STATE OF MICHIGAN

COURT OF APPEALS

KATHRYN KLIMKOWSKI,

Plaintiff-Appellant/
Cross-Appellee,

v

WAYNE COUNTY and SUSAN L. HUBBARD,

Defendants-Appellees/
Cross-Appellants.

UNPUBLISHED
December 18, 1998

No. 187642
Wayne Circuit Court
LC No. 92-233340 CZ

Before: Holbrook, Jr., P.J., and Young, Jr., and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the judgment of no cause of action on her sex discrimination claim against defendants following a jury trial. Plaintiff also appeals the trial court's order granting defendants summary disposition on her claims of breach of contract, intentional infliction of emotional distress, and tortious interference with a contractual relationship. In addition, plaintiff appeals the trial court's order denying her motion for reconsideration of the court's decisions directing a verdict in favor of defendants on plaintiff's handicap discrimination claim, denying plaintiff's motion for a mistrial, and denying plaintiff's motion for judgment notwithstanding the verdict ("JNOV") or new trial. Defendants cross-appeal the trial court's order denying them summary disposition on plaintiff's sex and handicap discrimination claims. We affirm.

Plaintiff began to work as a legislative secretary for defendant Hubbard, a Wayne County Commissioner, on January 20, 1990. Upon being hired, plaintiff became a member of the American Federation of State, County, and Municipal Employees ("AFSCME") Local 1659. Terms of plaintiff's employment were governed by a collective bargaining agreement in effect between the union and Wayne County. Plaintiff's job duties included answering the telephone, dealing with constituent relations, typing, and other general secretarial duties. Plaintiff was also involved in Hubbard's task force on airport noise.

Plaintiff's relationship with Hubbard appears to have begun deteriorating shortly after she began working for the Commissioner. In July 1990, plaintiff informed Hubbard that plaintiff was pregnant. In early August 1990, plaintiff began experiencing physical problems associated with her pregnancy. At the suggestion of her doctor, plaintiff took a week off from work, returning on August 13, 1990. Then in the early morning hours of August 15, 1990, plaintiff began bleeding. Following the advice of the doctor who treated plaintiff at the hospital emergency room, plaintiff remained at home in bed for the next two weeks. Upon her return to work on August 27, 1990, plaintiff informed Hubbard that plaintiff's personal physician had informed her that because of the threat of a possible miscarriage, she needed to take an additional two weeks off. According to plaintiff, Hubbard responded to this news by telling plaintiff that "she didn't know if she could keep me on if I continued to have these medical problems." Hubbard unequivocally denies having made any such statement. After plaintiff returned to work early in September 1990, she worked fairly steadily through the last four months of the year. Plaintiff began her maternity leave on February 25, 1991; her son was born on March 8, 1991. Plaintiff was released to return to work on May 29, 1991, but chose to take some additional maternity leave so that she could stay home with her newborn son through July 14, 1991. When she returned to work on July 15, 1991, plaintiff found that a new staff member had assumed plaintiff's duties with regard to the airport noise task force. Plaintiff also alleged that Hubbard had placed new restrictions on how plaintiff should go about her secretarial duties. Again, Hubbard denied plaintiff's allegation.

On August 19, 1991, plaintiff again met with her doctor to discuss the post-partum complications she had been experiencing since her return to work. According to plaintiff, her doctor told her that the abdominal pain she was experiencing could be caused by scar tissue damage inside the uterine wall, cysts, or endometriosis.[1] In order to discover the cause of plaintiff's continuing problems, plaintiff's doctor scheduled a laproscopic surgery for August 23, 1991. Plaintiff's doctor informed her that she would need to remain in bed for seven days following the procedure. Both plaintiff and Hubbard agree that Hubbard did not react negatively to the news of the surgery. However, during the course of the day on August 21, 1991, relations between the two women deteriorated to the point that plaintiff was eventually escorted out of the building. On August 26, 1991, plaintiff received a letter of termination from Hubbard dated August 23, 1991. Noting that plaintiff was an at will employee, the termination letter did not indicate the reasons for plaintiff's firing.[2]

I. THE GRANT OF SUMMARY DISPOSITION TO DEFENDANTS ON PLAINITFF'S CLAIMS OF BREACH OF CONTRACT, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AND TORTUOUS INTERFERENCE WITH CONTRACTAL RELATIONS

Plaintiff claims that the trial court erred in granting defendants summary disposition on her breach of contract, intentional infliction of emotional distress, and tortious interference with contractual relations claims. We disagree. We review motions for summary disposition de novo in order to determine "whether the moving party was entitled to judgment as a matter of law." *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). The trial court's grant of summary disposition was based both on MCR 2.116(C)(8) and (C)(10).

> MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. . . . The court must accept as

> true all well-pleaded facts. . . . A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Id.*]

We conclude that the trial court properly dismissed plaintiff's claim of breach of employment contract because it was barred by the expiration of the six-month statute of limitations. MCL 423.216(a); MSA 17.455(16)(a). See also *Ray v Organization of School Administrators & Supervisors, Local 28, AFL-CIO*, 141 Mich App 708, 710-711; 367 NW2d 438 (1985). The grievance procedure established in the collective bargaining agreement stated that an arbitrator's decision on any given grievance is final and binding on all parties. The arbitrator issued his decision on May 29, 1992. Accordingly, plaintiff had six months--or until November 29, 1992--to file her lawsuit.[3] Therefore, because plaintiff's December 2, 1992, filing was outside of the limitations period, the trial summary dismissal of plaintiff's breach of contract claim was proper. *McCluskey v Womack*, 188 Mich App 465, 469-470; 470 NW2d 443 (1991).

We also conclude that the trial court properly dismissed plaintiff's claims of intentional infliction of emotional distress and tortious interference with contractual relations. As characterized by plaintiff, Hubbard's conduct does not rise to the level being the type of extreme and outrageous conduct necessary to support a claim of intentional infliction of emotional distress. *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985) ("'Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'") (quoting Restatement of Torts, 2d, § 46, comment d, p 73). See also *Haverbush v Powelson*, 217 Mich App 228; 551 NW2d 206 (1996); *Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 341-342; 483 NW2d 407 (1991). As for plaintiff's tortious interference claim, we conclude that she has failed to establish a prima facie case. The conduct on which plaintiff relies does not rise to the level of an affirmative act of interference by defendant that is either inherently wrongful or can never be justified under any circumstances. *Feaheny v Caldwell*, 175 Mich App 291, 304-306; 437 NW2d 358 (1989).

Additionally, we reject plaintiff's assertion that the grant of summary disposition for each of these claims deprived her of the right to engage in meaningful discovery. Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). However, summary disposition may be appropriate if further discovery does not stand a fair chance of uncovering factual support for the nonmoving party's position. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 482; 531 NW2d 715 (1995). Such is the situation in the case at hand. On each of the above claims, we are convinced that there was not a fair chance that further discovery would have uncovered factual support for plaintiff's position.

III. HANDICAP DISCRIMINATION CLAIM

Plaintiff further claims that the trial court erred in directing a verdict on her claim that Hubbard discriminated against her in violation of the Michigan Handicappers Civil Rights Act ("HCRA"), MCL 37.1101 *et seq.*; MSA 3.550(101) *et seq.*[4] Again, we disagree. "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). A motion for directed verdict should only be granted "when no factual question exists upon which reasonable minds could differ." *Id.*

"To establish a prima facie case of discrimination under the HCRA, it must be shown that (1) the plaintiff is 'handicapped' as defined in the HCRA, (2) the handicap is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 215; 559 NW2d 61 (1996). Plaintiff's claim of handicapper discrimination was based on §§ 202(1)(b) and (e) of the HCRA, which provide that it is wrong for an employer to:

> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a handicap that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> ***
>
> (e) Discharge or take other discriminatory action against an individual on the basis of physical or mental examinations that are not directly related to the requirements of the specific job. [MCL 37.1202(1)(b), (e); MSA 3.550(202)(1)(b), (c).]

For purposes of § 202 of the HCRA, the term "handicap" has been defined by the Legislature in pertinent part as:

> (*i*) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
>
> . . . For purposes of [§ 37.1201 *et seq.*; MSA 3.550(201)] . . . , substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position . . .
>
> ***
>
> (*ii*) A history of a determinable physical or mental characteristic described in subparagraph (*i*).
>
> (*iii*) Being regarded as having a determinable physical or mental characteristic described in subparagraph (*i*). [MCL 37.1103(e); MSA 3.550(103)(e).]

Because we find that plaintiff has failed to establish that her claimed handicap would substantially limit a major life activity, we conclude that the trial court did not err in granting defendants' motion for a directed verdict on plaintiff's handicap discrimination claim. In interpreting the relevant portions of the HCRA, we turn to federal law for guidance. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 604; 580 NW2d 817 (1998) (looking to the interpretive guidelines promulgated by Equal Employment Opportunity Commission and federal case law for guidance in analyzing the HCRA); *Stevens, supra* at 217 (looking "to the Rehabilitation Act [of 1973, 29 USC § 701 *et seq*.,] and the [Americans with Disabilities Act, 42 USC §12101 *et seq*.,] for guidance in interpreting the terms 'substantially limits' and 'major life activities' under the HCRA").

"Substantially limits" is defined in 29 CFR § 1603.2(j)(1) as:

> (i) *Unable to perform* a major life activity that the average person in the general population can perform; or
>
> (ii) *Significantly restricted* as to the condition, manner or duration under which an individual can perform a particular life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity. [Emphasis added.]

When considering whether an impairment substantially limits a major life activity, the regulations suggest considering the following three factors:

> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. [29 CFR § 1603.2(j)(2). See also *Stevens, supra* at 218 (citing to these same factors for interpretive guidance).]

We do not believe that as presented to this Court, plaintiff's alleged handicap either prevented or significantly restricted her from engaging in a major life activity. Plaintiff has provided no evidence that the circumstances surrounding her outpatient laproscopic surgery for a post partem medical condition interfered with her ability to care for herself, perform manual tasks, or engage in everyday activities such as "'walking, seeing, hearing, speaking, breathing, learning, and working.'" *Stevens, supra* at 217. Further, there is no evidence that plaintiff's condition carries a long term or permanent impact nor is there any indication that plaintiff's alleged handicap would "significantly decrease [her] . . . ability to find satisfactory employment elsewhere." *Stevens, supra* at 218. Hence, because plaintiff has failed to establish that she is handicapped as defined by the HCRA, she has failed to establish an actionable claim under the HCRA.

On a related matter, plaintiff also claims that the trial court's failure to instruct the jury that her claim of handicap discrimination had been dismissed by the court caused great confusion among the jury and greatly prejudiced her case. Plaintiff's failure to either timely object to the instructions given or

request an explanatory instruction, MCR 2.516(C), means that review by this Court is precluded "unless manifest injustice would result." *Janda v Detroit*, 175 Mich App 120, 126; 437 NW2d 326 (1989). "'Manifest injustice results where the [alleged] defect in instruction is of such magnitude as to constitute plain error, requiring a new trial, or where it pertains to a basic and controlling issue in the case.'" *Bieszck v Avis Rent-a-Car System, Inc*, 224 Mich App 295, 302; 568 NW2d 401 (1997), quoting *Mina v General Star Indemnity Co*, 218 Mich App 678, 680; 555 NW2d 1 (1996) (citations omitted by Court). Because we find that the alleged defect is neither of such a magnitude as to constitute plain error, nor did it pertain to a basic and controlling issue, appellate review of this issue is precluded. *Id.*

IV. JURY SELECTION

Plaintiff next claims that she was denied a fair trial because of alleged errors that occurred in the jury selection process. First, plaintiff asserts that defendant improperly used a preemptory challenge to remove an African-American juror from the panel. An appellate court reviews such claims under the three-step analysis established in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986): "(1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the preemptory challenge to articulate a race-neutral rationale for striking the juror at issue, then (3) the court must determine whether the complaining litigant carried the burden of proving 'purposeful discrimination.'" *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996). This Court "give[s] great deference to the trial court's findings on this issue because they turn in large part on credibility." *Id.* at 319-320.

We conclude that plaintiff has failed to establish the requisite prima facie showing of discrimination. Plaintiff's bare assertion that defendants must have necessarily been motivated by race given that the juror at issue was African-American is simply not enough to raise a reasonable presumption of discrimination. See *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996) (observing that "the race of a challenged juror alone is not enough to make out a prima facie case of discrimination"). Furthermore, the fact that defendants used a peremptory challenge "in an attempt to excuse [a minority member] . . . from the jury venire . . . is not enough to establish a prima facie showing of discrimination." *Id*. Accord *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989).

Second, plaintiff argues that the trial court erred by refusing to excuse juror Joseph DeBlois for cause. In *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 231; 445 NW2d 115 (1989), the Michigan Supreme Court held that in order for a party to seek relief after the denial of a challenge for cause, the party must, among other things, establish that the trial court's denial was improper. Plaintiff has failed to make such a showing. Plaintiff's challenge to the seating of DeBlois was based upon the juror having indicated that he thought he had voted for Hubbard in the last election. After the challenge was raised, the following exchange took place between the juror, the trial judge, and plaintiff's counsel:

> *The Court:* Mr. DeBlois, have you ever met Commissioner Hubbard?
>
> *Juror DeBlois*: I don't think I ever met her, no.

The Court Have you ever had occasion to go to the Wayne County Board of Commissioners to seek out Ms. Hubbard to ask her for something as your commissioner?

Juror DeBlois: No, I don't know anything about the County Board of Commissioners.

The Court: And do you think because you believe in the last election you may have voted for Commissioner Hubbard that it would influence your decision one way or another?

Juror DeBlois: No, not at all.

The Court: If after listening to all of the testimony you were convinced Ms. Klimkowski was a victim of sex discrimination, would you be able to return a verdict in her favor?

Juror DeBlois: Yes.

The Court: If you found after listening to all of the testimony she was not, could you return a verdict in favor of Wayne County and Ms. Hubbard?

Juror DeBlois: Yes.

The Court: Request is denied.

Plaintiff's Counsel: One additional question, if I may.

The Court: You may.

Plaintiff's Counsel: Sir, have you ever complained about the noise the airplanes made flying over Dearborn?

Juror DeBlois: No, but I heard it during the conversation. My son's house is in West Dearborn and it was quite noisy. I never complained. I never made an official complaint.

Plaintiff's Counsel: Do you know if your son has?

Juror DeBlois: No, I don't think he did either.

Plaintiff's Counsel: Do you know if he attended any noise abatement hearings?

Juror DeBlois: I don't think he did.

Plaintiff's Counsel: How long has your son lived in West Dearborn?

Juror DeBlois: About two years.

Plaintiff's Counsel: Nothing else.

The Court: Mr. Lewis [defense counsel].

Defense Counsel: Nothing further.

The Court: Pass for cause?

Defense Counsel: Pass for cause.

The Court: Pass for cause?

Plaintiff's Counsel: Pass for cause.

We find nothing in this exchange that calls DeBlois's impartiality into question. Further, we find nothing in the record that causes us to question juror DeBlois's assurance that he was and could remain impartial. Finding that plaintiff has failed to establish that the trial court's denial for cause was improper, we necessarily conclude that the trial court did not abuse its discretion. *Poet, supra* at 251.

Third, plaintiff argues that the trial court improperly limited her voir dire questioning. Specifically, plaintiff asserts it was error for the trial court not to allow the following two questions: (1) "At what stage during a woman's pregnancy do you believe she should be required to stop working and take maternity leave?"; and (2) "How soon after a woman delivers her baby, do you believe she should be allowed to return to work, assuming there are no medical complications?"

It is a well established principle in Michigan jurisprudence that "[i]t is indispensable to a fair trial that a litigant be given a reasonable opportunity to ascertain on the *voir dire* whether any of the jurors summoned are subject to being challenged for cause or even peremptorily." *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939). Accord *White v Vassar*, 157 Mich App 282, 289; 403 NW2d 124 (1987). As a result, it is considered an abuse of discretion for the trial court to unduly limit the scope of voir dire. *Fedorinchik, supra* at 439; *White, supra* at 289. We do not find, however, that the trial court abused its discretion in this instance. The two questions would not have helped plaintiff uncover any facts that could have served as grounds for a legitimate challenge for cause. Rather, as the court noted, the questions could have lead to harmful speculation and confusion among the jurors, as well as quite possibly diverting their attention away from considering only the applicable law and facts of this case.

V. REMAINING ISSUES

Plaintiff argues that the trial court erred in granting defendants' motions in limine to preclude the testimony of Marcie Shannon, Christopher Keane, and plaintiff's testimony concerning her political

work for defendant. Again, we disagree. "This Court reviews trial court decisions to admit evidence for an abuse of discretion." *Harville, supra,* 218 Mich App at 322. After thoroughly reviewing the record, we are convinced that the trial court did not abuse its discretion in concluding that the proposed testimony was both irrelevant to the issues to be litigated, MRE 401, and more prejudicial than probative, MRE 402. See *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710-711; 550 NW2d 797 (1996).

Plaintiff also argues that the trial court erred in denying her motion for a mistrial. A trial court's decision to either grant or deny a motion for a mistrial is reviewed on appeal for an abuse of discretion. *People v Messenger,* 221 Mich App 171, 175; 561 NW2d 463 (1997). Plaintiff argues that certain questions posed by defense counsel to plaintiff were so prejudicial as to warrant the grant of a mistrial. We disagree. In the four instances cited by plaintiff from out of this nine day trial, her counsel immediately objected to the question posed, and the trial court sustained each of these objections. In fact, plaintiff never responded to the cited questions. We conclude, therefore, that plaintiff has failed to establish that her interests were unfairly prejudiced by the questions posed.

Additionally, plaintiff claims that the trial court erred in denying her motion for JNOV or new trial. Because plaintiff failed to cite any legal authority to support her argument, we will not address the issue. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). "A party may not merely announce his position and leave it to us to discover and rationalize the basis for his claim." *Id.* Accord *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Patterson v Allegan Co Sheriff,* 199 Mich App 638, 640; 502 NW2d 368 (1993). For this same reason, we likewise decline to address plaintiff's claim that the trial court abused its discretion in precluding the affidavit of Patricia Enright. Additionally, because plaintiff' failed to file a motion to disqualify the trial judge, MCR 2.003, plaintiff's claim that the trial court exhibited improper bias in favor of defense counsel is not properly before this Court. *In re Forfeiture of $53*, 178 Mich App 480, 497; 444 NW2d 182 (1989).

Finally, in light of our disposition of the issues concerning plaintiff's handicap and sex discrimination claims, defendants' cross-appeal is rendered moot. See *Becker v Halliday*, 218 Mich App 576; 554 NW2d 67 (1996); *Detroit Bd of Educ v Celotex Corp*, 196 Mich App 694, 493 NW2d 513 (1992).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer

[1] A cyst is a sac, "[u]sually small, containing fluid, and imbedded in some tissue of the body. . . . Generally speaking a cyst is an abnormal or diseased structure." Schmidt, *Attorney's Dictionary of Medicine and Word Finder* (New York: Matthew Bender, 1991), p C-438. Endometriosis is a "condition in which tissue identical with or resembling the lining of the uterus is present in abnormal

paces." *Id.* at E-94. "Diagnosis of endometriosis requires laparoscopy. Tissue biopsed during the procedure is examined by a pathologist." *Attorneys' Textbook of Medicine* (Gray & Gordy eds., 3rd ed. 1997), ¶ 290.55(1). Laproscopy is "[t]he visual examination of the interior of the abdomen by means of a trocar (tube) passed through the abdomen wall, telescopes, and a fiberoptic light guide." Schmidt, *supra* at L-32.

[2] Pursuant to the terms of the collective bargaining agreement, plaintiff filed a written grievance on August 29, 1991, challenging the validity of her termination. The arbitrator ruled that under the terms of the collective bargaining agreement, plaintiff was an at will employee.

[3] We reject plaintiff's assertion that the statute of limitations period was tolled by virtue of her phone calls to the union president requesting information about the appeal procedure. See *Rodgers v Washtenaw Co*, 209 Mich App 73, 75; 530 NW2d 118 (1995). We also reject plaintiff's claim of unfair labor practice. Under MCL 423.216(a); MSA 17.455(16)(a), unfair labor practice claims are also subject to a six month statute of limitations. In any event, plaintiff has failed to establish that the union's conduct in handling her grievance was arbitrary, discriminatory, or exercised in bad faith. See *Goolsby v Detroit*, 419 Mich 651, 660-665; 358 NW2d 856 (1984).

[4] In 1998 PA 20, the Michigan Legislature amended the HCRA to change all references to "handicappers" to "persons with disabilities." Because plaintiff's action was initiated before these changes were made, all references in this opinion will follow the old nomenclature.