STATE OF MICHIGAN

COURT OF APPEALS

DESIREE LEVLEIT,

Plaintiff/Appellee/
Cross-Appellant,

v

COLOR CUSTOM OF LIVONIA, INC., an assumed name for SERVICE PLASTICS, INC.,

Defendant/Appellant/
Cross-Appellee.

UNPUBLISHED
May 6, 1997

No. 178182
Wayne Circuit Court
LC No. 92-227011 CZ

Before: Hood, P.J., and Saad and T.S. Eveland*, JJ.

PER CURIAM.

Defendant appeals as of right and plaintiff cross-appeals an order of judgment, following a jury trial, awarding plaintiff $50,000 in compensatory damages.[1] We affirm.

Plaintiff sued defendant, alleging sexual discrimination in violation of the Elliot-Larson Civil Rights Act and retaliation in violation of the Michigan Occupational Safety and Health Act (MIOSHA). Plaintiff was employed by defendant as a plastic injection molding machine operator. While assigned to Machine Number Nineteen, plaintiff injured her thumb while manually pushing pins into manufactured plastic parts from the machine. A medical examination revealed a partial evulsion of the nail of plaintiff's left thumb which was dressed and fitted with a thumb guard. Plaintiff returned to work with restrictions based upon the limitations imposed by the thumb guard. She remained capable of performing other jobs. In the past, male employees with thumb injuries were not assigned to Machine Number Nineteen, but were reassigned to other jobs, by Don Grey, plaintiff's supervisor.

In February 1991, plaintiff became concerned about employee safety because oil had accumulated on the floor and platforms, a safety door had separated from its hindge on one of the larger

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

machines and unsecured machine parts had been placed on top of other machines. Becky Bansky, the plant operations manager, issued a memorandum to all supervisors instructing that the plant be cleaned, specifically with regard to the condition of the floor. Eventually, plaintiff contacted the Michigan Department of Labor (MDOL) regarding the safety conditions. On June 20, 1991, plaintiff forwarded completed complaint forms to the MDOL. On July 9, 1991, a MIOSHA inspector inspected defendant's workplace.

According to plaintiff, when she reported to work on July 9, 1991, Grey instructed her to clean the oil from the floor, a task that she had never previously been instructed to perform. Grey denied this allegation. On July 18, 1991, plaintiff attended a safety meeting with Becky Bansky and Ken Jones, the plant supervisor. During the meeting, plaintiff asked if the oil that had accumulated in a certain area would be cleaned. In response, Bansky instructed plaintiff to clean the oil. Jones then made a derogatory remark. Jones denied that he made the remark.

On July 18, 1991, plaintiff was assigned to Machine Number One. She noticed that the machine was "running bad parts," and alerted Grey. Grey did not remedy the defects. Twenty minutes later, plaintiff again alerted Grey. In response, Grey told plaintiff to accompany him to the quality control office and issued plaintiff a written warning notice that stated that on the previous day, she had exceeded the allotted lunch period by eight minutes. Plaintiff denied the allegation and refused to sign the notice. Grey then suspended plaintiff. Grey denied that he met with plaintiff in the quality control office on July 18, 1991.

On July 19, 1991, plaintiff contacted the MDOL and complained that she had been suspended for refusing to sign an employee warning notice. On July 24, 1991, MIOSHA forwarded a written warning to defendant, advising defendant that it could not retaliate against plaintiff. On July 25, 1991, plaintiff contacted defendant regarding unpaid wages and was advised that she could return to work. Upon arriving at work on July 25, 1991, plaintiff was presented with a warning notice, signed by Bansky, which stated that plaintiff had left her work station on July 18, 1991, to make a telephone call, after having been verbally warned that such behavior was not permitted. Plaintiff agreed to sign the notice in order to secure her employment. She added a statement to the notice, however, indicating that she left only to attend a meeting with Grey and did not make a telephone call.

Plaintiff did not report to work on July 19, 1991, due to illness. When plaintiff returned to work on July 28, 1991, she was assigned to Machine Number Nineteen. Plaintiff advised David Florn, defendant's employee responsible for workplace safety, that Machine Number Nineteen necessitated the use of her thumb. Plaintiff advised her supervisor, Grey, of her medical restriction and offered to have a physician reexamine her if so required. Grey then discharged plaintiff. Plaintiff was not advised that she was discharged as a result of having made a MIOSHA complaint.

Following trial, the jury returned a verdict of no cause of action on plaintiff's sexual discrimination claim and awarded plaintiff $50,000 in compensatory damages on her retaliation claim.

Defendant raises two evidentiary issues relating to the testimony of MDOL investigator, Dana Guthrie. Neither has merit. The decision to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion." *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). "[E]rror requiring reversal may not be predicated upon a ruling that admits evidence unless a substantial right was affected." *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996); MRE 103(a).

Defendant argues that the trial court abused its discretion by admitting Guthrie's testimony because it was more prejudicial than probative. We disagree. Evidence that tends to make the existence of a fact at issue more probable or less probable is relevant and, therefore, admissible. MRE 401, 402; *Chmielewski, supra*. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *Chmielewski, supra*. The fact that evidence is damaging and harms the opposing party does not indicate that it is unfairly prejudicial. *Id.* Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

In this case, Guthrie's testimony included evidence of defendant's policy regarding injured employees, defendant's response to plaintiff's physical restrictions and defendant's justifications for disciplining plaintiff. Because this evidence made plaintiff's claims of sexual discrimination and retaliation more probable than they would have been without the evidence, it was relevant. While Guthrie's testimony may have been harmful simply because of her title, we are not convinced that it was unduly prejudicial. Guthrie's testimony centered on her investigation, and included only the facts ascertained during the course of that investigation. For example, Guthrie testified regarding defendant's reasons for disciplining plaintiff as reported to her by defendant's supervisory employees and defendant's corporate representative. There was no reference to her findings, conclusions or agency action as a result of that investigation. Guthrie's testimony also did not include conclusory or definitive assertions which could be taken to imply that the MDOL had filed a complaint or made any finding or imposed any sanction upon defendant. Guthrie testified unequivocally that she was assigned to investigate a complaint filed *by plaintiff*.

Furthermore, contrary to defendant's assertion, we find that the trial court did not limit Guthrie's testimony to impeachment purposes only. Rather, the court expressly permitted Guthrie to be used as an impeachment witness and left undecided whether it would permit plaintiff to present substantive testimony. The trial court did not abuse its discretion in the admission of this evidence.

Plaintiff argues, in her cross-appeal, that the trial court erred in granting defendant summary disposition on her Michigan Handicappers' Civil Rights Act (MHCRA)[2] claim. We disagree. We review a trial court's order of summary disposition de novo. *Weisman v US Blades, Inc*, 217 Mich App 565, 566-567; 557 NW2d 484 (1996). Summary disposition may be granted where, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

To establish a prima facie case of handicapper discrimination, the plaintiff must establish that (1) she is handicapped as defined by the MHCRA, (2) her handicap is unrelated to her ability to perform the duties of the particular job or position, and (3) she has been discriminated against in one of the ways set forth in the MHCRA. *Hall v Hackley Hosp*, 211 Mich App 48, 53-54; 532 NW2d 893 (1995).

The MHCRA covers only those whose disabilities are unrelated to their capacity to perform their jobs. The handicapped person seeking employment must be capable of performing the duties of the position. A disability that is related to one's ability to perform the duties of a particular position is not a "handicap" within the meaning of the act. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995); *Rymar v Mich Bell Telephone Co*, 190 Mich App 504, 661-662; 476 NW2d 451 (1991).

As previously indicated, plaintiff was employed by defendant as a machine operator. There is no question that plaintiff's thumb injury impaired her ability to operate certain machines. Therefore, plaintiff's injury was related to her ability to perform the duties of her employment and, thus, is not a "handicap" within the meaning of the MHCRA.

Affirmed.

/s/ Harold Hood
/s/ Thomas S. Eveland

Judge Saad concurring in result only.

[1] Plaintiff's issue regarding attorney fees was stricken by this Court in an order dated October 30, 1996, for want of jurisdiction, and therefore we do not address it.

[2] MCL 37.1101 *et seq*.; MSA 3.550(101*) et seq*.