pay and that plaintiff still had future damages as a result of the break in employment. The trial court ultimately ruled that plaintiff could not request future damages because she was young and had good prospects for other employment, even though reinstatement was not a feasible remedy.

Front pay is a monetary award that compensates victims of discrimination for lost employment extending beyond the date of the remedial order. Front pay refers to that part of an award that accrues after a decision is rendered. *Rasheed, supra,* p 117, n 8, citing 2 Larson, Employment Discrimination, § 55.39, p 11-96.1. In this case, there was no unconditional offer of reinstatement by defendant. When the remedy of reinstatement is not appropriate, as here, front pay is an appropriate monetary award. *Rasheed, supra,* p 133, n 42, citing 2 Larson, Employment Discrimination, § 55.39, p 11-96.121. Thus, the trial court's reliance on *Riethmiller v Blue Cross & Blue Shield of Michigan,* 151 Mich App 188; 390 NW2d 227 (1986) in denying plaintiff's request for front pay is misplaced because this Court in *Riethmiller* held only that future damages should not be available in cases where reinstatement was an appropriate remedy. *Id.,* p 201.

In the present case, because reinstatement was not a possible remedy, the trial court should have permitted the jury to consider the issue of front pay. In addition, the jury will have to be instructed on plaintiff's mitigation of her damages, therefore, no windfall will occur. *Rasheed, supra,* pp 123-124. Accordingly, on retrial, plaintiff should be permitted to offer evidence regarding her claim for front pay.

Next, plaintiffs argue that the trial court abused its discretion in awarding them twenty-five per cent of the requested attorney fees and costs. Because this issue may occur after the new trial, we will address the merits to avoid the duplication of error.

The decision to grant attorney fees under the Civil Rights Act is discretionary with the trial court. *Howard, supra,* p 437. The trial court is required to make findings of fact on the reasonableness of the amount of fees awarded. *Id.* Further, where attorney fees are to be awarded, the trial court must determine the reasonable amount of fees according to the nonexclusive list of factors set forth in *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982). *Howard, supra,* p 437. The party requesting the fees bears the burden of establishing entitlement to an award and also documenting the appropriate hours expended and the hourly rate. *Id.*

Plaintiffs requested a total amount of attorney fees of $89,616.71 and costs of $12,789.45. The trial court awarded twenty-five per cent of the fees and costs. It is not clear why the trial court reduced the amount of attorney fees and costs to twenty-five per cent, although there was apparently a contingent fee agreement plaintiffs had with counsel. Although consideration of the contingent fee agreement as one factor was not error, *Wilson v General Motors Corp,* 183 Mich App 21, 42; 454 NW2d 405 (1990), the contingent fee agreement is not contained in the lower court record. Rather, should this issue again come up after the new trial, the trial court should hold an evidentiary hearing if the opposing party challenges the reasonableness of the requested fee. *Howard, supra,* p 438. The trial court is to make factual findings on any disputed issues. *Id.* Further, the trial court should consider the factors set forth in *Wood* in determining the reasonable amount of attorney fees.

Last, plaintiffs argue that the trial court abused its discretion in denying their motion for additur. We need not address this issue because we have determined that plaintiffs are entitled to a new trial on the issue of damages only.

Affirmed in part, reversed in part, and remanded for a new trial with respect to the issue of damages only in accordance with this opinion. Jurisdiction is not retained.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh, III

[1] In this opinion, "plaintiff" will refer solely to Dawn Shawen-Worde.

[2] However, our opinion should not be read to preclude defendant from properly attempting to admit this evidence upon retrial. We offer no opinion as to whether this evidence is relevant regarding the question of causation and damages with respect to the loss of consortium claim.