STATE OF MICHIGAN

COURT OF APPEALS

SUSAN FISHER,

Plaintiff-Appellee/Cross-Appellant,

v

WAL-MART STORES, INC.,

Defendant-Appellant/Cross-Appellee,

and

RICKY PHIPPS,

Defendant.

UNPUBLISHED
October 16, 1998

No. 202955
Calhoun Circuit Court
LC No. 95-002672-NZ

Before: Doctoroff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant Wal-Mart[1] appeals as of right from a judgment of $36,451 entered in favor of plaintiff after a jury trial on the issue of damages in this wrongful discharge action. The jury trial followed entry of an order of default against defendant as a discovery sanction. Plaintiff cross-appeals. We affirm.

On appeal, defendant first argues that the trial court erred in failing to set aside the order of default. We disagree. We review the trial court's decision for an abuse of discretion. *Frankenmuth Ins v ACO, Inc*, 193 Mich App 389, 397; 484 NW2d 718 (1992). An abuse of discretion exists when a decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *Marrs v Board of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Pursuant to MCR 2.313(B)(2)(c), an order of default is a possible sanction for discovery abuses. When the sanction of a default judgment is contemplated, the trial court must evaluate on the record other available options before concluding that default is warranted. *Frankenmuth*, *supra* at

396-397; see also *Houston v Southwest Detroit Hospital*, 166 Mich App 623, 629-630; 420 NW2d 835 (1987). "The sanction of default judgment should be employed only when there has been a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary." *Frankenmuth*, *supra* at 397.

In this case, plaintiff served defendant with the complaint, interrogatories and request to produce on October 2, 1995. Defendant was required to serve interrogatory answers and a response to the request to produce within 42 days (i.e., by Monday, November 13, 1995). MCR 1.108(1); MCR 2.309(B)(4); MCR 2.310(B)(2). Plaintiff's attorney sent a letter dated November 15, 1995, to defendant's attorney requesting advice on the overdue responses. On November 24, 1995, plaintiff's attorney sent another letter to defendant's attorney confirming a telephone conversation of November 22, 1995, in which defendant's attorney agreed to provide the discovery responses "within the next few days." Defendant's attorney did not respond, so plaintiff filed a motion to compel on December 4, 1995. Plaintiff's attorney then sent a letter dated December 6, 1995, to defendant's attorney asking if it would be necessary to appear at the motion. In a letter dated December 7, 1995, plaintiff's attorney agreed to adjourn plaintiff's motion to compel discovery one week, and stated that defendant's attorney had agreed to answer the interrogatories and produce the documents by the next week.

Defendant did not respond as agreed, and on January 3, 1996, the trial court entered a stipulated order that defendant would answer the interrogatories and the request to produce on or before January 18, 1996. On January 18, defendant's attorney faxed plaintiff's attorney unsigned[2] answers to the interrogatories and request to produce. The answer to interrogatory number 7 included referred to an "Exhibit A" that was not attached. The answers also referred to a "witness list" in interrogatories numbers 33, 35 and 36, but did not include the list. Likewise, defendant's response to plaintiff's requests to produce did not include referenced attachments. On January 26, 1996, plaintiff filed a motion for default for failure to comply with the discovery order. Defendant's attorney's legal assistant sent a letter to plaintiff's attorney dated January 31, 1996, which included the missing attachments. The trial court granted plaintiff's motion for default judgment against defendant and denied its motion to set aside the default judgment.

In sum, defendant and its attorney failed to comply with the court rules when they did not respond to plaintiff's interrogatories and request to produce within the initial 42 days, see MCR 2.309(B)(4); MCR 2.310(B)(2), failed to provide answers as agreed after plaintiff adjourned the first hearing on the motion to compel, and failed to respond completely and in compliance with the court rules after *stipulating* to entry of the January 3, 1996, order. Furthermore, defendant did not request an additional extension from the court and took only limited steps to cure the defects after the court-ordered date for compliance. Under these facts, the trial court's sanction of a default, although harsh, did not evidence a perversity of will, a defiance of judgment, or the exercise of passion or bias.

Defendant correctly argues that the trial court's initial order of default was defective, because it was entered without an on-the-record evaluation of the other available sanctions. *Frankenmuth*, *supra* at 397. However, the trial court cured this error during the hearing on defendant's motion to set aside the default when it determined, on the record, that defendant's violation was not "accidental" and explained why default, as opposed to the other available sanctions, was "appropriate." This after-the-

fact explanation adequately indicated the "why and

how" of the trial court's decision. See *Adams v Perry Furniture Co (On Remand)*, 198 Mich App 1, 16; 497 NW2d 514 (1993). Finally, whether defendant had a meritorious defense is irrelevant. Defendant was not defaulted for failure to appear or answer, but rather was penalized under MCR 2.313 for a failure to provide discovery. For these reasons, we hold that the trial court's actions did not constitute an abuse of discretion.

Defendant next argues that the trial court erred in refusing to give special jury instructions regarding mitigation of damages. We disagree. When an area is not adequately covered by the standard jury instructions, the trial court is obligated to give additional supplemental instructions when requested if the supplemental instructions properly instruct on the applicable law. *Sherrard v Stevens*, 176 Mich App 650, 655; 440 NW2d 2 (1988).

In cases alleging wrongful discharge under the Civil Rights Act, MCL 37.2101 *et seq*; 3.548(101) *et seq*, front pay is generally not an appropriate remedy where, after the employee's wrongful termination, the employer discovers misconduct that would have resulted in the employee's proper termination. The measure of damages in such cases is generally the amount of the employee's back pay from the time of the wrongful discharge to the time of the discovery of the misconduct. See *Smith v Union Charter Twp (On Rehearing)*, 227 Mich App 358, 363; 575 NW2d 290 (1998); *Wright v Restaurant Concept Management, Inc*, 210 Mich App 105, 111-112; 532 NW2d 889 (1995). Here, the trial court properly denied defendant's request for special jury instructions to this effect, because defendant presented no evidence that it discovered any employee misconduct on the part of plaintiff *after* plaintiff's termination. Evidence that defendant terminated plaintiff as a result of misconduct known at the time of plaintiff's termination was irrelevant to the issue of plaintiff's damages. Accordingly, defendant is not entitled to the relief requested on appeal.

On cross appeal, plaintiff argues that the trial court erred in denying her motion for an award of attorney fees. We disagree. A trial court's decision to grant or deny attorney fees under the Civil Rights Act is reviewed for an abuse of discretion. See *Reithmiller v Blue Cross & Blue Shield of Michigan*, 151 Mich App 188, 203; 390 NW2d 227 (1986).

Plaintiff contends that the trial court "made it very clear that he believed he had no discretion to award attorney fees." However, a careful reading of the trial court's on-the-record explanation of its decision in its original ruling on plaintiff's motion, and of its second on-the-record explanation of its decision in plaintiff's motion for reconsideration, shows that the trial court was mindful of its discretion. Instead of explaining that it *could* not award attorney fees because of the default, the trial court twice stated that it *would* not award attorney fees because of the default. Contrary to plaintiff's contention, the trial court never indicated that it was precluded from awarding attorney fees as a result of the default. Cf. *King v General Motors Corp*, 136 Mich App 301, 308; 356 NW2d 626 (1984).

Although attorney fees may be awarded to the prevailing party in a civil rights action, if such an award is "appropriate," see MCL 37.2802; MSA 3.548(802), given the totality of circumstances, we cannot say that the trial court abused its discretion in denying plaintiff's motion in this case. The trial court had already imposed a harsh sanction on defendant which saved plaintiff the effort and expense of having to prove her case in a trial on the issue of defendant's liability. We do not believe that the trial

court should have been foreclosed from taking this fact into consideration in determining the appropriateness of an award of attorney fees. Accordingly, we hold that the trial court did not abuse its discretion in denying defendant's motion for an award of attorney fees.

Affirmed. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] Defendant Ricky Phipps was dismissed from the action because plaintiff failed to serve him with process. Accordingly, use of the word "defendant" in this opinion will hereafter refer only to Wal-Mart.

[2] MCR 2.309(B)(3) provides that the answers to interrogatories must be signed by the person making them and that objections must be signed by the attorney making them.