STATE OF MICHIGAN

COURT OF APPEALS

LEONARD MILES,

Plaintiff-Appellee,

v

TGI FRIDAY'S,

Defendant,

and

CHRIS PRIEBE and STEVE MACKEY,

Defendants-Appellants.

UNPUBLISHED
May 13, 1997

No. 187715
Wayne Circuit Court
LC No. 90-020213-CZ

LEONARD MILES,

Plaintiff-Appellant,

v

TGI FRIDAY'S,

Defendant-Appellee,

and

CHRIS PRIEBE and STEVE MACKEY,

Defendants.

No. 187740
Wayne Circuit Court
LC No. 90-020213-CZ

LEONARD MILES,

Plaintiff-Appellee,

v

No. 191337
Wayne Circuit Court
LC No. 90-020213-CZ

CHRIS PRIEBE and STEVE MACKEY,

Defendants-Appellants,

and

TGI FRIDAY'S,

Defendant.

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

These consolidated appeals involve plaintiff's claims for retaliatory discharge and racial discrimination under the Elliott-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq*. Following trial, plaintiff obtained a favorable verdict, from which defendants Priebe and Mackey appeal as of right in Docket No. 187715.[1] In Docket No. 187740, plaintiff appeals as of right from an order awarding mediation sanctions to defendant TGI Friday's (TGI), and in Docket No. 191337, defendants Priebe and Mackey appeal as of right from an order awarding plaintiff costs and attorney fees following his successful jury verdict. We affirm in part, reverse in part, and remand.

Docket No. 187715

Defendants Priebe and Mackey[2] contend that the trial court erred in denying their motion for directed verdict of plaintiff's retaliatory discharge claim.[3] Defendants first claim that a directed verdict should have been granted because plaintiff voluntarily dismissed that claim during his first trial against TGI. Defendants, however, failed to raise this as a ground for its motion for directed verdict at trial, and thus we will not consider it on appeal. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

Defendants further claim that plaintiff failed to establish a prima facie case of retaliatory discharge at trial. A prima facie case of retaliatory discharge requires proof that the plaintiff opposed violations of the civil rights act and that the opposition was a significant factor in the adverse employment decision. *Johnson v Honeywell Information Systems, Inc*, 955 F2d 409, 415 (CA 6, 1992). Plaintiff presented evidence that he complained or tried to complain about racial discrimination in the restaurant kitchen, and that after one attempt, Priebe used a racial slur towards him. He was told by a manager that he was fired for racial reasons, and another manager testified that plaintiff brought

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

complaints to management and that plaintiff was fired for making waves. This evidence was sufficient to establish a prima facie case of retaliatory discharge, and thus the trial court properly denied defendants' motion for directed verdict of this claim.

Next, defendants argue that the trial court should have granted them a directed verdict on plaintiff's claim of racial discrimination. First, defendants claim that the trial court should have granted them a directed verdict because the jury in the first trial necessarily determined that defendants did not discriminate against plaintiff when it found in favor of TGI. However, defendants were not parties at the time of that verdict, and this Court cannot conclude that the jury considered discrimination by defendants in reaching its verdict.

Defendants also contend that plaintiff failed to present a prima facie case of racial discrimination and thus a directed verdict was proper. A prima facie case of discrimination may be shown by demonstrating that: the plaintiff was a member of a protected class, that he was discharged or otherwise discriminated against, that the defendant was predisposed to discriminate, and the defendant acted on that predisposition in discharging the plaintiff. *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 651; 513 NW2d 441 (1994). Here, plaintiff presented sufficient evidence on each element to establish a prima facie case. The only element seriously argued by defendants is whether plaintiff presented evidence that they acted on a demonstrated predisposition in firing plaintiff. Plaintiff showed that he had never been reprimanded for missing shift leader meetings until just before his termination, he had not received any other written reprimands and had never been reprimanded in writing for the reasons defendants said they terminated him, he had been recommended for a raise just before his discharge, and Priebe would not tell plaintiff why he had been fired. One of the managers present used racial slurs in response to plaintiff's inquiry regarding why he was being fired. This evidence was sufficient to establish that defendants acted on a predisposition to discriminate against African-Americans, and thus the trial court properly denied defendants a directed verdict.

Defendants also raise three evidentiary errors, none of which warrant reversal. Defendants first assert that the court abused its discretion by denying their motion in limine to exclude evidence of discrimination by TGI or TGI employees other than defendants because that evidence was not relevant. In *Dixon v W W Grainger, Inc*, 168 Mich App 107, 115; 423 NW2d 580 (1987), a panel of this Court held that evidence that supervisors tolerated racial slurs was relevant to whether a defendant has a predisposition to discriminate. Because defendants were managers, such evidence was similarly relevant here, and thus the trial court did not abuse its discretion in denying defendants' motion in limine.

Second, defendants assert that the trial court erred in permitting plaintiff to use or introduce information which his counsel acquired during an ex parte interview with Brian Hartsfield, a witness at trial who was a manager at TGI. Defendants cite no authority other than MRPC 4.2, which by its terms applies only to parties or to the managerial employees of an organization. Defendants are individuals, not organizations, and thus plaintiff's counsel was permitted to contact Hartsfield without notice to defendants or their counsel.

Third, defendants argue that the trial court erred in prohibiting them from introducing evidence of plaintiff's discharge from the U.S. Navy and from another job. Defendants failed to make an offer of proof, and thus they cannot obtain appellate review of this claim. MRE 103(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992).

Lastly, defendants contend that the trial court's jury instruction regarding the retaliatory discharge claim was improper because it included the phrase "recommendation to terminate." The instruction accurately stated the law, there was no standard jury instruction, and it properly incorporated plaintiff's theories against both defendants. See *Mull v Equitable Life Assurance Soc of the US*, 196 Mich App 411, 422; 493 NW2d 447 (1992), aff'd 444 Mich 508; 510 NW2d 184 (1994). The retaliatory discharge instruction was proper.

Docket No. 187740

Plaintiff contends that the trial court abused its discretion in entering an order awarding TGI mediation sanctions resulting from the first trial in which TGI obtained a verdict of no cause of action. Although TGI waited an extraordinarily long time, over three years, to have the order entered, it is clear that plaintiff agreed to the amount in the order, and it appears that plaintiff will not suffer prejudice from the delay and indeed has benefited by not becoming obligated to pay the sanctions. MCR 2.602(B)(4) permits a party to submit a proposed judgment or order for settlement at any time, and thus the trial court did not abuse its discretion in entering the order at the time it did so.

Plaintiff also contends, however, that the trial court abused its discretion because it entered the order without a hearing on plaintiff's objection that the order did not expressly provide that no interest was to be awarded on the mediation sanction amount. The order is silent with regard to interest, and it is unclear from the record whether the trial court intended to award interest. Accordingly, we remand for clarification of this aspect of the mediation sanctions order. We note that the trial court has discretion whether to award interest on a mediation sanction award and that if interest is granted, it runs from the date of entry of the new order. *Pinto v Buckeye Union Ins Co*, 193 Mich App 304, 312; 484 NW2d 9 (1992).

Docket No. 191337

Defendants contend that the trial court abused its discretion in awarding plaintiff costs and attorney fees because the trial court lacked jurisdiction. We agree, but reverse and remand without prejudice to renewal of plaintiff's motion for costs and fees. Because defendants filed their claim of appeal before the trial court definitely determined that it would award plaintiff costs and attorney fees, the trial court lacked jurisdiction to make such an award. *Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990). The proper remedy is to reverse without prejudice and remand. *Id.*

Because it may arise on remand, we also address defendants' contention that the trial court erred in awarding plaintiff costs and fees associated with his appeal from the order of summary disposition granted to defendants before trial in 1991. The statute provides that a court may award all or a portion of "the costs of litigation," without limitation. MCL 37.2802; MSA 3.548(802). A panel of this Court has also concluded that appellate attorney fees were proper in an Elliott-Larsen civil rights case, and remanded it to the trial court for "determination and award of appellate attorney fees." *McLemore v Detroit Receiving Hosp and Univ Med Center*, 196 Mich App 391, 403; 493 NW2d 441 (1992). Accordingly, appellate fees may be awarded on remand if sought.

In Docket No. 187715, we affirm the judgment in favor of plaintiff. In Docket No. 187740, we find no abuse of discretion in the entry of the order awarding TGI mediation sanctions, but remand for clarification whether interest was to be also granted. In Docket No. 187740, we reverse the trial court's award of attorney fees without prejudice and remand for a determination of attorney fees, if any.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, none of the parties having prevailed in full.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1]Defendant TGI Friday's (TGI) obtained a verdict of no cause of action in a prior trial, which this Court affirmed in an unpublished per curiam opinion, issued April 28, 1994 (docket no. 144208).

[2]For convenience we will use "defendants" to refer to Priebe and Mackey only.

[3]Although defendants also seek to claim error regarding the denial of their motion for summary disposition before trial, they have abandoned this claim by failing to provide the transcript of the hearing on their motion. *Waterford Sand & Gravel Co v Oakland Disposal, Inc*, 194 Mich App 571, 572; 487 NW2d 511 (1992). Accordingly, we consider only their claims of error regarding their motion for directed verdict.