STATE OF MICHIGAN

COURT OF APPEALS

	UNPUBLISHED
BRENDA HORVATH,	August 13, 1999
Plaintiff-Appellee,	
v	No. 204378
	Wayne Circuit Court
CITY OF RIVER ROUGE,	LC No. 95-519690 CL
Defendant-Appellant.	

Before: White, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals the judgment, the order denying its motion for judgment notwithstanding the verdict or new trial, and the award of mediation sanctions to plaintiff in this failure to promote and harassment case brought under the whistleblowers' protection act (WPA), MCL 15.361 et seq.; MSA 17.428(1) *et seq*. We affirm in part and reverse in part.

I

The facts viewed in a light most favorable to plaintiff are that plaintiff began employment in defendant's treasurer's office in 1977 as a clerk/secretary. She had extensive contact with the public and trained the department's employees. In 1991, Edward Reeder, the elected city treasurer, appointed Billy Evans, a longtime friend, as deputy treasurer. The city treasurer position is part-time, while the deputy treasurer position, which is full-time, is responsible for handling the day to day affairs of the office. Evans took a stress leave of absence in August 1993.

Before Evans left, a number of citizens complained that they had received delinquent tax notices despite having paid their taxes and having receipts so indicating. Plaintiff advised Reeder of these discrepancies, and there was testimony that Reeder did not adequately investigate at least some of them. Several weeks after Evans left, plaintiff and co-worker JoAnn Sprader unexpectedly discovered a cardboard box in the city's vault that contained cash, uncashed checks and other valuables. Plaintiff took the box to the then mayor, Margaret Watson, who in turn called the police.

In January 1994, before plaintiff reported Evans' wrongdoing, plaintiff discussed her interest in the deputy treasurer position with Reeder, who told her he did not intend to nominate her.

After Evans left in August 1993, several citizens complained of similar discrepancies and plaintiff advised Reeder of them. One of these citizens, a Mr. Dege, came to the treasurer's office on July 13, 1994, after receiving a delinquent tax notice despite having paid the tax and having a receipt so indicating. Plaintiff waited on Dege and noticed that his receipt was not the kind used for taxes. Dege indicated that a man had waited on him. Plaintiff looked through the office files and could not find a record of having received Dege's tax payment. Dege was angry and asked to speak to someone in authority, and plaintiff took Dege to the mayor's office. Dege spoke to the mayor and also filed a police complaint. In July 1994, plaintiff gave a statement to the River Rouge police department regarding Evans' conduct.

Watson testified that plaintiff told her about Evans' practices and that Watson in turn spoke to Reeder about it a number of times, telling him that plaintiff believed Evans was doing something improper. Watson testified that Reeder responded negatively, was evasive and said that plaintiff and Sprader were "over-reacting." Evans was eventually charged with and pleaded guilty of embezzlement.

Plaintiff testified at trial that as a result of having blown the whistle on Evans, Reeder became hostile toward plaintiff and isolated her, giving her practically no work. Sprader testified similarly regarding Reeder's treatment of plaintiff. Several witnesses testified that Reeder and plaintiff had gotten along well before these incidents.

A city council member testified that, in a council meeting, Reeder blamed plaintiff and Sprader for the problems in the office after Evans left, and also implied that plaintiff and Sprader were acting dishonestly.

In August 1994, plaintiff asked to be put on the agenda of the city council meeting. At the meeting, she said she wanted to be appointed deputy treasurer, and complained of Reeder's treatment of her. Plaintiff requested that she be paid the deputy treasurer's salary since she had been doing the job for a year, and that she be given back pay. Reeder stated at this council meeting that no monies should be budgeted for a deputy treasurer, contrary to his position in April and June 1994 when he indicated that although he was not going to fill the deputy treasurer position, it should continue to be budgeted. Plaintiff filed a grievance regarding her salary, which was denied.

Reeder was reelected in 1995, and in April 1995 appointed a deputy treasurer at a salary of $28,000 per year. The city commission unanimously approved the appointment. Plaintiff earned about $22,000.

Plaintiff testified that her duties were almost entirely given to the deputy treasurer, that she had almost nothing to do, and that Reeder and his deputy locked away records to which she had previously had access. In September 1995, plaintiff filed a grievance against Reeder claiming harassment. Plaintiff testified that as a result of the hostile environment, in October 1995 she bid on and obtained a position

in the city's fire department. Plaintiff's salary and benefits remained the same as her salary in the treasurer's office.

Defendant moved for a directed verdict at the close of plaintiff's proofs. Defendant did not state the grounds of the motion at that time and the court took the motion under advisement, indicating that it knew what defendant was going to argue. At the close of all the proofs, defendant renewed its motion, arguing that defendant was not liable for Reeder's acts because only Reeder could nominate plaintiff for the deputy treasurer position, it had not discriminated against plaintiff and plaintiff had not named Reeder as a defendant; plaintiff should be barred from recovering damages for the period of July 1994 until April 1995, when the deputy treasurer was appointed, because plaintiff brought suit in July 1995 and the WPA is governed by a ninety-day statute of limitations; that plaintiff's damages terminated on October 6, 1995, when she transferred from the treasurer's office to the fire department; and that plaintiff had not established a prima facie case of discrimination.

The trial court denied defendant's motion on the basis that the issues could have been raised pre-trial based on the proofs before trial. The jury returned a verdict in plaintiff's favor and awarded damages of $10,000. The trial transcript indicates that both counsel had agreed to the general verdict form, which provided:

> 1. On plaintiff's claim under the Michigan Whistleblower Protection Act, we the jury find in favor of:
>
> ___ Plaintiff ___ Defendant (check one)
>
> If you found in favor of defendant, your deliberations are over. If you found in favor of plaintiff, proceed to Question #2.
>
> 2. We find plaintiff's damages to be in the amount of:
>
> $ _____

II

In reviewing the trial court's denial of defendant's motion for directed verdict, this Court reviews the evidence presented up to the time of the motion to determine whether a question of fact existed. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 603; 552 NW2d 523 (1996). Any conflicts in the evidence are resolved in favor of the nonmoving party. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). The same standard of review applies to determinations of motions for judgment notwithstanding the verdict. *Yacobian v Vartanian*, 221 Mich 25, 27; 190 NW2d 641 (1922). In deciding a motion for new trial, the trial court determines whether the overwhelming weight of the evidence favors the losing party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). This Court reviews the trial court's determination for abuse of discretion, giving substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.*

Defendant first argues that because the city council does not have the authority to appoint a person to the position of deputy treasurer, but may only approve the appointment of a deputy treasurer named by the city treasurer, and because the city council may not compel the city treasurer to appoint a person to that position, the city treasurer cannot be construed as the agent of the city within the meaning of the WPA, and the city cannot be held liable for the failure of the city's treasurer to nominate the plaintiff for appointment as deputy treasurer in retaliation for her protected activity.

The WPA provides:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule . . . to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [MCL 15.362; MSA 17.428(2).]

The act defines "employer" as:

> . . . a person who has 1 or more employees. Employer includes an agent of an employer and the state or a political subdivision of the state. [MCL 15.361(b); MSA 17.428(1)]

Defendant asserts that, contrary to the trial court's ruling on its directed verdict motion, it raised this defense before trial, in the joint final pretrial order, which stated in pertinent part:

> II. CONCISE STATEMENT OF DEFENDANT'S DEFENSES AND CLAIMS INCLUDING LEGAL THEORIES:
>
> 1. The position of deputy treasurer is authorized by the City Charter. The office of the deputy treasurer is an appointed position, subject to the approval of the city council. The treasurer also has the power to revoke the appointment at pleasure. Mr. Reeder left the position of deputy treasurer vacant from the time of Mr. Evans' departure until after his reelection in April, 1995. It is the city's position that it has no liability in this matter, because a political appointment to the position of deputy treasurer is not covered within the meaning of the Whistleblower's [sic] Act.
>
> * * *
>
> V. ISSUES OF LAW TO BE LITIGATED:
>
> 1. Whether the Whistleblower's [sic] Protection Act is applicable to a situation where the plaintiff is denied a promotion to an appointed position.

Plaintiff argues that nowhere in the joint final pretrial order did defendant indicate that Reeder was not an agent of defendant, and that defendant described itself in that order as the entity which may or may not have refused to appoint plaintiff to the deputy treasurer position. The pretrial order stated in pertinent part:

> IV. ISSUES OF FACT REMAINING TO BE LITIGATED:
>
> 1. *Whether plaintiff was subjected to a hostile and intimidating work environment because of her whistleblowing activities.*
>
> 2. Whether defendant refused to pay plaintiff the salary of a deputy treasurer because of her whistleblowing activities.
>
> 3. Whether defendant refused to appoint plaintiff into the open position of deputy treasurer because of her whistleblowing activities.
>
> 4. *Whether defendant took any other adverse action against plaintiff, including harassment, because of her whistleblowing activities*. [Emphasis added.]

We conclude that plaintiff is correct in asserting that defendant did not raise the specific issue whether Reeder was an agent of defendant under the WPA before trial. The question whether Reeder, by virtue of being an elected official, was not under defendant's control, and thus not defendant's agent is a separate question from the question whether the WPA applies to denials of appointed positions, which issue was, indeed, raised. The first time defendant raised the agency issue was in closing argument;[1] plaintiff objected to it, arguing that it was being raised for the first time, and defendant did not argue otherwise.[2] Moreover, defendant did not request a jury instruction on agency and approved the jury instructions the trial court read. We conclude that the issue of agency regarding liability for Reeder's alleged retaliatory harassment of plaintiff was not preserved.

Under these circumstances, as regards the harassment claim, the trial court did not abuse its discretion in denying defendant's motion for directed verdict on the agency issue on the basis that the issue was not raised pre-trial.[3] However, the question of defendant's liability for the failure to appoint plaintiff to the deputy treasurer position was arguably preserved, and the court should have entertained defendant's motion on the merits. Nonetheless, because we agree with defendant that plaintiff's failure to appoint claim was time-barred, we do not address the merits of defendant's other arguments regarding this claim.

III

Defendant argues that plaintiff's failure to appoint claim is time-barred by the WPA's ninety-day statute of limitations. Defendant preserved this defense by pleading it as an affirmative defense.[4]

The doctrine of continuing violations was extended to WPA claims in *Phinney v Perlmutter*, 222 Mich App 513, 546; 564 NW2d 532 (1997). Plaintiff argues that she presented evidence that retaliation occurred within the limitations period and that defendant had engaged in a "continuous course

of conduct." See *id.* at 546. Plaintiff filed her complaint in July 1995, and presented evidence of retaliatory actions affecting the terms and conditions of her employment between April and July 1995, including having duties taken away. Plaintiff thus presented sufficient evidence to raise a genuine issue of fact that the alleged retaliatory harassment constituted a "continuing course of conduct." *Id.* Defendant concedes in its supplemental brief that plaintiff's harassment claim could properly go to the jury provided plaintiff presented a prima facie case. Plaintiff's failure to appoint claim, on the other hand, concerns an isolated employment decision having a degree of permanence that would trigger an employee's awareness of and duty to assert her rights. *Sumner v Goodyear Tire & Rubber Co,* 427 Mich 505, 538; 398 NW2d 368 (1986). Thus, the trial court should have granted defendant's motion for directed verdict in part, dismissing the failure to appoint claim as time-barred.

IV

Defendant argues that Reeder's actions in violation of the WPA, if any, were ultra vires, and defendant thus cannot be held liable because there is no intentional tort exception to governmental immunity. However, defendant waived this argument by not pleading immunity as an affirmative defense. MCR 2.111(F)(3).

V

Defendant argues that plaintiff did not establish a prima facie case under the WPA. Having concluded that the failure to appoint claim was time-barred, we address this claim of error as it relates to the harassment claim only.

This Court reviews a trial court's determination whether the evidence established a prima facie case under the WPA de novo. *Terzano v Wayne Co,* 216 Mich App 522, 526; 549 NW2d 606 (1996). In order to establish a prima facie case under the WPA, the plaintiff must show 1) that she engaged in protected activity as defined by the act; 2) she was subsequently discharged, threatened or otherwise discriminated against; and 3) that a causal connection existed between the protected activity and the adverse employment action. MCL 15.362; MSA 17.428(2); *Terzano, supra* at 526.

Defendant does not dispute that plaintiff established the first two elements of a prima facie case. Plaintiff established that she made several reports of "a violation or suspected violation of a law or regulation or rule," by testimony that she reported her concerns that Evans was doing something improper to the police and to Mayor Watson. Plaintiff also presented evidence that adverse actions were taken against her affecting the conditions of her employment, including having duties taken away after she reported Evans, being isolated by Reeder, and Reeder's altering her paycheck, among other things.

Notwithstanding that Reeder had earlier said that plaintiff would not be appointed deputy treasurer, plaintiff presented evidence of a causal connection between her protected activities and the harassment. Various witnesses testified that plaintiff's relationship with Reeder was good and cordial before she reported Evans, and that after she reported Evans, Reeder would not communicate with her and took duties away from her. There was also testimony that after Evans' departure, Reeder told the

city council that plaintiff and Sprader were to blame for the problems in the treasurer's office and implied to the council that plaintiff and Sprader were acting dishonestly. Plaintiff presented evidence that after she reported Evans, Reeder altered one of her paychecks. We thus conclude that plaintiff presented a prima facie case under the WPA.

VI

Defendant next argues that plaintiff suffered no compensable damages after October 6, 1995, and the trial court thus erred in denying its motion for judgment notwithstanding the verdict. Under the circumstances that the jury heard plaintiff's testimony that she was no longer in a hostile environment once she transferred to the fire department in October 1995, that the jury awarded only $10,000 pursuant to the agreed-upon general verdict form, thereby almost certainly rejecting plaintiff's claim for lost wages, the jury most likely awarded the $10,000 in damages for the harassment plaintiff was subjected to from July 1994 until she transferred to the fire department in October 1995. Emotional distress damages may be awarded in a WPA claim. *Phinney, supra* at 559-560.

We further reject defendant's claim that plaintiff presented no evidence of mental distress damages. Plaintiff's testimony regarding the harassment and the resultant stress was adequate to support a claim for emotional distress damages, especially in light of the amount awarded – ten thousand dollars.

VII

The question remains regarding the appropriate remedy for the trial court's error in permitting the failure to appoint claim to go to the jury. Because there was a general verdict form, this court cannot determine with absolute certainty that the error did not affect the outcome of the trial. Under that circumstance, we normally would order the case retried on the retaliatory harassment claim alone. However, given the amount of the verdict and the way the case was presented and argued, it seems apparent that the jury itself limited damages to the period preceding the October 1995 transfer, and that the jury rejected the claim for economic damages resulting from the failure to appoint, choosing instead to award a relatively modest sum for the retaliatory harassment. Under these circumstances, remand for a new trial is not necessary.[5]

VIII

Lastly, defendant argues in a supplemental brief that the trial court erred in awarding plaintiff reasonable attorney fees pursuant to statute and then awarding mediation sanctions. We agree.

In *McAuley v General Motors Corp*, 457 Mich 513; 578 NW2d 282 (1998), the Supreme Court held that the prevailing party was not entitled to a second award of attorney fees under the mediation rule, MCR 2.403(O), where he had already been fully reimbursed for his reasonable attorney fees under a statutory provision, the attorney fee provision of the Handicapper's Civil Rights Act. The Court stated that it agreed with this Court that "multiple awards in excess of a reasonable attorney fee are permissible where independent purposes are served by the provisions authorizing such awards," but

held that its enactment of MCR 2.403 did not intend double recovery under the circumstances presented in this case. *Id.* at 522-523.

> . . . if the prevailing party has already been fully reimbursed for reasonable attorney fees through the operation of the attorney fee provision of the HCRA, there are no 'actual costs' remaining to be reimbursed under [MCR 2.403].
>
> * * *
>
> In conclusion, the mandatory language of MCR 2.403(O), which requires the rejecting party to compensate the prevailing party for 'actual costs' of the portion of the litigation made necessary by the rejection of the mediation evaluation, refers to the obligation of the rejecting party to reimburse the prevailing party for reasonable attorney fees in an amount determined by the trial court in its discretion; once this occurs and the prevailing party has been made whole, the requirement of the court rule is satisfied and no further compensation is warranted or required. [*McCauley, supra* at 523, 525.]

Plaintiff argues that her claim under the WPA should be treated differently than the HCRA claim in *McCauley, supra*, because the Supreme Court has characterized the purposes behind the WPA as special and unique, citing *Dudewicz v Norris-Schmid, Inc*, 443 Mich 68; 503 NW2d 645 (1993). In *Dudewicz*, the Court stated that the WPA was designed to alleviate the inability to combat corruption or criminally-irresponsible behavior in the conduct of government or large businesses. *Id.* at 75. Given the holding in *McCauley*, plaintiff's claim is unpersuasive. Both the HCRA and WPA have statutory attorney fee provisions, and thus appear to fall directly under *McCauley*'s proscription of double recovery. Thus, the award of $7,280 in attorney fees under MCR 2.403(O) must be vacated.

Affirmed in part, reversed in part, and remanded for amendment of the judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

[1] Defendant stated in pertinent part in closing argument:

> Now, did the employer threaten or otherwise discriminate against Brenda Horvath regarding her compensation, terms, conditions, location, or privileges of employment after Brenda Horvath engaged in protective [sic] activities? There, we have a dispute.
>
> We have a dispute here because we have Mr. Redder [sic], the Treasurer whose an elected official, having to run his shop versus the City of River Rouge, which all the employee [sic] are paid by. We write the check –the City writes the check. The City

does not run the Treasurer's Office, Mr. Redder [sic] the Treasurer, runs the Treasurer's Office. He's elected by the citizens of River Rouge.

* * *

The City of River Rouge continue to pay her salary. They never took disciplinary actions against her. . . .

. . . . The City and the City fathers and City Mayor took no action against Brenda Horvath.

[2] Plaintiff's counsel argued:

MR. PITT: Yes. The Defendant made an improper argument to the jury saying that the Defendant in this case is not responsible because Ed Redder [sic] is the City Treasurer.

I have before me a pretrial order which says otherwise, and I mean it has never been contested that the Defendant, that the Defendant, that the City of River Rouge is responsible for what has happened. And Defendant at the last minute, I think has made a deliberate attempt to mislead the jury that the City of River Rouge, which they admitted in all the pleadings, were responsible for what happened, is no longer responsible.

I tried to correct it in my rebuttal and I hope that I did, but I think I'm entitled – I should have an instruction to that effect.

THE COURT: Your objection is noted. I'm not going to do anything in the way of the jury. If I do start instructing, I'm telling them what the facts are in the case, whose responsible, whose all that, I'm not willing to do that, to risk that.

So, I think you may be – you did the best you can at cleaning it up in rebuttal.

So, your objection is noted, I'm going to leave it at that.

Mr. Donaldson, any comments?

MR. DONALDSON [defendant's counsel]: I'm satisfied with the ruling.

MR. PITT: Again, for the record, I think a curative instruction – without a curative instruction –

THE COURT: What do you want me to say, that the City is responsible for everything that Mr. Redder [sic] did?

> MR. PITT: That Mr. Redder [sic] is an agent of the City and that the City is responsible for the acts of its agent?
>
> THE COURT: I'm going to deny that request. It's as clear as you can make it. I will have to deny that request.

After the trial court instructed the jury, plaintiff's counsel reiterated its objection to the court's failure to read a curative instruction on agency. Defense counsel again stated that he was satisfied with the instructions.

[3] Even assuming that defendant did raise this issue pretrial, there was substantial evidence to support that Reeder had authority over plaintiff, controlled plaintiff's duties, took duties away, disciplined plaintiff, set work hours, altered her paycheck, and created a hostile environment, which led to plaintiff's transferring out of the treasurer's office. Plaintiff argues and defendant concedes that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority. *Champion v Nationwide Security*, 450 Mich 702, 712; 545 NW2d 596 (1996).

[4] We observe, however, that defendant's motion for directed verdict at the close of proofs and its motion for judgment notwithstanding the verdict argued that **none** of the alleged adverse actions taken by defendant occurred within the limitations period. Defendant did not argue the failure to appoint claim specifically, except in a different argument -- that plaintiff failed to establish a prima facie case.

[5] We note that at argument plaintiff agreed that a new trial would be warranted if this Court concluded that the failure to appoint claim was improperly submitted to the jury, but the harassment claim was properly submitted to the jury. However, plaintiff cannot complain if the verdict is affirmed. Defendant's briefs do not address the appropriate remedy should this Court conclude that submission of the harassment claim was proper, and do not seek a new trial as an alternative to the relief sought -- reversal and entry of judgment for defendant.