STATE OF MICHIGAN

COURT OF APPEALS

OTIS R. DIAMOND,

Plaintiff-Appellee,

v

ELM METAL FINISHING CORPORATION,

Defendant-Appellant.

UNPUBLISHED

No. 177758
LC No. 93-64386-NO

Before: Michael J. Kelly, P.J. and O'Connell and K.W. Schmidt,* JJ.

MICHAEL J. KELLY, P.J. (dissenting)

I respectfully dissent. I would affirm the jury verdict, the circuit court judgment and the order denying defendant's motion for new trial. I find ample evidence to support each of the five questions on the verdict form and each of the five affirmative responses given by the jury in response to those questions.

Plaintiff injured his back in 1990 and from that time onward although he was able to perform his duties as line leader and line supervisor he often re-injured his back, had to go into rehabilitation, receive medical treatment and incur considerable expenses. His condition also necessitated time off so that the defendant corporation, being self-insured for health care and having severe financial problems, had every reason to cut defendant off its list of liabilities, real and potential. That is why defendant was motivated to terminate plaintiff.

There is ample support on the record not only from plaintiff's testimony but from the testimony of Pat McClusky that the parties fought bitterly over medical bills which defendant left unpaid; in fact James McClusky admitted that the payroll deductions for medical benefits were not being used to pay medical bills, they were being used to keep the company afloat. It is immaterial that the medical bills were eventually taken care of because defendant was refused treatment over time by medical care providers who had not been timely paid. It is easy to see an atmosphere of hostility which undoubtedly persuaded the jury that defendant's removal from the quality control position was a significant

---

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

discriminatory act. The "elevation" of plaintiff to production supervisor was properly explained by plaintiff's counsel:

> …So they had a need to put somebody in [as] production supervisor but that's a separate question from whether there was a genuine reason or need to extract or remove Otis Diamond from quality control from the job that he could have done [sic].
>
> This is a significant point. It's a significant distinction because wanting Otis in the new position is different than removing him from a position he could do.
>
> In these circumstances they removed him from a position that he could do with his handicap, and they were assigning him to a position that he could not do with his handicap, production supervisor. That's discrimination. That's a discriminatory act. That if without a legitimate reason they remove an employee from a position where he can do the job, and assign him, without options, to position that he can't do with his handicap.
>
> Let me give you an analogy which I can think can help make this clear why that's discrimination. You remember Jim McCluskey's indication - - I believe it was him and it might have been Mr. O'Connor - - they indicated that they have a handicapped employee with one leg who drives a forklift. What if the McCluskey's came up to that employee and said he had to be a production supervisor, and assume that he could not perform that job with his one leg; that the requirements of the supervisor's job were such that he could not do it. He could drive a forklift truck in his handicapped situation but he could not be a production supervisor in his handicapped situation, and if McCluskey's came to that employee and said because of our needs you can't be a forklift operator anymore. The only option available for you to work in our plant from this point on is a production supervisor. It's production supervisor or the street. Somehow, that's a lot clearer to me; maybe it takes some of the other secondary issues out of the picture, but it's clear that if an employee [sic: employer] were allowed to do that, it would make a mockery of our Handicap Civil Rights Act because it wouldn't have any teeth.
>
> All an employer would have to do to get rid of a handicapped employee would be to assign them from the job that they were in and performing to a job to a job [sic] that they couldn't do and either force the Hobson's choice or if they don't take the [sic: horse at the] door or [sic] the street as a choice, discharge them for not performing that job. So that Hobson's choice in these circumstances clearly would amount to a discriminatory act and that's what happened to Otis Diamond. That's precisely what happened to Otis Diamond. That he was removed from a position that he could perform in without any genuine need to being removed from that position that he could not perform in because of his handicap and given no other choice".

The majority says there is no testimony or evidence in the record that defendant was aware that plaintiff was likely to incur substantial medical bills in the future because of his handicap. This is simply to ignore that plaintiff's back problems were diagnosed, in part, as "a bulging disc or herniated disc". It doesn't take a medical expert to prognosticate future medical problems, even catastrophe, on such a diagnosis. The physicians had already ordered a permanent limitation on plaintiff's standing, bending, lifting and walking.

The majority concedes that the plaintiff was incapable of performing the duties of production supervisor to which he was transferred. Mr. McClusky admitted that he told plaintiff that there were no options open to him at that point, he was to take supervisory position or else. Plaintiff testified Mr. McClusky's words were; "if you don't want to do this, then I guess we no longer need you here."

Defendant was clearly taken off a job he could do and thrust into a position he could not do. The dispute is only over the reason for defendant's placing him on the horns of this dilemma.. I believe the evidence amply supports the jury verdict that it was defendant's purpose to force plaintiff into a position where he would be required to quit or where defendant would have just cause to fire him.

I do not believe this is a case of extending the spirit or letter of the MHCRA to require accommodation for a new job placement. We should not condone an employer's action in taking a handicap employee off a job in which he was accommodated and clearly entitled to the protection of the MHCRA to force him into a job for which he could not be accommodated and in which his handicap prevented his performance. There is a clear distinction between reassignment to a vacant position and "new job" placement. In the Federal context, reassignment as an accommodation has a long and strong history and prevents a reassignment which results in transferring the employee to a position which aggravates the disability. *Rohne v U.S. Department of Army,* 665 F Supp 734, (ED Mo, 1987), 46 Fep cases 1133. Cf, "Accessing The Impact: the 1990 amendment to the Michigan Handicappers Civil Rights Act and the Americans with Disabilities Act", Wayne Law Review, vol 37, 1902, (1991).

As to appellant's claimed errors of failure to use its suggested jury instructions I find that a comparison of the standard jury instructions read by the court shows virtually all substantive aspects of appellant's suggested jury instructions were covered and there is no merit to appellant's arguments concerning instructional error.

Finally I find no error in the verdict form. If anything I believe the verdict form favored appellant.

I would affirm.

/s/ Michael J. Kelly