STATE OF MICHIGAN

COURT OF APPEALS

VICTORIA MORALES

Plaintiff-Appellee

v

CITIZENS INSURANCE CO.,

Defendant-Appellant.

UNPUBLISHED

No. 186582
Wayne County
LC No. 93-301655 CZ

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

MARKMAN, P.J., (dissenting).

I respectfully dissent and would find that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict in this employment discrimination action. I would do so for two reasons.

First, I would do so because I do not believe that the plaintiff is "handicapped" under MCL 37.1103; MSA 3.550(103). While the parties may be prepared to "stipulate" that plaintiff is handicapped, this Court is not obligated to accept such a stipulation. *In Re Finlay Estate*, 430 Mich 590, 595; 424 NW2d 272 (1988).[1]

I am unaware of any support for the proposition that an individual is properly characterized as "handicapped" where: (a) such individual does not currently suffer from any handicap; (b) such individual is not currently perceived to suffer from any handicap but is merely perceived to have suffered from a past handicap; and (c) such individual's perceived past handicap, in fact, made her unable to perform the work for which she was hired and therefore was clearly related "to [her] qualifications for employment." MCL 37.1103; MSA 3.550(103). While there may be some support in recent law for these three propositions taken separately, *Sanchez v Lagoudakis*, 440 Mich 496, 506; 486 NW2d 657 (1992); *Rymar v Michigan Bell Telephone*, 190 Mich App 504, 506-07; 476 NW2d 451 (1991), the conjunction of these propositions takes this case far beyond the legitimate reach of the

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

Michigan Handicappers' Civil Rights Act. To afford plaintiff the protections of the Act dilutes the focus of a law designed to ensure equal employment opportunities for genuinely disabled individuals.

Second, even if I were to agree with the majority that plaintiff is "handicapped" for purposes of this Act, I would still conclude that the trial court erred in failing to grant defendant's motion. Plaintiff was fired, not because of her handicap— real or perceived, past or present, job-related or not —but rather because of her lack of candor with defendant on her job application. She failed to inform her prospective employer that, for most of the previous two years, she had not been employed and gaining experience as an insurance claims representative, as she had indicated, but rather had been on disability from her prior employment. In effect, plaintiff's purported four years of experience was actually only approximately one year of experience. [2] In response to learning this information through a background check, defendant's branch manager spoke to plaintiff in a conversation tape-recorded by plaintiff:

> It's not really as much the disability, I guess. It does raise a question in one's mind. I mean, I have to be honest with you. It does raise a question in one's mind as to why it wasn't mentioned… But I guess the thing is, I mean, you know, I'm being honest with you. You know, I would think that maybe you should consider letting potential employers know of it as opposed to maybe finding out afterward because it does raise questions when you get something like that back.

The branch manager had also indicated earlier to plaintiff that it was the background report, not the disability itself, that caused her concern. "Well, I mean that was one of the *things that came back* that raised a question in my mind." [Emphasis supplied.] There is no evidence that these remarks by the branch manager did not honestly and sincerely communicate her discomfort with the accuracy of plaintiff's job application— a wholly understandable discomfort, in my judgment.

Nor is there any other evidence that plaintiff was denied employment with defendant for reasons of discrimination. I do not see a genuine issue of material fact regarding whether the branch manager's remarks, and defendant's eventual decision not to hire plaintiff, were pretextual. I do not believe that Michigan has reached the point in the evolution of its employment discrimination laws that an employer is properly suspected of pretext where he fails to hire an applicant who has not been forthcoming about what work she has been doing for the past two years.[3]

Nor do I find it suggestive of pretext that the manager alluded to plaintiff's "disability" on several occasions during her conversation with plaintiff. How could the manager do otherwise when the disability was the very subject of plaintiff's suspected lack of candor? The implication of the majority opinion is that, where an applicant has been denied employment due to a lack of candor which touches in some fashion upon the characteristic which has given rise to the civil rights protection, e.g. an applicant lying about his age in an age discrimination case, that such lack of candor is so inextricably tied to the civil rights protection itself that summary disposition will rarely, if ever, be appropriate.

In addition to defendant's explanation that plaintiff was not hired for reasons relating to her lack of candor on her application, defendant also asserts that the prevailing applicant possessed greater

employment experience. Plaintiff's suggestion that this explanation is also pretextual is unavailing, in my judgment. She first argues that an experience level was never expressly set forth to her as a requirement of the position. However, I take judicial notice that, *whatever* qualifications are ever expressly set forth by an employer-- everything else being equal-- it is *always* the case that the greater an applicant's experience the better. Further, no experience requirement was ever communicated to plaintiff in the first place, largely because defendant was misled to believe that plaintiff *possessed* the requisite experience. Plaintiff also argues that the prevailing applicant also misstated information on her application. In the case of the prevailing applicant, however, the effect of such misstatement was to *understate* her qualifications. In such a circumstance, it is not difficult to imagine that an employer might conclude the misstatement to be an innocent one.

For these reasons, I would conclude that the trial court erred in failing to grant judgment notwithstanding the verdict. See *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395; 493 NW2d 441 (1992). Plaintiff has not established even a prima facie case of discrimination, much less overcome her burden of establishing that defendant's explanations for failing to hire her were pretextual. See *Crittenden v Chrysler*, 178 Mich App 324, 331; 443 NW2d 412 (1989). [4]

/s/ Stephen J. Markman

[1] "It is well established that a court is not bound by the parties' stipulations of law." The instant stipulation is one that relates to whether an individual suffers from a "handicap" and is therefore subject to the protections of the Handicappers' Civil Rights Act.

[2] Plaintiff conceded that aspects of her employment application were inaccurate. Defendant also learned subsequently that plaintiff had overstated by twenty-five percent her income from her previous employer. If the trial court did not err in granting the motion JNOV, it surely erred in not limiting damages as of the time that defendant learned of this misrepresentation. See *Wright v Charters*, 210 Mich App 105, 111-12, 532 NW2d 889 (1995). Contrary to the majority opinion, I do not believe that the evidence presented at trial "indicated that plaintiff did not intentionally provide erroneous information"; at best, there may have been some ambiguity about plaintiff's intent. Further, the majority observation that the inaccurate salary figures provided by plaintiff "were not substantially off" is a surprising way to describe a twenty-five percent error which has not been explained by plaintiff.

[3] More precisely, the focus should be, not on whether the applicant herself was unforthcoming, but rather on whether the employer *perceived* her to be unforthcoming. Plaintiff purports to explain her questionable responses on her job application by asserting that she was advised to respond in such a manner by a job counselor. To whatever extent reliance upon such advice may be understood to mitigate plaintiff's responsibility for her actions, it does not alter the reasonableness of defendant's basis for harboring the view that plaintiff was not forthcoming on her job application.

[4] The trial court also erred, although perhaps not reversibly, in allowing plaintiff's counsel to repeatedly argue during his opening and closing statements that there was a "natural tendency of people to discriminate against other people." While the majority agrees that the court erred in allowing this argument, it does not believe that such argument was intended to prejudice the defendant because

counsel was only "attempting to highlight for the jury the motivation behind and the purpose of Michigan's civil rights laws." I disagree and believe that this argument, made repetitively made by plaintiff's counsel, was designed to inflame the jury and prejudice the defendant. See *Wilson v General Motors*, 183 Mich App 21, 26; 454 NW2d 405 (1990).