STATE OF MICHIGAN

COURT OF APPEALS

BARBARA JONES,

Plaintiff-Appellee/Cross-Appellant,

v

WAYNE STATE UNIVERSITY,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
April 14, 1998

No. 190345
Wayne Circuit Court
LC No. 93-325083 NO

Before: Gribbs, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right the final judgment for plaintiff in the amount of $294,753.50, following a jury trial on damages as to plaintiff's claims for age, race and gender discrimination. Defendant also appeals the order denying its motion for JNOV or, in the alternative, new trial. In addition, defendant appeals the entry of default as to liability against it and the court's denial of its motion to reconsider or set aside the default. Plaintiff cross-appeals the final judgment and the order granting remittitur. We reverse and remand.

Defendant first argues that the trial court abused its discretion when it entered a default as to liability against it for failing to comply with a discovery order. We agree.

Our legal system favors disposition of litigation on the merits. *North v Dep't of Mental Health*, 427 Mich 659, 662; 397 NW2d 793 (1986). Nonetheless, a default judgment may be entered as a sanction for discovery abuses. MCR 2.313(B)(2)(c). However, default is a drastic measure and should be used with caution. *Mink, supra*; *Frankenmuth Mutual Ins Co v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992). Before imposing the sanction of a default judgment, a trial court should consider on the record: (1) whether the failure to respond to discovery requests extends over a substantial period of time, (2) whether there was a court order directing discovery that was not complied with, (3) the amount of time that has elapsed between the violation and the motion for a default judgment, and (4) whether willfulness has been shown. *Mink, supra*; *Frankenmuth, supra*. The court must also evaluate other options on the record before concluding that the drastic sanction is warranted. *Frankenmuth, supra*. The sanction of default judgment should be employed only when

there has been a flagrant and wanton refusal to facilitate discovery; the violation must be conscious or intentional. *Id*.

We are not convinced that the instant case rises to the level of a "blatant refusal to comply with the discovery request and the court orders compelling compliance." See *Mink, supra,* 244-245. Here, there was one motion to compel and one stipulated court order. Before the hearing on plaintiff's motion for default, defendant attempted to provide answers. Although the court found forty-five of the answers unsatisfactory, apparently, sixty-three of the responses were satisfactory. Further, we are not persuaded that plaintiff suffered substantial prejudice at mediation where, of the 108 witnesses listed by defendant, all but twenty-six were listed by plaintiff. We note that plaintiff already possessed a lengthy petition signed by 415 law students exemplifying her availability and efficiency. In addition, no substantial prejudice existed as it related to trial in that trial was not scheduled to begin for another five months. Finally, the trial court failed to carefully evaluate and impose the various other discretionary discovery sanction options available to it.

Because the circumstances of this case do not support the harsh sanction of default, we find that manifest injustice would result if the default and the resulting default judgment are allowed to stand. See MCR 2.603(D)(1), *Harvey Cadillac Co v Rahain*, 204 Mich App 355, 358; 514 NW2d 257 (1994). The trial court abused its discretion in entering the default against defendant as a sanction for violating the discovery order. *Mink v Masters*, 204 Mich App 242, 244; 514 NW2d 235 (1994); *Marposs Corp v Autocam Corp*, 183 Mich App 166, 170-171; 454 NW2d 194 (1990). We therefore reverse the entry of default judgment as to liability against defendant, vacate the final judgment, and remand for a new trial before a different judge.

On remand, the trial court should determine the propriety of front pay damages in this case. See *Wells v New Cherokee Corp*, 58 F3d 233, 238 (CA 6, 1995); *Roush v KFC National Management Company*, 10 F3d 392, 398-399 (CA 6, 1993). In deciding whether to allow plaintiff to seek front pay damages, the court should consider: (1) whether reinstatement into plaintiff's former position is a feasible remedy, (2) plaintiff's prospects for other employment, and (3) the number of years before mandatory retirement. See *Riethmiller v Blue Cross & Blue Shield*, 151 Mich App 188, 198; 390 NW2d 227 (1986), citing 74 ALR Fed 751. If there is a future damage award on remand, the court must instruct the jury on the reduction of the award to present value or reduce the award to present value itself. SJI2d 53.03; *Howard v Canteen Corp*, 192 Mich App 427, 441; 481 NW2d 718 (1991).

In light of our reversal and remand of this case, the remaining issues raised in defendant's appeal and plaintiff's cross-appeal are moot. *Crawford Co v Secretary of State*, 160 Mich App 88, 93; 408 NW2d 112 (1987); *Swinehart v Secretary of State*, 27 Mich App 318, 320; 183 NW2d 397 (1970); *Detroit v Killingsworth*, 48 Mich App 181; 210 NW2d 249 (1973).

We reverse the entry of default judgment as to liability, vacate the final judgment, and remand for a new trial before a different judge. We do not retain jurisdiction.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Henry William Saad