STATE OF MICHIGAN

COURT OF APPEALS

RONALD DOWELL and ANTOINETTE DOWELL,

Plaintiffs-Appellants,

v

CITY OF TROY and FRANK GERSTENECKER,

Defendants-Appellees.

UNPUBLISHED
December 10, 1996

No. 186995
LC No. 89-380805

Before: Doctoroff, C.J., and Corrigan and Danhof,* JJ.

PER CURIAM.

Plaintiffs appeal by right the judgment after a jury verdict for defendants involving plaintiffs' claims of handicap discrimination, tortious interference with an employment relationship, and loss of consortium. We affirm.

Plaintiffs first contend that the court should have granted their motion in limine to preclude evidence that plaintiff Ronald Dowell[1] used marijuana while on sick leave and was marijuana dependent. We disagree. We review a trial court's evidentiary rulings for an abuse of discretion. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361; 533 NW2d 373 (1995). MRE 402 states that all relevant evidence is admissible unless otherwise provided for in the law or rules of evidence.

Plaintiff's marijuana dependence and use were relevant to the issue of damages. Plaintiff admitted that he had smoked marijuana while employed by defendant. His psychiatrist's records noted that he was marijuana dependent. Evidence of employee wrongdoing that would have led to a legitimate discharge had it been known to the employer may be used to limit back and front pay. *McKennon v Nashville Banner Publishing Co*, ___US___; 115 S Ct 879, 886; 130 L Ed 2d 852 (1995); *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 111-112; 532 NW2d 889 (1995). Here, defendants used the information solely to argue that had they known that plaintiff was using marijuana or was marijuana dependent, they would have terminated him immediately. Defendants argued that because plaintiff's position as personnel and purchasing director required him to

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

hire law enforcement personnel and to bargain with unions regarding drug testing, they could not have continued his employment given his illegal drug use. They argued that if the jury found in favor of plaintiff, damages should be limited.

Defendant Gerstenecker explained why the marijuana dependency was relevant:

> I cannot have department heads, who are responsible . . . under marijuana dependence. Their duties are to retain and hire police officers whose very work day in and day out has to deal with law enforcement, bringing to trial people who possess and sell drugs, including marijuana. I would have to fire a person who was in this position who would be marijuana dependent because of the very significant role this person plays in representing the City of Troy, not only with the police officers, but with our snow plow truck drivers. All of those people have to be drug tested to make sure that they are not on any form of drug, and this department has the responsibility for those records and giving leadership in that direction.

The evidence plainly was relevant to damages and was admissible under MRE 402. Plaintiff next argues that even if the evidence was relevant to damages, it was more prejudicial than probative under MRE 403. The only argument that plaintiff proffers that the evidence was more prejudicial than probative, however, was that the Oakland County jury probably did not approve of marijuana use. This argument does not address the factors contemplated in MRE 403. Evidence is not precluded as unfairly prejudicial simply because it is damaging. *Haberkorn, supra* at 361-362. Further, the evidence was not a focal point of the case, was not cumulative, and was crucial to support defendants' argument that damages should be limited. Finally, we cannot identify any potential for jury confusion regarding the issues. The trial court did not abuse its discretion in admitting the evidence.

Plaintiff next argues that the trial court should have allowed counsel to voir dire the jury on the issue of marijuana consumption. Plaintiff has raised this issue for the first time on appeal. *Gortney v Norfolk & W R Co,* 216 Mich App 535, 544; 549 NW2d 612 (1996); *Heshelman v Lombardi,* 183 Mich App 72, 82-83; 454 NW2d 603 (1990). Plaintiff not only failed to object during voir dire, but also failed to request that the jury be questioned about marijuana use. A trial court does not err in failing to ask specific questions on voir dire where counsel never makes a specific written or oral request regarding the questions to be asked. See *Carter v Braunstein,* 89 Mich App 119, 122; 279 NW2d 596 (1979).

Finally, plaintiff argues that the jury instruction on the handicap claim was error requiring reversal. We disagree. The court instructed in part:

> In this case, the handicap alleged is a mentally ill restored condition, I mean that the individual's mental condition is *completely* stabilized, in *complete* remission.
>
> The plaintiff must prove that he was discriminated against because he was mentally ill restored.

> The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or the reasons for the defendant's failure to reinstate the plaintiff when his doctor indicated he was ready to return to work was his mentally ill restored condition. Plaintiffs' mentally ill restored condition does not have to be the only reason, or even the main reason, but it does have to be one of the reasons which made a difference in determining whether or not to return plaintiff to work.
>
> To prove his claim of handicap discrimination, the plaintiff has the burden of proving by a preponderance of the evidence that:
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> a) He was mentally ill restored and thus handicapped within the meaning of the law;
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> b) His mentally ill restored condition was not related to his ability to perform the duties of his particular job or position; and
>
> c) The defendants intentionally discriminated against him on the basis of his mentally ill restored condition when they ordered a psychological examination and requested a meeting with the plaintiff before his return to work.

Plaintiff objects to the term "completely stabilized or in complete remission." He argues that the proper definition of "mentally ill restored" should have been simply "stabilized or in remission."

Although our courts have not clearly defined the term "mentally ill restored," the Michigan Handicappers' Civil Rights Act, MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*, does not require a showing that an employee is completely restored to his normal condition or completely stabilized. The purpose of the handicappers' civil rights act is to "mandate the employment of the handicapped to the fullest extent reasonably possible." *Crittenden v Chrysler Corp,* 178 Mich App 324, 331; 443 NW2d 412 (1989). The Legislature intended to protect persons whose disabilities are unrelated to their ability to perform a given job. *Johnson v Lansing Dairy Co,* 175 Mich App 605, 609; 438 NW2d 257 (1988). Given the legislative intent to protect people who are capable of performing their employment duties, we believe that if a person's mental condition has stabilized so that it will not interfere with his ability to perform his job, the person is "mentally ill restored" under the act, even if he may have residual problems in other areas of his life. Therefore, the trial court erred in instructing the jury that plaintiff had to be completely stabilized or in complete remission to be protected under the act.

On this record, however, the error was harmless This Court reviews jury instructions as a whole and does not reverse unless an instructional error results in a jury verdict inconsistent with substantial justice. *Jernigan v General Motors Corp,* 180 Mich App 575, 582-583; 447 NW2d 822 (1989). Reading the instructions as a whole, the court instructed the jury that plaintiff not only had to prove that he was handicapped because of his condition, but also that the handicap was unrelated to his

ability to perform his job and that defendants discriminated against him by requesting that he undergo an independent medical examination (IME). Plaintiff presented no evidence whatsoever that defendants discriminated against him on the basis of his alleged handicap. Both plaintiff and Gerstenecker testified that IME's were permitted and used for employees who had been off work due to illness or injury. Plaintiff offered no testimony that defendants treated him differently from other employees by requiring an IRE. Thus, although the court erred in requiring complete remission of the mental condition, the outcome of the litigation would not have changed had the court omitted the words "complete" and "completely" from the instructions. See *Jernigan, supra* at 582-583.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof

[1] Because plaintiff Antoinette Dowell's claims are derivative, "plaintiff" in this opinion refers to plaintiff Ronald Dowell only.