STATE OF MICHIGAN

COURT OF APPEALS

EVANGELINE ZIMMERMAN,

Plaintiff-Appellant,

v

COMPREHENSIVE HEALTH SERVICES, INC., d/b/a THE WELLNESS PLAN,

Defendant-Appellee.

UNPUBLISHED
July 9, 1999

No. 207280
Muskegon Circuit Court
LC No. 97-336331 CZ

Before: Gage, P.J., and White and Markey, JJ.

PER CURIAM.

Plaintiff Evangeline Zimmerman filed suit against defendant Comprehensive Health Services, Inc., alleging that it discharged her from her position as its health systems manager (1) because she filed a claim for worker's disability compensation benefits, MCL 418.301(11); MSA 17.237(301)(11), and (2) contrary to her legitimate expectations that she could only be discharged in conformity with defendant's formal complaint procedure. Plaintiff appeals by right from the trial court's order granting defendant's motion for summary disposition of both claims pursuant to MCR 2.116(C)(10). Plaintiff has withdrawn her issue on appeal whether the trial court erred in dismissing her "legitimate expectations" claim; therefore, we will not address that issue. As to the trial court's grant of summary disposition of plaintiff's "retaliatory discharge" claim, we reverse.

We review de novo a decision to grant or deny a motion for summary disposition pursuant to MCR 2.116(C)(10) to determine whether the moving party was entitled to judgment as a matter of law. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482 (1994). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Featherly v Teledyne Industries, Inc*, 194 Mich App 352, 357; 486 NW2d 361 (1992). To avoid summary disposition, the nonmoving party must come forward with admissible evidence demonstrating the existence of a genuine issue of material fact in support of the claim presented. *Id*. Giving the nonmoving party every reasonable benefit of the doubt, the trial court must then determine whether the record leaves open an issue about which reasonable minds might differ. *Moore v First Security Cas Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997). Summary

disposition is proper when it appears from the record "that it is impossible for the claim or defense to be supported . . . because of some deficiency which cannot be overcome [at trial]." *SSC Associates Ltd Partnership v General Retirement System of Detroit*, 192 Mich App 360, 365; 480 NW2d 275 (1991).

The Worker's Disability Compensation Act [hereinafter "WDCA"] provides, in relevant part, that

> [an employer] shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of . . . herself . . . of a right afforded by this act. [MCL 418.301(11); MSA 17.237(301)(11).]

To establish a prima facie case of retaliatory discharge under the WDCA, the employee must prove that (1) she engaged in a protected activity, (2) the employer knew this, (3) the employer discharged her, and (4) there existed a causal connection between the protected activity and the discharge. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997); *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 325; 559 NW2d 86 (1996). Specifically at issue in this appeal is plaintiff's ability to demonstrate the existence of a genuine issue of material fact in support of her claim that she engaged in a protected activity.

Plaintiff contends that the fact that she filed a notice of injury is sufficient, in and of itself, to demonstrate that she engaged in a protected activity. We disagree.

The problem with plaintiff's argument is that the WDCA prohibits an employer from discharging an employee because she filed a *claim* for worker's compensation. *Phillips v Butterball Farms Co, Inc*, (After Second Remand) 448 Mich 239, 244-245; 531 NW2d 144 (1995). It does not, however, prohibit an employer from discharging an employee because she *might* file a claim for such benefits sometime in the future. *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 668; 473 NW2d 790 (1991); *Ashworth v Jefferson Screw Products, Inc*, 176 Mich App 737, 746; 440 NW2d 101 (1989); *Wilson v Acacia Park Cemetery Ass'n*, 162 Mich App 638, 645-646; 413 NW2d 79 (1987). Although plaintiff insists that by filing an injury report her claim was no longer anticipated or in the future, we find that the WDCA draws a marked distinction between a "notice of injury" and a "claim for compensation" when it provides:

> [a] proceeding for compensation for an injury . . . shall not be maintained unless a *claim for compensation* for the injury, which claim may be either oral or in writing, has been made to the employer . . . within two years after the occurrence of the injury. . . . The employee shall provide a *notice of injury* to the employer within 90 days after the [occurrence] of the injury. . . . [MCL 418.381(1); MSA 17.237(381)(1)(emphasis added).]

See *La Rosa v Ford Motor Co*, 270 Mich 365, 367; 259 NW 122 (1935). The trial court captured the essence of this distinction when it noted, "it is likely that throughout the workplace many employees file notices of injury to their employers . . . [for which] benefits are never sought." Either the injuries do not prove serious enough to necessitate compensation or the compensable nature of the injury is not readily apparent. A notice of injury simply alerts the employer that the employee might file a claim for benefits. It does not alter the anticipatory nature of that claim. Accordingly, if the record revealed that plaintiff merely notified defendant that she suffered a work-related injury, we would conclude that summary disposition of her retaliatory discharge claim was appropriate. The record, however, is replete with evidence from which a reasonable juror could conclude that plaintiff filed a "claim" for benefits within the meaning of the WDCA and that she did so before defendant discharged her.

MCL 418.381(1); MSA 17.237(381)(1) expressly provides that under the act a claim for worker's compensation "may be either *oral* or in writing . . . *to the employer*" or may be a written claim made to the bureau of worker's compensation (emphasis added). Our Supreme Court has long since rejected the notion that previous incarnations of the WDCA, which, for our purposes here, has remained substantially unchanged, imposed any formal requirements for the filing of a claim with the employer. *LaRosa, supra*, 270 Mich at 367. Indeed, any request for compensation for an injury constitutes a claim within the meaning of the WDCA, so long as that claim is clear and unequivocal. *Duvall v Ford Motor Co*, 288 Mich 348, 351; 284 NW 904 (1939), modified in part on other grounds on rehearing, 288 Mich 353 (1940). *Hansen v Pere Marquette R Co*, 267 Mich 224, 229; 255 NW 192 (1934).

Viewing the evidence in the light most favorable to plaintiff, the evidence indicates that plaintiff made an unequivocal oral claim to defendant for worker's compensation benefits for job-related stress, that defendant then filed a written claim for such benefits on plaintiff's behalf, and that defendant then fired plaintiff upon her subsequent return to work. Specifically, there is record evidence that plaintiff called Bonnie Scherwitz, defendant's compensation and benefits analyst, and informed her that she was filing a worker's disability compensation claim based on job-related stress. As Scherwitz explained, it was her role to serve as the point of contact for employees filing claims for benefits. In a letter dated June 4, 1996, Scherwitz stated that defendant had filed a worker's compensation "claim" for plaintiff to The Accident Fund. Moreover, Patricia Brewer, manager of human resources employment and employee services for defendant, clearly indicated in a letter to plaintiff dated August 20, 1996, that plaintiff's worker's compensation "claim" had been promptly filed by defendant on May 14, 1996, once plaintiff provided notice to Scherwitz. Plaintiff, who was on leave when the claim was filed on her behalf, was discharged when she returned to work on June 3, 1996. The evidence indicates that defendant was notified of the denial of plaintiff's claim for worker's compensation benefits sometime after plaintiff returned to work and was discharged. Defendant instead ignores its repeated acknowledgments that plaintiff filed a "claim" within the meaning of the act, and asserts that what is required is a petition for benefits, which plaintiff admittedly did not file. We reject this position. The making of a claim for compensation for injury under the act is an exercise of a right afforded by the act.

Thus, we simply cannot say that it would be impossible for plaintiff to support the "protected activity" element of her retaliatory discharge claim at trial. Accordingly, the trial court's order granting defendant's motion for summary disposition of plaintiff's retaliatory discharge claim is reversed.

We remand for further proceedings regarding plaintiff's retaliatory discharge claim. We do not retain jurisdiction of this case.

/s/ Hilda R. Gage
/s/ Jane E. Markey